



United States Copyright Office

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August 15, 2016

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Re: Second Request for Reconsideration for Refusal to Register “Spinner Hat” and “Digital Iris”; Correspondence ID: 1-1B3II4X

Dear Mr. Hanson:

The Review Board of the United States Copyright Office (“Board”) has considered Digital Iris, LLC’s (“Digital Iris’s”) second requests for reconsideration of the Registration Program’s refusal to register two-dimensional artwork copyright claims in the works titled “Spinner Hat” and “Digital Iris” (“Works”). After reviewing the applications, deposit copies, and relevant correspondence in the cases, 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

Spinner Hat and Digital Iris are two-dimensional graphic designs. Spinner Hat is a stylized depiction of a propeller beanie created using geometric shapes with the words “Spinner Hat” in yellow below set in a solid blue square. The propeller beanie design is composed of a red semicircle, which is flat on the bottom, a smaller blue circle in the middle and a horizontally-oriented yellow propeller on the top. The edges of all design elements are shaded slightly. Digital Iris consists of a black curved line and an orange circle, arranged to form a stylized combination of the capital letter “D” and lowercase “i.” Below this, the words “Digital Iris” are spelled out in orange. The edges of all orange design elements in this work are shaded slightly.

The Works are depicted below.



II. ADMINISTRATIVE RECORD

On September 24, 2014, Digital Iris filed two applications to register copyright claims in the Works. In May 14, 2015 letters, a Copyright Office registration specialist refused to register the claims in the Works, finding that they “lack[] the authorship necessary to support a copyright claim.” Letters from Sandra Ware, Registration Specialist, to Kyle Hanson, Hanson Law Group LLP (May 14, 2015) (separate letters were sent for each work).

In a letter dated August 11, 2015, Digital Iris requested that the Office reconsider its initial refusal to register the Works. Letter from Kyle Hanson, Hanson Law Group, LLP, to U.S. Copyright Office (Aug. 11, 2015) (“First Request”). After reviewing the Works in light of the points raised in the First Request, the Office reevaluated the claims and again concluded that the Works do not contain a sufficient amount of original and creative artistic or graphic authorship to support copyright registration. Letter from Stephanie Mason, Attorney-Advisor, to Kyle Hanson, Hanson Law Group LLP (Nov. 4, 2015).

In a letter dated February 2, 2016, Digital Iris 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 Kyle Hanson, Hanson Law Group LLP, to U.S. Copyright Office (Feb. 2, 2016) (“Second Request”). In that letter, Digital Iris disagreed with the Office’s conclusion that the Works, as a whole, do not include a sufficient amount of creativity to support registration under the Copyright Act. Specifically, Digital Iris claimed that although both Works are comprised of familiar symbols and basic geometric shapes, “the combination of [those symbols and shapes] satisfies that ‘minimal degree of creativity’ required by law.” Second Request at 1 (citing *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (added emphasis omitted)). For Spinner Hat, the author claimed that its design choices of using “a highlighted bow-like shape on top, a dome shape with a highlighted and shaded button, and child-like highlighted and shaded writing underneath all with a shaded background, and ... specifically chosen colors” constituted “creative choices that suffice for purposes of copyright registration. Second Request at 2. For Digital Iris, the author claimed creativity in the fact that the graphic “widens and narrows, from the point on the top left to the extremely widened bottom right, and so on through to the final black point in the middle just underneath and to the left of the shaded orange circle” as well as the “minimally” creative incorporation of the letters “D” and “i,” “as in Digital Iris” into the work. *Id.* at 2. Digital Iris concedes that the words incorporated into each work “would not constitute copyrightable subject matter,” but suggests that combining those words with each work’s graphic elements make the Works copyrightable. *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, the term “original” consists of two components: independent creation and sufficient creativity. *See Feist*, 499 U.S. at 345. 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 long-standing 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 COMPENDIUM (THIRD) § 310.2. The attractiveness of a design, the espoused intentions of the author, the design's visual effect or appearance, 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 *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903). Thus, the fact that a work required effort to create, or has commercial or aesthetic appeal, does not necessarily mean that the work constitutes a copyrightable work of art.

B. Analysis of the Works

After carefully examining the Works and applying the legal standards discussed above, the Board finds that the Works do not satisfy the requirement of creative authorship and thus are not copyrightable.

For Spinner Hat, it is indisputable that the work's constituent elements—a semicircle, a circle, a square, a propeller, the words "Spinner Hat," and coloring—are not individually subject to copyright protection. See 37 C.F.R. § 202.1(a) (prohibiting registration of "words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, [and] lettering or coloring"); see also COMPENDIUM (THIRD) § 906.1 ("[t]he Copyright Act does not protect common geometric shapes"). The portion of the design that consists of a semicircle, circle, and propeller comprise the familiar design of a propeller beanie. Though Digital Iris describes the semicircle as a "dome," the circle as a "button," and the propeller as a "bow-like shape," if there was any doubt the design is a propeller beanie, the use of the synonym "spinner hat" both as the title of the work and in the work itself dispels any doubt. Second Request at 2. Propeller beanies have been in existence since 1947 and typically consist of a solid or multicolor beanie hat with a propeller on top. See Ian Ellis, *History of the Propeller Beanie and the Ultimate Propeller-Head Geek*, TODAY IN SCI, <http://todayinsci.com/Events/Patent/UltimatePropellerHead.htm>. For example, the 1948 painting "Boy with a propeller beanie" by Guy Pène du Bois features a red hat with a yellow propeller, the same features as the design in Spinner Hat. See *id.*

For Digital Iris, it is also indisputable that the work's constituent elements—a stylized combination of the letters "D" and "i," the words "Digital Iris," and coloring—are not individually subject to copyright protection. See 37 C.F.R. § 202.1(a), (e) (prohibiting registration of "mere variations of typographic ornamentation, lettering or coloring" and "[t]ypeface as typeface"); see also COMPENDIUM (THIRD) § 913.1 ("the U.S. Copyright Office cannot register a claim to copyright in typeface or mere variations of typographic ornamentation or lettering, regardless of whether the typeface is commonly used or truly unique"). The Office does not register typeface characters, as "the creative aspects of the character (if any) cannot be separated from the utilitarian nature of that character." *Id.* § 906.4. The question then is whether the combination of either of the Works' elements are protectable under the legal standards described above.

The Board finds that, viewed as a whole, the selection, coordination, and arrangement of the elements that comprise the Works are not sufficient to render the Works original. As explained in the *Compendium of U.S. Copyright Office Practices*, "the Office cannot register a work consisting of a simple combination of a few familiar symbols or designs with minor linear or spatial variations." COMPENDIUM (THIRD) § 313.4(J). For example, the Eighth Circuit upheld the Copyright Office's refusal to register a simple logo design consisting of four angled lines which formed an arrow and the word "Arrows" in a cursive script below. See *John Muller & Co., Inc. v. NY Arrows Soccer*

Team, Inc., 802 F.2d 989, 990 (8th Cir. 1986). Spinner Hat is a typical propeller beanie set in a blue background with the words "Spinner Hat" below the design. Much like the jellyfish designs in *Satava* or the logo in *John Muller* that both did not satisfy the originality requirement by combining a small number of unprotectable ideas and standard elements, combining the well-known design of a propeller beanie with an uncopyrightable short phrase and a solid color background does not make Spinner Hat original and eligible for copyright registration. Similarly, in *Digital Iris* the combination of the uncopyrightable short phrase "Digital Iris" and the stylized combination of the letters "D" and "i" also does not qualify that work as original and eligible for copyright registration. Accordingly, the Works lack the requisite amount of creativity in selection, coordination, and/or arrangement to warrant copyright protection. See *Feist*, 499 U.S. at 359.

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 Works. 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