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

December 4, 2019

Ariana G. Hiscott, Esq.
Cooley LLP
101 California St.
5th Floor
San Francisco, CA 94-111-5800

Re: Second Request for Reconsideration for Refusal to Register Stylized Bird Design; Correspondence ID: 3ENTDI1; SR # 1-6073911191

Dear Ms. Hiscott:

The Review Board of the United States Copyright Office ("Board") has considered Allbirds, Inc.'s ("Allbirds'") second request for reconsideration of the Registration Program's refusal to register a two-dimensional artwork claim in the work titled "Stylized Bird Design" ("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 black and white design with one portion of the drawing starting at the lower left and extending diagonally to the upper right, ending in a right-leaning curve at the top. The second portion appears as an "s" shape, or vertical-oriented sine wave, which extends from the upper right to the bottom of the work. The Work is depicted as follows:

II. ADMINISTRATIVE RECORD

On December 6, 2017, Allbirds filed an application to register a copyright claim in the Work. In a June 11, 2018, 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 J. Ernst, Registration Specialist, to Michael Young, Cooley LLP 1 (June 11, 2018).

In an August 21, 2018, letter, Allbirds requested that the Office reconsider its initial refusal to register the Work. Letter from Ariana G. Hiscott, Cooley LLP, to U.S. Copyright Office (Aug. 21, 2018) ("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 Ariana G. Hiscott, Cooley LLP 1 (Feb. 14, 2019). In response to the First Request, the Office stated that the Work was an uncopyrightable combination of a straight and curved band, which are common and familiar designs. *Id*. at 3. The Office also stated that the impression that the Work conveys, may go "to the mind of the viewer rather than the composition of the work itself." suggesting that a mental impression of the Work resembling a bird was not objectively apparent in the composition. *Id*.

In a May 14, 2019, letter, Allbirds 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 Ariana G. Hiscott, Cooley LLP, to U.S. Copyright Office (May 14, 2019) ("Second Request"). In that letter, Allbirds disputed *Feist's* applicability as *Feist* involved a "telephone directory that arranged openly available facts in alphabetical order" while the Work here "required artistic decisions on how to represent a bird in a sufficiently abstract and artistically minimalist way to be bold and impactful, with a large amount of negative/white space, while still conjuring the image of a bird." *Id*. at 2. Further, Allbirds disagreed with the Office's position that it does not consider the effect, impression, or symbolic meaning that a work conveys, because "the meaning or . . . impression that an image conveys is an undividable aspect of an artistic work." *Id*. at 1.

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 Publications, Inc. v. Rural Telephone Service 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).

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.

First, the Work, essentially a straight line connected to a curved portion, is composed of familiar shapes not protected by copyright. 37 C.F.R. § 201.1; *see also Tompkins Graphics, Inc. v. Zipatone, Inc.*, No. 82-5438, 1983 U.S. Dist. LEXIS 14631, at *4 (E.D. Pa. Aug. 15, 1983)

("[B]asic geometric shapes have long been in the public domain and therefore cannot be regulated by copyright."). The combination of these two basic design elements results in a simple design that does not include enough creative authorship to render the Work protectable.

Allbirds contends that the Work "required artistic decisions on how to represent a bird in a sufficiently abstract and artistically minimalist way to be bold and impactful, with a large amount of negative/white space, while still conjuring the image of a bird." Second Request at 2. The Board does not assess the espoused intentions of a design's author, or a design's visual impact, in determining whether a design contains the requisite minimal amount of original authorship necessary for registration. *See Bleistein*, 188 U.S. at 251. Accordingly, the fact that the Work may have been intended to "conjur[e] the image of a bird" is not relevant. And copyright protects specific creative expressions, and cannot extend to the *idea* of a bird. *See Blehm v. Jacobs*, 702 F.3d 1193, 1204 (10th Cir. 2012) (finding that there is no copyright protection in unprotectable common anatomical elements, including abstract human arms, legs, faces, and fingers as expressed in stick figures).

Second, if the Work is evaluated as a depiction of a cursive lower case "s," it would also not be protectable. Copyright does not protect simple variations of lowercase letters. 37 C.F.R. § 202.1(a), (e) (prohibiting registration of "familiar symbols or designs; mere variations of typographic ornamentation [or] lettering" and "[t]ypeface as typeface"); *see also* COMPENDIUM (THIRD) § 906.4 ("As a general rule, typeface, typefont, lettering, calligraphy, and typographic ornamentation are not registrable."). Indeed, Applicant uses the work as a stylized "s," as shown in Allbirds' trademark registration depicting the Work as the final letter in the "Allbirds" mark.[1] Neither "mere scripting or lettering, either with or without uncopyrightable ornamentation," "[h]andwritten words or signatures, regardless of how fanciful they may be," nor "mere use of different fonts," satisfies the requirements for copyright registration. *Id.* § 913.1; *see also Coach*, 386 F. Supp. 2d at 498 (stating that "letters of the alphabet cannot be copyrighted").

Because the Work is a simple design that lacks the necessary creativity, both as an abstract bird design or as a depiction of the letter "s," it is not eligible for copyright protection. While the Board appreciates that careful design may have gone into creating a minimal impression of a "letter 's' bird" for branding purposes, to hold otherwise would grant Applicant a monopoly on this simple design against other comers who wish to use an identical or highly similar design to depict their own minimal rendition of a bird, scripted "s", wishbone, or particular squiggle.

[1] ALLBIRDS, Registration No. 87040627 ("The mark consists of the words 'allbirds' in a cursive font.").

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
Karyn A. Temple, Register of Copyrights
and Director, U.S. Copyright Office
Regan A. Smith, General Counsel and
Associate Register of Copyrights
Catherine Zaller Rowland, Associate Register of
Copyrights and Director, Public Information and
Education