



United States Copyright Office

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September 20, 2017

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**Re: Second Request for Reconsideration for Refusal to Register Rub Dirt;
Correspondence ID: 1-20MNGWH; SR 1-2656656545**

Dear Ms. McCoy:

The Review Board of the United States Copyright Office (“Board”) has considered Baseballism, Inc.’s (“Baseballism’s”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the work titled “Rub Dirt” (“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 composed of five words in white set on the Swiss flag, that is, a red square with an equilateral, white cross in the middle. Above the cross are the words “RUB DIRT” and below the cross are the words “ON IT.” Both phrases are curved slightly towards the center of the Work. In the bottom-right corner of the Work is the word “BASEBALLISM.” The white cross and words are speckled with red.

The Work is depicted as follows:



II. ADMINISTRATIVE RECORD

On August 20, 2015, Baseballism filed an application to register a copyright claim in two-dimensional art in the Work. In a May 25, 2016 letter, a Copyright Office registration specialist refused to register the claim, finding that it “lacks the authorship to support a copyright claim.” Letter from Beth Garner, Registration Specialist, to Kalin Boodman, Baseballism, Inc. 1 (May 25, 2016).

In a letter dated August 23, 2016, Baseballism requested that the Office reconsider its initial refusal to register the Work, and argued that the Work “contains more than a minimal degree of creative authorship” when considered as a whole. Letter from B. Anna McCoy, Alleman Hall McCoy Russell & Tuttle LLP, to U.S. Copyright Office 5 (Aug. 23, 2016) (“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 “does not contain a sufficient amount of original and creative artistic or graphic authorship to support a copyright registration.” Letter from Stephanie Mason, Attorney-Advisor, to Kalin Boodman, Baseballism, Inc. 1 (Jan. 30, 2017). Further, the Office noted that neither the Work’s constituent elements—common and familiar shapes, words, and coloring—nor the combination of those unprotectable elements supported copyright registration. *Id.* at 2.

In a letter dated April 28, 2017, Baseballism 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 B. Anna McCoy, McCoy Russell LLP, to U.S. Copyright Office (Apr. 28, 2017) (“Second Request”). Baseballism claimed that “the level of originality required for copyright protection . . . is very low” and the Work “far exceeds the level of originality required . . .” *Id.* at 2, 5. Baseballism asserted that its use of specific crosses, fonts, and colors were the product of creative choice. *Id.* at 5-7. Finally, Baseballism stated that “common graphical configurations have been held to be copyrightable” and short phrases were found to be copyrightable when combined with artwork and considered as a whole. *Id.* at 8, 10.

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 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.).

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 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).

B. Analysis of the Work

After careful examination, the Board finds that the Work fails to satisfy the requirement of creative authorship and thus is not copyrightable.

None of the Work’s individual elements are protected by copyright as “[w]ords and short phrases such as . . . slogans; familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering or coloring” are all ineligible for copyright protection. 37 C.F.R. § 202.1(a), (e). First, the phrase “rub some dirt on it” is a traditional sports idiom and, as one newspaper article notes, “[c]hances are if anyone has played a sport . . . they’ve heard this saying.” Carlos Monarrez, *Why is ‘Rub Some Dirt on it’ a Famous Sports Phrase*, DETROIT FREE PRESS, July 16, 2016, <http://www.freep.com/story/sports/mlb/tigers/2016/07/16/sports-rub-some-dirt-on-it/87184302/>. A variation of a common phrase that removes one word (“some”) does not make such a common phrase original. Even if this short phrase was original to the author here, several courts have identified that short phrases are not copyrightable. *See Hutchins v. Zoll Med. Corp.*, 492 F.3d 1377, 1385 (Fed. Cir. 2007) (holding that short phrases, including “if no pulse, start CPR,” were not copyrightable); *Magic Mktg. v. Mailing Servs.*, 634 F. Supp. 769, 771 (W.D. Pa. 1986) (noting that “fragmentary words and phrases” are not protected by copyright); *see also* COMPENDIUM (THIRD) § 313.4(C) (“Catchwords, catchphrases, mottoes, slogans, or other short expressions” are not protected by copyright.). Similarly, the typeface used in the Work is not protected by copyright. *See Eltra Corp. v. Ringer*, 579 F.2d 294, 298 (4th Cir. 1978) (typeface is not copyrightable); COMPENDIUM (THIRD) § 313.3(D) (same).

The Work’s graphic elements also are not protected by copyright. Here, the white cross is a familiar symbol or design, as is the combination of the white cross with a red background,

which comprises elements of the Swiss flag. COMPENDIUM (THIRD) § 313.4(J) (noting that familiar symbols “such as crosses” are not copyrightable). As the *Compendium* makes clear, “[m]aking a few minor changes in a preexisting work of authorship, such as simple tone-overs or color overlays” would not give rise to copyrightable authorship. COMPENDIUM (THIRD) § 313.4(K). Thus, the shading and slight weathering effect on the Work does not make it copyrightable. The Board takes note that traditionally, a *red* cross on a *white* background (the reversed colors of the Work) indicates first-aid in some form and was first used “[a]s a compliment of Switzerland . . . formed by reversing the [Swiss] colours” and designating “the Medical Service of armed forces.” Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 38, Aug. 12, 1949, 6 U.S.T. 3314. The coloring of the Swiss flag is frequently confused for the Red Cross. Philip F. Stahel, *Swiss Flag or Red Cross Emblem: Why the Confusion?*, PATIENT SAFETY IN SURGERY, May 7, 2013, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3663670/pdf/1754-9493-7-13.pdf>. Whether viewed as a Swiss flag or the reversed colors of the Red Cross,¹ the graphic elements of the Work are not original.

Importantly, the Office must consider the work as a whole, in its entirety. The combination of the unprotected elements in this matter simply do not rise to the level of copyrightability. While some configurations of non-copyrightable elements may warrant copyright protection, *Satava* instructs, “it is not true that *any* combination of unprotectable elements automatically qualifies for copyright protection.” *Satava*, 323 F.3d at 811. Here, the combination of a common phrase related to healing and a common design does not give rise to copyrightable authorship. Baseballism cites *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970), for the proposition that the Board should review the elements of a work “together to represent a tangible expression of an idea.” Second Request at 10. But Baseballism misses the point, as *Roth Greeting Cards* involved both short phrases *and original artwork*, including, “a colored drawing of a cute moppet suppressing a smile” and “a forlorn boy sitting on a curb weeping.” *Roth Greeting Cards*, 429 F.2d at 1110. Here, the “artwork” is simply the preexisting cross design. Thus, while the level of creativity required to support copyright protection is not demanding, it is not non-existent and the Work falls below this low threshold.

¹ Note that the Red Cross and Swiss flag are both protected under other laws of the United States, though consideration of these laws was unnecessary in determining copyrightability of the Work here. See 18 U.S.C. §§ 706, 708.

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: 
Catherine Rowland
Copyright Office Review Board