



United States Copyright Office

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

December 23, 2019

Ian L. Saffer, Esq.
Adsero IP LLC
8210 SouthPark Terrace
Littleton, CO 80120

Re: Second Request for Reconsideration for Refusal to Register RE/MAX Hot Air Balloon Logo; Correspondence ID: 1-3DJ6NIL; SR# 1-5790193091

Dear Mr. Saffer:

The Review Board of the United States Copyright Office (“Board”) has considered RE/MAX, LLC’s (“RE/MAX’s”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the work titled “RE/MAX Hot Air Balloon Logo” (“Work”). In the application, RE/MAX excluded the “[s]hape and design of historical RE/MAX hot air balloon vehicles” and indicated that the new material included in the claim consisted of “2-D artwork, [c]reation of an abstract 2-dimensional vector-based line drawing.” 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 graphic drawing of a hot air balloon and basket. The balloon is shades of red, white, and blue. In the middle portion of the balloon is the stylized text stating “RE/MAX” in blue and red. The Work also displays a grey basket at the bottom, detached from the balloon. The Work is as follows:



The Work is a derivative of an earlier work “RE/MAX hot air balloon logo (vertical-1998)”¹ (“98 Work”). The 98 Work has more vertically oriented sections or “gores” and those gores are delineated with structural load tape or seams in white. In the horizontal white portion of the 98 Work’s balloon, there is shading and the text’s font is different, though the coloring is otherwise similar. The 98 Work has a more detailed basket in white and includes a passenger, the balloon’s skirt, and supports connecting the basket to the skirt. The 98 Work is as follows:



The 98 Work is itself a derivative of a 1991 photograph titled “RE/MAX hot air balloon photograph (vertical-1991)” (“91 Work”)². The registration for this work has the following notation of an earlier work: “RE/MAX hot air balloon design preexisting.” Predating all of these works is a 1978 picture of the RE/MAX hot air balloon in flight adopted for RE/MAX’s 1978-era logo³ and RE/MAX’s three-dimensional balloon itself.⁴ The 1978-era logo is as follows:



¹ Copyright Office registration number VA-001418052.

² Copyright Office registration number VA-001418053.

³ See *RE/MAX Brand Refresh*, <https://www.remax.com/newsroom/company-info/remax-brand-refresh/>.

⁴ For a depiction of the RE/MAX balloon in flight, see *History of the RE/MAX Balloon with Dave Liniger* (Jan. 22, 2013), <https://www.youtube.com/watch?v=Cm7siKzFj1c>.

II. ADMINISTRATIVE RECORD

On September 19, 2017, RE/MAX filed an application to register a copyright claim in the Work. On April 25, 2018, a Copyright Office registration specialist refused to register the claim, finding that it “lacks the authorship necessary to support a copyright claim.” Letter from L.M., Registration Specialist, to Adam Scoville, RE/MAX LLC, at 1 (Apr. 25, 2018).

On July 24, 2018, RE/MAX requested that the Office reconsider its initial refusal to register the Work. Letter from Ashley Krause, RE/MAX, to U.S. Copyright Office (July 24, 2018) (“First Request”). RE/MAX argued that the Work contained significant creative choices meeting the required level of creativity, including choices involving: shapes and features; colors, perspective, and shading; lettering; and hot air balloon features. *Id.* at 2. RE/MAX also argued that the Work was registerable by comparing it to other hot air balloons and to other works that were the subject of litigation or that were registered by the Office. *Id.* at 3–7. 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 “is a derivative work that does not contain sufficient new authorship to support a copyright registration.” Letter from Jaylen S. Johnson, Attorney-Advisor, to Adam Scoville, RE/MAX LLC at 1 (Jan. 22, 2019).

In response, RE/MAX 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 Ian L. Saffer, Adsero IP LLC, to U.S. Copyright Office (Apr. 22, 2019) (“Second Request”). RE/MAX argued that the Work was eligible for registration, because it contains “many creative differences” from RE/MAX’s earlier works containing depictions of the RE/MAX balloon. *Id.* at 1. RE/MAX claimed that these differences were with respect to: format; shapes; colors, perspective, and shading; and hot air balloon features. *Id.* at 5–10.

RE/MAX also emphasized the use of design experts as well as an in-house design team to create the Work, stating:

[The designers] considered variables such as the overall shape of the Work; how (and whether) to effectively use creative shapes, shading, and color build (across the primary color segments of red, white, and blue) to give the Work a modern three-dimensional perspective; the specific color palette and color theory to be used to evoke the ideals of trustworthiness and leadership; and what aspects of a hot air balloon to include in or exclude from the design to make [it] recognizable, while also creating a modern twenty-first century aesthetic.

Id. at 4–5. Finally, RE/MAX stated that the Work should be registered, because the Board previously registered a different work involving a logo using and the same red, white, and blue colors and shading. *Id.* at 10–11.

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 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 “[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. 2014) (“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).

2) Derivative Works

The Copyright Office will register a claim in a derivative work where the deposit material contains new authorship with a sufficient amount of original expression. 17 U.S.C. § 103(a) (“The subject matter of copyright . . . includes . . . derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.”); *see also* COMPENDIUM (THIRD) § 311.1 (citing H.R. REP. NO. 94-1476, at 57 (1976)). The registration for a derivative work, however, “does not cover any previously published material, previously registered material, or public domain material that appears in the derivative work. Nor does it cover any material that is not owned by the copyright claimant.” *Id.*; *see also* 17 U.S.C. § 103(b) (copyright in a derivative work is “independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.”).

In the case of derivative works, the “new authorship that the author contributed to the derivative work may be registered, provided that it contains a sufficient amount of original expression, meaning that the derivative work must be independently created and it must possess more than a modicum of creativity.” COMPENDIUM (THIRD) § 311.2 (citing *Waldman Publishing*

Corp. v. Landoll, Inc., 43 F.3d 775, 782 (2d Cir. 1994)). The amount of creativity required for a derivative work is the same as that required for a copyright in any other work: “[a]ll that is needed to satisfy both the Constitution and the statute is that the ‘author’ contributed something more than a ‘merely trivial’ variation, something recognizably ‘his own.’” *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102–03 (2d Cir. 1951) (citing *Chamberlin v. Uris Sales Corp.*, 150 F.2d 512, 513 (2d Cir. 1945)). Thus, “the key inquiry is whether there is sufficient nontrivial expressive variation in the derivative work to make it distinguishable from the [preexisting] work in some meaningful way.” *Schrock v. Learning Curve Int’l, Inc.*, 586 F.3d 513, 521 (7th Cir. 2009).

Although the amount of originality required is low, courts have recognized that derivative works “[l]acking even a modest degree of originality . . . are not copyrightable.” *L Batlin & Son*, 536 F.2d at 490; *Durham Industries, Inc. v. Tomy Corp.*, 630 F.2d 905, 911 (2d Cir. 1980). Indeed, “[s]pecial caution is appropriate when analyzing originality in derivative works, ‘since too low a threshold will give the first derivative work creator a considerable power to interfere with the creation of subsequent derivative works from the same underlying work.’” *We Shall Overcome Foundation v. The Richmond Org., Inc.*, 16-cv-2725, 2017 WL 3981311, at *13 (S.D.N.Y. Sept. 8, 2017). Very minor variations do not satisfy this requirement, such as merely changing the size of the preexisting work or recasting a work from one medium to another. *See L. Batlin & Son*, 536 F.2d at 491. Further, a claim to register a derivative work that adds only non-copyrightable elements to a prior product is not entitled to copyright registration. *Boyd’s Collection, Ltd. v. Bearington Collection, Inc.*, 360 F. Supp. 2d 655, 661 (M.D. Pa. 2005). Ultimately, whatever the addition is, it must be independently protectable for the derivative work to be registered.

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.

RE/MAX claims copyright in two-dimensional artwork and requests to notate, at the Review Board stage, that this Work is a derivative of two of RE/MAX’s prior registered works. Second Request at 1, n.1 (registration numbers VA-0001418052 and VA-0001418053). RE/MAX argues that the differences (in format, shapes, colors, perspective, shading, and hot air balloon features) are numerous and creative enough to register the Work as a derivative of its earlier works. *Id.* at 10–15.

The Work shares the following design elements with RE/MAX’s earlier works: the shape of the hot air balloon; the red, white, and blue coloring of the balloon; the horizontal orientation of the coloring; creation of a three-dimensional effect through the use of gores and shading; the use of the term “RE/MAX” in consistent colors in the white portion of the design. While RE/MAX agrees that the 98 Work and 91 Work are earlier copyright registrations that predate the Work here and that creators of the Work were “familiar” with these earlier works, RE/MAX states that this Work’s creators “did not copy these previous works.” *Id.* at 4. RE/MAX’s application excludes the “[s]hape and design of historical RE/MAX hot air balloon

vehicles,” but otherwise does not address the existence of additional earlier works involving the RE/MAX balloon, namely the 1978-era RE/MAX logo design or any of the three-dimensional RE/MAX hot air balloons that predate the Work.

RE/MAX’s argument that the Work is registerable, because it is in a different format than the earlier works is not persuasive. A change in medium from a two-dimensional photograph or a two-dimensional vector-based line drawing to a two-dimensional “digital media” work does not impart the Work with the required modicum of creativity for registration. *See L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 491 (2d Cir. 1976) (noting that changes in medium alone does not constitute originality).

RE/MAX’s argument that differences in the shapes, colors, perspective, or shading between the Work and its earlier works meet the required quantum of originality are also not persuasive. All of the balloon designs depict the traditional colors of a RE/MAX balloon, red, white, and blue, oriented horizontally. While the shading and angular perspective of all incarnations of the balloon design are slightly different, these differences are the “merely trivial” types of variations that are not protected by copyright. *See Alfred Bell & Co.*, 191 F.2d at 102–03. RE/MAX itself describes these variations as “subtle adjustments” from RE/MAX’s earlier logo.⁵ It also appears that some of the design variations in this Work are not themselves original. For example, an orientation that depicts higher angular perspective, resulting in more of the red portion of the balloon design being visible, was used in the 1978-era logo design. Further, minor color and shading variations made to earlier works are generally regarded as *de minimis* unprotectable contributions. *See Darden v. Peters*, 488 F.3d 277, 287 (4th Cir. 2007) (the addition of “color, shading, and labels using standard fonts and shapes [to a preexisting work] fall within the narrow category of works that lack even a minimum level of creativity” required for registration).

With respect to the hot air balloon features included in the Work, RE/MAX argues that the balloon’s sections or gores are of a different width and number of earlier versions than the earlier works and are not separated by structural load tape or seams. Second Request at 9. In addition to simplifying these earlier design choices, RE/MAX also argues that it declined to include the “scoop, burner, and connective wires for the gondola basket, and the people inside the gondola basket.” *Id.* In essence, the Work is an abstraction of more detailed, earlier works. While abstractions can be protected by copyright, they must still represent some creative contribution that is more than a familiar shape or design. *See* COMPENDIUM (THIRD) §§ 313.4(J), 906.2. Further, as the Copyright Act states, “copyright in a . . . derivative work extends only to the material contributed by the author of such work.” 17 U.S.C. § 103. While the Work, as an abstraction of earlier RE/MAX works, does not contain a detailed skirt, basket supports, or a person, the Board does not significantly credit removing more detailed design elements.

RE/MAX emphasizes that several design experts contributed to the Work, but the intangible attributes that RE/MAX ascribes to the Work—including the professional skills and

⁵ *What's This? A New Look for an Iconic Brand?* (Aug. 21, 2017), <https://www.remax.com/newsroom/press-releases/whats-this-new-look-for-an-iconic-brand.htm> (statement of Pete Crowe, RE/MAX Senior Vice President of Communications and Marketing).

choices of its designers—cannot be assessed in an objective manner because they are not evident in the deposit itself. Even if these attributes were present in the deposit, the Board does not assess the espoused intentions of a design’s author, or a design’s visual impact, in determining whether a Work contains the requisite minimal amount of original authorship necessary for registration. *See Bleistein*, 188 U.S. at 251. Accordingly, the fact that the Work was the fruit of a professional design process does not factor into the Board’s originality analysis.

RE/MAX argues that the Work at issue is “analogous” to the Review Board’s decision in “American Airlines Flight Symbol.”⁶ Second Request at 10–11. But American Airlines Flight Symbol did not involve creation of a derivative work from a preexisting work, and there are several preexisting works at issue here. In any case, neither registration specialists nor the Review Board will “compare . . . deposit copy(ies) with other works that have been previously registered with the Office” for the purpose of granting copyright registration. COMPENDIUM (THIRD) § 309.1. In contrast, the Copyright Office will compare works, as in the case here, when “the applicant appears to be asserting a claim in a work that is unusually similar to another work of authorship that is known to the specialist [or Review Board].” *Id.*

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

⁶ *Registration Decision Regarding American Airlines Flight Symbol; Correspondence ID 1-28H4ZFK; SR 1-3537494381* (Dec. 7, 2018), <https://www.copyright.gov/rulings-filings/review-board/docs/american-airlines.pdf>.