



United States Copyright Office

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

December 12, 2017

Scott Warner, Esq.
Garvey Schubert Barer
1191 Second Avenue, Suite 1800
Seattle, WA 98101

Re: Second Request for Reconsideration for Refusal to Register UnCruise Whale Tail Logo; Correspondence ID: 1-2AKODON; SR#: 1- 3715307131

Dear Mr. Warner:

The Review Board of the United States Copyright Office (“Board”) has considered InnerSea Discoveries LLC (“InnerSea’s”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional graphic design claim in the work titled UnCruise Whale Tail Logo (the “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 a two-dimensional graphic design. It consists of two blue lines that join in an incomplete loop or ribbon in the middle, with symmetrical curved sides. The title of the Work—UnCruise Whale Tail Logo—indicates that the Work represents the tale of a whale. The Work is depicted as follows:



II. ADMINISTRATIVE RECORD

On June 21, 2016, InnerSea filed an application to register a copyright claim in the Work. In November 2016, a Copyright Office registration specialist refused to register the claim, finding that it “lacks the authorship necessary to support a copyright claim.” Letter from Wilbur King, Registration Specialist, to Scott Warner, Garvey Schubert Barer (Nov. 4, 2016).

In February 2017, InnerSea requested that the Office reconsider its initial refusal to register the Work. Letter from Scott Warner, Garvey Schubert Barer, to U.S. Copyright Office (Feb. 3, 2017) (“First Request”). InnerSea argued that the Work is sufficiently original and is a creative rendition of a whale’s tail that has atypical design elements such as: (1) straightened fluke edges; (2) a ribbon to replace the tail stock; (3) a “distinct cobalt blue outline” around the shape of the drawing; and (4) the transparent nature of the artwork. *Id.* at 2. InnerSea further claimed that the Work is “but one” of the “hundreds (if not thousands) of different ways to portray a whale’s tail.” *Id.* at 3. 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 Scott Warner, Garvey Schubert Barer (Apr. 27, 2017). The Office described the Work as containing common and familiar leaf shapes, and, regarding InnerSea’s design choices, noted that “[i]t is not the possibility of choices that determines copyrightability but rather whether the particular resulting expression contains copyrightable authorship.” *Id.* at 2–3.

InnerSea subsequently 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 Scott Warner, Garvey Schubert Barer, to U.S. Copyright Office (July 27, 2017) (“Second Request”). While InnerSea agreed that “some elements of the [Work] are common geometric shapes and thus may not be copyrightable,” it alleged that “the selection and arrangement of ‘straight’ and ‘curved’ lines in the logo are copyrightable because the combination possesses a sufficient amount of creative expression.” *Id.* at 3. InnerSea additionally asserted that the Office improperly judged the aesthetic qualities of the Work. *Id.*

III. DISCUSSION

A. *The Legal Framework – Originality*

The Copyright Office may register a work 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 or familiar 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)”). 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 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 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.

The Work uses two blue lines to create an exceedingly simplistic design with essentially three cuneate shapes (including a loop or bare ribbon in the middle). Copyright law does not protect familiar shapes or designs, or geometric shapes. 37 C.F.R. § 202.1(a). InnerSea acknowledges that “some elements of the [Work] are common geometric shapes and thus may not be copyrightable,” but argues that “the selection and arrangement of ‘straight’ and ‘curved’ lines in the logo are copyrightable because the combination possesses a sufficient amount of creative expression.” Second Request at 3. While it is true that combining simple and familiar shapes can result in a copyrightable design, the Work is not such a design. COMPENDIUM (THIRD) § 313.4(J). Instead, the authorship is *de minimis* and fails to meet even the low threshold set by the Supreme Court in *Feist*. This alone warrants the Office's refusal to register the Work.

Much of the prior discussion focused on the Work as a depiction of a whale's tail. The Board finds that the Work is not copyrightable regardless of whether or not it depicts a feature of an animal. Looking at the Work as a whale's fluke, however, does not make the Work any more creative. To the contrary, the basic physiological characteristics of animals are considered “standard, stock, or common” and not protectable by copyright. *Alpi Intn'l, Ltd. v. Anga Supply, LLC*, No. 13-cv-4888, 2015 U.S. Dist. LEXIS 60822, *8 (N.D. Cal. May 8, 2015); *see also Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 901 (9th Cir. 1987) (in an infringement case concerning stuffed dinosaur toys, a court “prevent[ed] reliance upon any similarity in expression resulting from . . . the physiognomy of dinosaurs” because to do so would protect the idea of a dinosaur); *Craig Frazier Design, Inc. v. Zimmerman Agency, LLC*, No. C 10-1094 SBA, 2010 U.S. Dist. LEXIS 107170, at *17 (N.D. Cal. Sept. 27, 2010) (finding that while the styling and shading of a graphic depiction of a duck's bill was subject to copyright protection, any design elements that “flow from a duck's physiology” were not protected). No artist is entitled to an exclusive right to depict such basic elements “that nature displays for all observers.” *Satava*, 323 F.3d at 812–13 (concluding that the artist does not have copyright protection over aspects of his glass-in-glass

Scott Warner
Garvey Schubert Barer

December 12, 2017

jellyfish sculptures resulting from “jellyfish physiology” observable to the public). Thus, if viewed as a whale’s tail, the Work is far too simplistic to constitute copyrightable authorship.

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 Zaffer Rowland
Copyright Office Review Board