



Copyright Review Board
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000

December 14, 2020

Brian M. Davis
VLP Law Group LLP
5960 Fairview Road, Suite 400
Charlotte, NC 28210

**Re: Second Request for Reconsideration for Refusal to Register Tempo
Automation T Logo; Correspondence ID: 1-40JV0DT; SR # 1-7884164105**

Dear Mr. Davis:

The Review Board of the United States Copyright Office (“Board”) has considered Tempo Automation, Inc.’s (“Tempo Automation’s”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the work titled “Tempo Automation T Logo” (“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 graphic design consisting of a stylized capital letter “T” with color gradient in blue and green color tones. The Work is as follows:



II. ADMINISTRATIVE RECORD

On July 15, 2019, Tempo Automation filed an application to register a copyright claim in the Work. In an August 30, 2019, letter, a Copyright Office registration specialist refused to register the claim, finding that “it lacks the authorship necessary to support a copyright claim.” Initial Letter Refusing Registration from U.S. Copyright Office, to Brian M. Davis, VLP Law Group LLP (August 30, 2019).

In a letter dated November 29, 2019, Tempo Automation requested that the Office reconsider its initial refusal to register the Work. Letter from Brian M. Davis, VLP Law Group LLP, to U.S. Copyright Office (November 29, 2019) (“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 creativity either elementally, or as a whole, to warrant registration.” Refusal of First Request for Reconsideration from U.S. Copyright Office, to Brian M. Davis, VLP Law Group LLP, at 2 (April 15, 2020).

In a letter dated June 29, 2020, Tempo Automation 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 Brian M. Davis, VLP Law Group LLP, to U.S. Copyright Office (June 29, 2020) (“Second Request”). In that letter, Tempo Automation argued that the Work contains sufficient creativity to warrant copyright protection. *Id.* at 1. Tempo Automation asserted that the Work “is not a mere typographical variation of the letter T,” but similar to “a complex geometric shape.” *Id.* at 3. Tempo Automation also argued that the “multiple color and design elements” contained within the Work “distinguish it from a mere typographical variation of a letter.” *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 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. *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. 2017) (“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.

B. Analysis of the Work

After carefully examining the Work and applying the legal standard discussed above, the Board finds that the Work does not contain the requisite authorship necessary to sustain a claim to copyright.

The Work consists of two continuous lines that together form the outline of a stylized letter “T.” Viewed another way, the Work is a block “T” with a bisecting line running up the center of the vertical stroke for three-fourths of its length, and from the center to the right side of the horizontal stroke at the top of the T, with a gap in the outline where the bisecting line exits the outline on the right side. This minor linear variation of the letter “T” is not copyrightable, as it is a mere variation of typographic ornamentation or lettering. 37 C.F.R. § 202.1(a); COMPENDIUM (THIRD) § 313.4(J). Letters are the building blocks of expression that cannot be copyrighted “regardless of how novel and creative the shape and form of the typeface characters may be.” COMPENDIUM (THIRD) § 906.4; *see also Eltra Corp. v. Ringer*, 579 F.2d 294, 298 (4th Cir. 1978) (noting Congress has consistently refused copyright protection to typeface). Although in rare instances some graphical works largely comprising lettering may be copyrightable, those “very limited cases” result in “original pictorial art that forms the entire body or shape of the typeface characters,” including “add-on[s] to the beginning and/or ending of the characters.” COMPENDIUM (THIRD) § 906.4. The Work’s stylized letter “T,” however, is not such an exception to the general rule prohibiting registration of lettering. Additionally, while Tempo Automation argued that the Work “is not a mere typographical variation of the letter T,” Second Request at 3, Tempo Automation itself titled the work “Tempo Automation T Logo” and represented to the U.S. Patent and Trademark Office that the Work “consists of a stylized ‘T.’”¹ The Work’s own title shows that the two lines were combined to evoke the letter “T.” Finally, even if Tempo Automation were correct that the Work is “more akin to a complex geographic shape,” Second Request at 3, the Board is doubtful whether the simple combination of two continuous lines bending at uniform 45 degree angles would be entitled to copyright protection. *See* COMPENDIUM (THIRD) § 906.1.

The other feature of the Work is the coloration of the linear elements with various shades of cyan. Mere variations in color do not “possess more than a *de minimis* quantum of creativity” and are therefore not protectable. *Feist*, 499 U.S. at 345; *see* 37 C.F.R. § 202.1(a); COMPENDIUM (THIRD) § 313.4(K), § 906.3 (“Merely . . . combining expected or familiar pairs or sets of colors is not copyrightable.”). While Tempo Automation cites such “shading” as a creative element, the shading is merely a basic color gradient text effect, uniformly shifting color from a blue shade on the left to an aquamarine shade on the right, and such text effects are commonly found within logo designs.² *See* COMPENDIUM (THIRD) § 906.4 (“[T]he mere use of text effects (including chalk, popup papercraft, neon, beer glass, spooky-fog, and weathered-and-worn), while potentially separable, is *de minimis* and not sufficient to support a registration.”).

¹ While the fact that a work is registered with the U.S. Patent and Trademark Office (“USPTO”) does not bear upon an application for copyright registration, since the Copyright Office will evaluate an application independently for purposes of copyrightability, *see* COMPENDIUM (THIRD) § 913.1, the Office does note the factual representations made in connection with the Work’s application for trademark registration. *See* T, Registration No. 5711338 (“The mark consists of a stylized ‘T’, changing from blue on the left side to green on the right side.”).

² *See Get in on the Gradient Design Trend*, VISUAL MEDIA ALLIANCE (July 1, 2020), <https://main.vma.bz/digest/get-in-on-the-gradient-design-trend> (discussing the increased use of gradients); Jacob Cass, *Logo Design Trends for 2020*, JUST CREATIVE (Dec. 16, 2019), <https://justcreative.com/2019/12/11/logo-design-trends-2020/> (listing color gradients as a top logo design trend and providing examples of logos currently using gradient); *WHY HAVE GRADIENTS BECOME THE NEW DESIGN TREND*, LOGOLADZ (July 5, 2018), <https://www.logoladz.com/why-have-gradients-become-the-new-design-trend/> (discussing the benefits of using gradient in logos).

Taken together, the Work consists of only a stylized letter “T” depicted with a cyan color gradient. Where a design combines uncopyrightable elements, it is protected by copyright only when the “elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.” *Satava*, 323 F.3d at 811. Here, the contributions are too few and their use too standard to constitute an original work of authorship, particularly when considered against the strong public policy rationale for prohibiting copyright in typographical elements or lettering. While “[t]he standard of originality is low, . . . it does exist,” and the Board concludes that this work lacks the modicum of creativity required for copyright protection. *Feist*, 499 U.S. at 362.

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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Associate Register of Copyrights

Catherine Zaller Rowland, Associate Register of

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