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

May 3, 2024

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Re: Second Requests for Reconsideration of Refusals to Register App Notification Upgrade V01 r2 and Landscape 3 Mnemonic (SR # 1-8813600682, 1-8810507311; Correspondence ID: 1-4NY9Z8V, 1-4RGV480)

Dear Mr. Maiers:

The Review Board of the United States Copyright Office ("Board") has considered American Airlines, Inc.'s ("American Airlines") second request for reconsideration of the Registration Program's refusal to register sound recording claims in "Landscape 3 Mnemonic" ("Landscape") and "App Notification Upgrade V01 r2" ("Upgrade") (each individually, a "Work," and together, the "Works"). After reviewing the applications, deposit copies, and relevant correspondence, along with the arguments in the second requests for reconsideration, the Board affirms the Registration Program's refusals to register each of the works.

I. DESCRIPTION OF THE WORKS

Landscape is a sound recording around one second in length. It consists of a series of five musical notes, G-D-G-A-G.

Upgrade is a sound recording around one second in length. It consists of a series of five musical notes, G-D-G-A-G.

II. ADMINISTRATIVE RECORD

American Airlines filed an application to register a copyright claim in Landscape on May 7, 2020, and filed an application to register a copyright claim in Upgrade on May 8, 2020. In separate letters, Copyright Office registration specialists refused to register each of the claims, determining that the Works lacked the required creative original authorship.[1]

[1] Initial Letter Refusing Registration of Landscape from U.S. Copyright Office to Eric Maiers (Sept. 14, 2020); Initial Letter Refusing Registration of Upgrade from U.S. Copyright Office to Eric Maiers (June 24, 2020).

In separate, substantively similar letters, American Airlines requested that the Office reconsider its initial refusals to register the Works.[2] American Airlines argued that the Works possessed sufficient creativity, that their brevity should not affect their entitlement to copyright protection, and that the Works evinced creative production authorship. *See, e.g.*, Landscape First Request at 3. After reviewing the Works in light of the points raised in the First Requests, the Office again concluded that the Works could not be registered in separate but substantively similar letters.[3] The Office noted that short sound recordings may lack a sufficient amount of authorship to be copyrightable, and determined that the Works, each of which persist for one second, lacked such authorship. *See, e.g.*, Landscape Second Refusal at 1. The Office also concluded that much of the Works' purportedly creative authorship, including decisions as to note selection and instrumentation, pertained to musical work authorship, rather than the sound recording authorship American Airlines claimed. *Id.* at 2.

In separate but substantively similar letters, American Airlines requested that, pursuant to 37 C.F.R. § 202.5(c), the Board reconsider the Office's refusals to register the Works for a second time.[4] The Second Requests provide additional detail about the process used to create the Works, provide more detailed descriptions of the sounds appearing in the Works, including sheet music, and renew the argument that the works evince creative production authorship sufficient to entitle the works to registration. *See, e.g.*, Landscape Second Request at 1, 3–4.

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 sufficient creative authorship necessary to sustain a claim to copyright.

A work may be registered if it qualifies as an "original work[] of authorship fixed in [a] tangible medium of expression." 17 U.S.C. § 102(a). 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 not all works meet this low threshold. *Id.* The Supreme Court described this threshold as "more than a *de minimis* quantum of creativity," and held that works "utterly lacking" a "creative spark," whose creativity is "so trivial as to be virtually nonexistent," are not entitled to copyright protection. *Id.* at 359–63. For example, the Office has long had regulations explaining that works consisting solely of "[w]ords and short phrases" or analogous examples of limited creativity are not protected by copyright law. 37 C.F.R. § 202.1; *see also Kitchens of Sara Lee, Inc. v. Nifty Foods*, 266 F.2d 541, 544 (2d Cir. 1959) (describing regulation as a "fair summary of the law").

[2] Letter from Eric Maiers re: Landscape to U.S. Copyright Office (Dec. 14, 2020); Letter from Eric Maiers re: Upgrade to U.S. Copyright Office (Sep. 24, 2020) (collectively, the "First Requests").
[3] Refusal of First Request for Reconsideration of Landscape from U.S. Copyright Office to Eric Maiers (Apr. 15, 2021); Refusal of First Request for Reconsideration of Upgrade from U.S. Copyright Office to Eric Maiers (Feb. 9, 2021).
[4] Letter from Eric Maiers re: Landscape to U.S. Copyright Office (July 15, 2021) ("Landscape Second Request"); Letter from Eric Maiers re: Upgrade to U.S. Copyright Office (May 9, 2021) ("Upgrade Second Request") (collectively, the "Second Requests").

The Office provides guidance about the registration of sound recordings in the *Compendium of U.S. Copyright Office Practices*. As the *Compendium* explains, "short sound recordings may lack a sufficient amount of authorship to be copyrightable (just as words and short textual phrases are not copyrightable)." U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 803.5(B) (3d ed. 2021) ("COMPENDIUM (THIRD)"). Examples of such unprotectable works include "short musical phrases consisting of only a few musical notes standing alone," "a trademark consisting of three musical notes," and "individual . . . sounds . . . consisting of [unprotectable] elements." *Id.* § 313.4(C). Finally, the *Compendium* identifies the features of a sound recording that are relevant to the question of copyrightability: "Elements that determine the sufficiency and creativity of sound recordings include the simultaneous or sequential number of sounds, the length of the recording, and the creativity perceptibly expressed in creating, fixing, and manipulating the sounds." *Id.* § 803.5(B).

Applying the relevant legal standards, the Board concludes that the Works lack sufficient creativity to be registered as sound recordings. The Board's decision is based on the short duration of the Works—each is barely a second long and consists of five notes. The Works evince the kind of *de minimis* creativity that cannot support copyright protection. Just as textual works consisting solely of names and short phrases are not protected by copyright, 37 C.F.R. § 202.1(a), brief sound recordings containing only *de minimis* authorship cannot be registered. *See* COMPENDIUM (THIRD) § 803.5(B) (explaining that "short sound recordings may lack a sufficient amount of authorship to be copyrightable (just as words and short textual phrases are not copyrightable)"); *see also VMG Salsoul v. Ciccone*, 824 F.3d 871, 878–81, 887 (9th Cir. 2016) (holding that copying "one quarter-note of a four-note chord, lasting 0.23 seconds" was "*de minimis*" and did not constitute infringement of a sound recording). While American Airlines argues that "the brevity of the [Works] should not affect [their] entitlement to copyright protection," Second Requests at 2, the brevity and simplicity of works are often important factors when determining copyrightability, including for sound recordings. *See* COMPENDIUM (THIRD) § 803.5(B) (whether a sound recording contains sufficient creativity to be registered turns on elements such as "the length of the recording."); *VMG Salsoul*, 824 F.3d at 881–82 (explaining that the Copyright Act's statutory text "treats sound recordings identically to all other types of protected works; nothing in the text suggests differential treatment, for any purpose, of sound recordings compared to, say, literary works."). And courts have generally found that short portions of musical works cannot be the basis for copyright infringement.[5] *See Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1069–71 (9th Cir. 2020) (en banc) (explaining that common musical building blocks, including compositions of a few notes or short arpeggios, cannot be protected by copyright and noting that the court "ha[s] never extended copyright protection to just a few notes"); *Newton v. Diamond*, 388 F.3d 1189, 1195–96 (9th Cir. 2004) (holding that the sampling of a three-note sound recording constituted *de minimis* copying of the underlying composition).

In support of reconsideration, American Airlines cites two cases where courts concluded that musical works consisting of a few notes were protected by copyright. *See* Second Requests at 2 (citing *Swirsky v. Carey*, 376 F.3d 841, 851–52 (9th Cir. 2004) and *Elsmere Music, Inc. v.*

[5] Though the copyright in a sound recording is distinct from that in musical works, *see* COMPENDIUM (THIRD) § 803.2(A) (distinguishing sound recordings and musical works), all works must satisfy the standard in *Feist* to be protected by the Copyright Act.

Nat'l Broad. Co., 482 F. Supp. 741, 744 (S.D.N.Y. 1980)). The analyses in these cases do not alter the Board's conclusion here. First, both cases involved works that the Office had determined were protected by copyright and registered. *See Swirsky*, 376 F.3d at 851 (noting work at issue had a "valid certificate of registration with the Copyright Office" and therefore was "entitled to a presumption of originality"); Registration No. PA0000007108 (1978 registration for "I love New York: the official theme of New York"). Second, both cases involved works that were much longer than the Works before the Board—neither court held that as a matter of law a whole work consisting solely of a few notes or whose entire duration comprises a single second was sufficient to overcome the standard the Supreme Court announced in *Feist*. *See Elsmere*, 482 F. Supp. at 744 (work "[i]n its entirety" was "composed of a 45 word lyric and 100 measures"). Finally, even outside the context of the complete songs, the portions of the works alleged to have been infringed in *Swirsky* and *Elsmere* are longer in duration than the Works here. *See* STEVE KARMEN, *I Love New York* (1977) (the plaintiff's work in *Elsmere*, wherein each instance of the allegedly infringed four-note refrain persists for around four seconds); XSCAPE, *One of Those Love Songs*, *on* TRACES OF MY LIPSTICK (Columbia Records 1998) (the plaintiff's work in *Swirsky*, wherein the allegedly infringed seven-note melodic line persists for around three seconds)[6]; *see also Newton*, 388 F.3d at 1195–96 (noting that the portion of the sound recording at issue "lasts six seconds" and concluding that the use was a *de minimis* portion of the complete work). For these reasons, the cases cited in the Second Requests do not suggest that the one-second Works here are protected by copyright.

American Airlines further argues that the Works evince creative production authorship sufficient to entitle the works to registration. *See, e.g.*, Landscape Second Request at 1, 3–4. It is correct that production authorship may contribute copyrightable authorship to a sound recording. COMPENDIUM (THIRD) § 803.3.[7] But almost all of what American Airlines categorizes as "production authorship" falls outside the proper scope of the inquiry here. For example, American Airlines' "cost[ly]," "lengthy, deliberate, and creative *process*," and American Airlines' intent for the Works to reflect certain ideas or "core brand traits," are not proper considerations. Landscape Second Request at 4 (emphasis added); *see* COMPENDIUM (THIRD) §§ 310.5–.7 (neither the author's inspiration and intent, nor the author's skill, experience, and artistic judgment, nor the time, effort, or expense required to create the work, are relevant to a work's copyrightability or originality); *see also Feist*, 499 U.S. at 352–54, 364 (rejecting the "sweat of the [author's] brow" as relevant to a work's copyrightability). To the extent that American Airlines describes "creativity *perceptibly* expressed in creating, fixing, and

[6] The Board independently assessed the duration of the allegedly infringed segments of *I Love New York* and *One of Those Love Songs*. *See Elsmere*, 482 F. Supp. at 743–44 (identifying plaintiff's work); *Swirsky*, 376 F.3d at 843 (same). The purpose of the comparison is to demonstrate that American Airlines' reliance on those cases does not support their argument as to brevity. The Board takes no stance as to the registrability of the portions of songs at issue. *See also* COMPENDIUM (THIRD) § 309.3 (determination of copyrightability is case-by-case, and registration of a particular work does not necessarily mean that the Office will register similar works).

[7] American Airlines cites *Steward v. West* for the proposition that a court may find "sufficient originality in sound recording, despite insufficient originality in the underlying musical composition." Second Requests at 4 (citing No. 13-cv-02449, 2014 U.S. Dist. LEXIS 186012, at *20–21 (C.D. Cal. Aug 14, 2015)). While the Board does not contest this statement of law, it should be noted that the court in *Steward* did not identify production authorship as conferring sufficient originality to the short sample taken from the sound recording. *Id.*; *see* COMPENDIUM (THIRD) § 803.3 (distinguishing performance and production authorship).

manipulating the sounds," COMPENDIUM (THIRD) § 803.5(B) (emphasis added), the Board considers the Works' brevity an overriding issue that bars registration of the Works.

IV. CONCLUSION

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

U.S. Copyright Office Review Board
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