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

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Re: Second Request for Reconsideration of Refusals to Register 3D EYEBROW DESIGN, 3D EYEBROW DESIGN (Lettered) (SR # 1-11206491761, 1-11206412381; Correspondence ID: 1-5HOOP5I)

Dear Ms. Vayner:

The Review Board of the United States Copyright Office ("Board") has considered the United Parcel Service of America, Inc.'s ("UPS") second request for reconsideration of the Registration Program's refusal to register two-dimensional artwork claims in the works titled "3D Eyebrow Design" (the "Blank Work") and "3D Eyebrow Design (Lettered)" (the "Lettered Work") (collectively, the "Works"). After reviewing the applications, deposit copies, and relevant correspondence, 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

A. 3D Eyebrow Design

The Blank Work is a two-color shield with a brown outline, golden border, and brown interior. The brown interior fills the shield except for the top, where it curves downward to the left. A shading gradient across both colors gives the shield a three-dimensional appearance.

The Blank Work is as follows:



B. 3D Eyebrow Design (Lettered)

The Lettered Work is the Blank Work with the addition of "ups" in centered gold lettering and matching gradient shading.

The Lettered Work is as follows:



II. ADMINISTRATIVE RECORD

On March 4, 2022, UPS filed two applications to register copyright claims in the Works. In two April 20, 2022 letters, a Copyright Office registration specialist refused to register the claims, determining that the Works lack the authorship necessary to support registration. Initial Letter Refusing Registration of the Blank Work from U.S. Copyright Office to Sabina Vayner at 1 (Apr. 20, 2022); Initial Letter Refusing Registration of the Lettered Work from U.S. Copyright Office to Sabina Vayner at 1 (Apr. 20, 2022).

On July 20, 2022, UPS requested that the Office reconsider its initial refusals to register the Works, identifying several visual elements and arguing that, combined, they satisfy the standard for creativity. Letter from Sabina Vayner Re: 3D Eyebrow Design to U.S. Copyright Office at 2–7 (July 20, 2022); Letter from Sabina Vayner Re: 3D Eyebrow Design (Lettered) to U.S. Copyright Office at 2–7 (July 20, 2022) (collectively, the "First Requests"). After reviewing the Works in light of the points raised in these requests, the Office reevaluated the claims and again concluded that the Works could not be registered. Refusal of First Requests for Reconsideration from U.S. Copyright Office to Sabina Vayner (Nov. 21, 2022) ("Second Refusal"). The Office explained that the Works are comprised of uncopyrightable common shapes, familiar designs, lettering, or mere variations thereof, and that the combinations of these elements lack sufficient original authorship to support registration. *Id*. at 3.

In a February 21, 2023 letter, UPS requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusals to register the Works. Letter from Sabina Vayner to U.S. Copyright Office (Feb. 21, 2023) ("Second Request"). UPS argued that the Works "are the result of many creative choices and decisions," noting the "sleek, curved, heart-shaped face[s]" and comparing the gradation to "the effect of sunlight on one side of the face or . . . the glint of sunshine on a metal shield." *Id*. at 2. UPS asserted that the Second Refusal's descriptions of the Works "trivialize[]" their high degree of creativity and contended that "each design is an artistic work of creative expression, with nuances and subtleties that significantly

exceed the modicum of creativity required for copyright protection." *Id*. at 3 (internal quotations omitted). UPS asserted that there are substantial parallels between the Works and other works that the Board found sufficiently creative and that, "to ensure consistent application of the Copyright Act and the Office's regulations," the refusals must be reversed. *Id*. at 7–8 (internal quotations omitted). UPS also cited court decisions to argue that combining simple geometric shapes in a unique way can meet the originality threshold. Second Request at 4 (citing *Atari Games Corp. v. Oman*, 888 F.2d 878 (D.C. Cir. 1989); *Prince Group, Inc. v. MTS Prod.*, 967 F. Supp. 121 (S.D.N.Y. 1997)).

III. DISCUSSION

After carefully examining the Works and considering the arguments made in the First and Second Requests, the Board finds that the Works do not contain the creativity necessary to sustain copyright claims.

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" and that "garden-variety," "obvious," or "practically inevitable" selection, coordination, and arrangement lack the necessary "creative spark required by the Copyright Act." *Id.* at 362–64.

At the same time, 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 claim. 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, 883 (D.C. Cir. 1989); *Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 498–99 (S.D.N.Y. 2005). As the Ninth Circuit has explained, "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." *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003).

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, and slogans; familiar symbols or designs"); *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"). In its regulations and publications, the Office

explains that copyright does not protect common geometric shapes or familiar designs, nor mere variations thereof. *Id.* § 202.1(a); U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 906.1 (3d ed. 2021) ("COMPENDIUM (THIRD)") (noting that common geometric shapes are not protectable); COMPENDIUM (THIRD) § 906.2 (stating that "mere variations" on familiar designs are not protectable). Copyright likewise does not protect "words and short phrases," nor "mere variations of typographic ornamentation [or] lettering," nor "typeface." 37 C.F.R. § 202.1(a), (e); COMPENDIUM (THIRD) § 313.3(D). Finally, copyright does not protect "[m]ere coloration or mere variations in coloring." 37 C.F.R. § 202.1(a); COMPENDIUM (THIRD) § 313.4(K), 906.3.

Applying these legal standards, the Board finds that the Works' individual elements and each Work as a whole fail to demonstrate sufficient creativity for copyright protection. The Works are simple two-color shields with gradient shading to create a 3D effect and, in the Lettered Work, centered unadorned lettering. Viewed individually, the shapes (whether viewed as a "heart-shaped face," Second Request at 2, or a shield) are uncopyrightable common geometric shapes or familiar designs. 37 C.F.R. § 202.1(a); COMPENDIUM (THIRD) §§ 906.1, 906.2. These shapes are uncopyrightable notwithstanding the single top-left curve of the brown interior shield, because "mere variations" on familiar designs are insufficiently creative to warrant registration. COMPENDIUM (THIRD) § 906.2. The gradient shading is also not sufficiently original as it is "[m]ere coloration or mere variations in coloring," *id.* § 906.3, and a standard way of creating a 3D effect given the underlying shield shape. To the extent that UPS asks the Board to deem these elements sufficiently creative because they "allud[e] to the effect of sunlight on one side of the face or . . . the glint of sunshine on a metal shield," Second Request at 2, we note that the Office only considers a work's "actual appearance" and not any "symbolic meaning or impression" when making originality determinations. COMPENDIUM (THIRD) § 310.5. Finally, the lettering in the Lettered Work constitutes unprotectable letters and mere typeface. 37 C.F.R. § 202.1(a), (e).

Viewed as a whole, the selection and arrangement of the Works' unprotectable elements are also insufficiently creative to warrant copyright protection because the Works combine only a few elements and in a manner that is standard or garden variety. *See Satava*, 323 F.3d at 811. The Blank Work combines concentric shield shapes in two colors with gradient shading consistent with a 3D shield, culminating in a simplistic arrangement. *See* COMPENDIUM (THIRD) § 905 ("Merely bringing together only a few standard forms or shapes . . . does not satisfy [the originality] requirement."). The addition of "ups" in the Lettered Work does not add sufficient creativity, as plain lettering on the center of a shield is a simplistic, garden variety arrangement that is not sufficiently original. *See id.*; 37 C.F.R. § 202.1(a), (e). To the extent that the Works may embody "many creative choices and decisions," Second Request at 2, the Office does not consider "the variety of choices available to the author[,] . . . but the actual work that the author created." COMPENDIUM (THIRD) § 310.8. Here, the perceptible design choices are insufficiently numerous to warrant copyright protection.

UPS's other arguments, based on analogies to other works found to be copyrightable, do not compel a different outcome as to the Works' lack of originality. First, UPS cites previous Board decisions, asserting that the Works are at least as original as the works therein. *See* Second Request at 4–8. The Office, however, does not compare works; rather, it makes determinations of copyrightability on a "case-by-case basis" and "[a] decision to register a

particular work has no precedential value." COMPENDIUM (THIRD) § 309.3. The prior Board decisions cited by UPS therefore have no bearing on the Board's determinations; and in any event, the Board does not find the comparisons persuasive. Second, UPS cites *Atari Games Corp.* and *Prince Group* for the proposition that combinations of simple geometric shapes may meet the originality threshold. Second Request at 4 (citing *Atari Games Corp.*, 888 F.2d at 883; *Prince Group*, 967 F. Supp. at 125). Again, the Office does not compare works and makes copyrightability determinations on a "case-by-case basis." COMPENDIUM (THIRD) § 309.3. Even so, while UPS is correct that some combinations of geometric shapes are protectable, the video game and fabric design in the cases it cites for this principle were more complex and involved more elements than the Works, which consist of far fewer common design elements.

IV. CONCLUSION

For the reasons stated herein, the Board affirms the refusal to register the copyright claims in the Works. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action in this matter.

Maria Strong

U.S. Copyright Office Review Board
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