



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

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**Re: Second Request for Reconsideration for Refusal to Register DB Work 001
(SR # 1-10431282401; Correspondence ID: 1-510EK2N)**

Dear Ms. Russell:

The Review Board of the United States Copyright Office (“Board”) has considered Drew Brady Company, Inc.’s (“Drew Brady”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the work titled “DB Work 001” (“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 in black consisting of a stylized flame or water drop with two narrow, negative spaces that vertically divide the Work. The Work is as follows:



II. ADMINISTRATIVE RECORD

On May 4, 2021, Drew Brady filed an application to register a copyright claim in the Work. In a June 1, 2021 letter, a Copyright Office registration specialist refused to register the claim, finding that it “lack[ed] the authorship necessary to support a copyright claim.” Initial Letter Refusing Registration from U.S. Copyright Office to Elizabeth T. Russell at 1 (June 1, 2021).

On June 26, 2021, Drew Brady requested that the Office reconsider its initial refusal to register the Work, arguing that the irregular and expressive shapes of the Work meet the low bar for creativity. Letter from Elizabeth R. Russell to U.S. Copyright Office at 2–5 (June 26, 2021) (“First Request”). After reviewing the Work in light of the points raised in the First Request, the Office re-evaluated Drew Brady’s claims and again concluded that the Work “[did] not contain a sufficient amount of original and creative artistic or graphic authorship to support a copyright registration.” Refusal of First Request for Reconsideration from U.S. Copyright Office to Elizabeth T. Russell at 1 (Oct. 29, 2021).

Drew Brady then 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 Elizabeth T. Russell to U.S. Copyright Office (Dec. 31, 2021) (“Second Request”). In that letter, Drew Brady asserted that the Work consists of two uncommon shapes, connected by a band, that express multiple ideas and reflect creative choices by the author. *Id.* at 2–6. Each “freeform drawing” is “irregularly shaped” and together they evoke both “a drop of water” and, through the insertion of negative space, “an original depiction of a flame.” *Id.* at 4–5. Drew Brady argued that “the author’s creative use of negative space to create this illusion, on its own, constitutes copyrightable authorship.” *Id.* at 5.

III. DISCUSSION

After carefully examining the Work and considering the arguments made in the First and Second Requests, the Board finds that the Work does not contain the requisite creativity necessary to sustain a claim to copyright.

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 these requirements. *See, e.g.*, 37 C.F.R. § 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 some cases, a combination 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 (the Copyright Act “implies that some ‘ways’ [of selecting, coordinating, or arranging uncopyrightable material] will trigger copyright, but that others will not”). The copyrightability of a combination of standard or common elements depends on whether the selection, coordination, or arrangement of those elements 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). A mere simplistic arrangement of a small number of non-protectable elements does not demonstrate the level of creativity necessary to warrant protection. *See Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) (“[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.”).

The Work is a 2-D graphic in black of “an original depiction of a flame” created by “the insertion of negative space” into a shape that “resembles a drop of water.” Second Request at 5. Drew Brady contends that the resulting shape is sufficiently creative to warrant registration because it is uncommon and distinct from the set of common shapes named in the Compendium of U.S. Copyright Office Practices. *See id.* at 3 (asserting that the shapes in the work are not common shapes because, unlike those listed in the Compendium, these shapes have no name). However, as Drew Brady concedes, the examples listed in the Compendium are not exhaustive. *See id.*; U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 906.1 (3d ed. 2019) (“COMPENDIUM (THIRD)”) (The list of common geometric shapes is “without limitation.”). The elements of the Work, though not listed by name, are still individually ineligible for copyright protection because they are simple modifications of common shapes and lines. Furthermore, to the extent that Drew Brady characterizes the elements of the Work and the Work as a whole as a drop of water and a flame, respectively, these are representational symbols that cannot be copyrighted. COMPENDIUM (THIRD) § 313.4(J) (belonging to a category “[c]ommon representational symbols, such as a spade, club, heart, diamond, star, yin yang, fleur de lys, or the like.”). Where a design combines uncopyrightable elements, it is protected 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 elements—a black water drop shape with two lines of negative space—are too few and the arrangement too simple to support copyright registration. *See* COMPENDIUM (THIRD) § 905 (“Merely bringing together only a few standard forms or shapes with minor linear or spatial variations does not satisfy [the creativity] requirement.”).

Furthermore, Drew Brady suggests that the Work contains a sufficient amount of creativity because the Work uses negative space to create an illusion where “[o]ur human brains . . . will see both the water and the flame.” Second Request at 5. How one might interpret the Work, however, is irrelevant to the Office’s objective analysis of the Work. *See Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S.Ct. 1002, 1015 (2017) (“[O]ur inquiry is limited to how [the design is] perceived . . .”). The Office only considers the actual appearance of the work and not the symbolic meaning any individual may assign to it. *See* 17 U.S.C. § 102(b); COMPENDIUM (THIRD) § 310.3 (“The symbolic meaning or impression of a work is irrelevant to [the creativity] determination” which focuses “only on the actual appearance . . . of the work that

has been submitted for registration[.]”). Accordingly, the Work is insufficiently creative to warrant registration.

Finally, Drew Brady suggests that the Work is no less original than similar works that the Office has previously registered. *See* Second Request at 7. The Office does not compare works; it makes determinations of copyrightability on a “case-by-case basis.” COMPENDIUM (THIRD) § 309.3. At the same time, the Board notes that the Work differs from those works that Drew Brady cites in that those works feature more design elements—such as stylized shading, letters and numbers, and multiple shapes in different colors and sizes—and more original arrangements than the Work in question. *See* U.S. Copyright Office Review Board, *Decision Reversing Refusal of Registration of Colorado Rapids Crest* (Mar. 30, 2020), <https://copyright.gov/rulings-filings/review-board/docs/colorado-rapids-crest.pdf>; U.S. Copyright Office Review Board, *Decision Reversing Refusal of Registration of Dead Kennedys “DK” Logo* (May 7, 2020), <https://copyright.gov/rulings-filings/review-board/docs/dead-kennedys-dk-logo.pdf>; U.S. Copyright Office Review Board, *Decision Reversing Refusal of Registration of Northwind Logo* (Oct. 9, 2020), <https://copyright.gov/rulings-filings/review-board/docs/northwind-logo.pdf>. The Board’s conclusion here is not impacted by these prior decisions.

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

Suzanne V. Wilson, General Counsel and

Associate Register of Copyrights

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