



United States Copyright Office

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August 15, 2016

Matthew H. Swyers
The Trademark Company
2703 Jones Franklin Rd., Suite 206
Cary, NC 27518

Re: Second Request for Reconsideration for Refusal to Register WE ARE FREEKIN AWESOME; Correspondence ID: 1-17UC60W

Dear Mr. Swyers:

The Review Board of the United States Copyright Office ("Board") has considered Warren Knecht Jr's ("Mr. Knecht's") second request for reconsideration of the Registration Program's refusal to register a two-dimensional artwork claim in the work titled "WE ARE FREEKIN AWESOME" ("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 work that consists of the letters "WAFA" on a blue background. "WAFA" is written in capitalized, sans-serif white letters.

A reproduction of the Work is set forth below.



II. ADMINISTRATIVE RECORD

On October 15, 2014, Mr. Knecht filed an application to register a copyright claim in the Work. In a January 8, 2015 letter, a Copyright Office registration specialist refused to register the claim, finding that it “lacks the authorship necessary to support a copyright claim.” Letter from Ivan Proctor, Registration Specialist, to Matthew Swyers, The Trademark Company (Jan. 8, 2015).

In a letter dated April 7, 2015, Mr. Knecht requested that the Office reconsider its initial refusal to register the Work. Letter from Matthew Swyers, The Trademark Company to U.S. Copyright Office (Apr. 7, 2015) (“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 Matthew Swyers, The Trademark Company (Aug. 18, 2015).

In a letter dated November 17, 2015, Mr. Knecht 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 Matthew Swyers, The Trademark Company, to U.S. Copyright Office (Nov. 17, 2015) (“Second Request”). In that letter, Mr. Knecht noted that “the creativity by utilizing offsetting colors of blue and white with the letters Wafa clearly satisfies the minimum threshold of creativity required for copyright protection.” *Id.* at 2. Specifically, Mr. Knecht argued that the Office must consider the “organization, arrangement, selection, or combination of elements of features *as a whole* rather than focusing on the individual elements themselves.” *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 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).

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 creative authorship necessary to sustain a claim to copyright.

Mr. Knecht does not dispute that the Work’s constituent elements—a blue background and the single word “WAF A” written in white capital letters—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, lettering or coloring”); *see also Moody v. Morris*, 608 F. Supp. 2d 575, 579 (S.D.N.Y. 2009) (finding that there was no valid copyright in the phrase “Where Words Come Alive” because “it is axiomatic that words, short phrases, titles, and slogans are not subject to copyright”).

Of course, works composed of unprotectable elements may be copyrightable, but only if the selection, arrangement, or modification of those elements reflects sufficient choice and authorial discretion that is not so obvious or minor that the “creative spark is utterly lacking or so trivial as to be nonexistent.” *Feist*, 499 U.S. at 359. The Work, however, does not meet this standard. Mr. Knecht’s assertion that he “merely seeks to register a design with one color of lettering on top of a different color of background,” Second Request at 2, only serves to highlight the *de minimis* nature of the creative authorship present in the Work. The Board finds that the combination of four letters

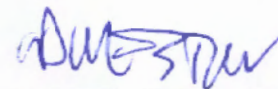
on a blue background is an extremely basic configuration which lacks the requisite amount of creativity to warrant copyright protection. *See Feist*, 499 U.S. at 359; *see also* COMPENDIUM (THIRD) § 312.2 (explaining that “generally, a selection consisting of less than four items will be scrutinized for sufficient authorship”).

Mr. Knecht further argues that the Work is similar to certain Louis Vuitton and Gucci patterns featuring stylized letters “LV” and “G,” respectively, integrated with other design elements into repeating patterns. Mr. Knecht claims, without providing evidence, that these patterns have been registered with the Office. He notes that the “brand lettering and offsetting colors” in those works are no different from the “specific color background . . . with an offsetting color for the lettering” in the Work at issue. *Id.* at 3. Assuming, *arguendo*, that these patterns were registered by the Office, the Office’s decision to register a particular work has no precedential value as to subsequent registration applications of a similar type. *See* COMPENDIUM (THIRD) § 309.3. Moreover, a comparison of the Work to the patterns referenced by Mr. Knecht does not convince the Board that the Work contains a sufficient amount of creative authorship. The Louis Vuitton and Gucci patterns feature multiple repeating graphic elements in addition to letters, while the Work is simply four letters on a background, and not a pattern at all. The only similarity is the use of letters on a contrasting background, which by itself cannot be the basis for copyright registration. *See Coach Inc.*, 386 F. Supp. 2d at 499.

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:



Chris Weston
Copyright Office Review Board