



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

July 28, 2023

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Re: Second Requests for Reconsideration for Refusal to Register Dolphin, Festival Sunglasses, Theatre Masks, Princess Mirror, Shiny Star, Come As You Are Rainbow Sunglasses, and Bestie Heart (SR # 1-9965062968, 1-9965249552, 1-9965185632, 1-10092119271, 1-10372974161, 1-10438172627, 1-10382030382; Correspondence ID: 1-506MLUY, 1-50LH6O1, 1-506O7Y0, 1-508B0LT, 1-52XQ9YM, 1-53GA0N9, 1-55QW7TX)

Dear Mr. Fernandez:

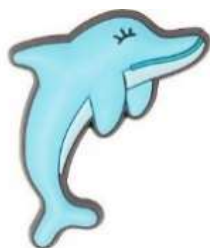
The Review Board of the United States Copyright Office (“Board”) has considered Crocs, Inc.’s (“Crocs”) second requests for reconsideration of the Registration Program’s refusal to register jewelry design claims in the works titled “Dolphin,” “Festival Sunglasses,” “Theatre Masks,” “Princess Mirror,” “Shiny Star,” “Come As You Are Rainbow Sunglasses” (“Rainbow Sunglasses”), and “Bestie Heart” (collectively, 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 denial of registration for the Works.

I. DESCRIPTION OF THE WORKS

The Works are seven jewelry designs used as decorative shoe charms. As depicted in the deposit copies submitted in support of their registration, they are as follows:

- Dolphin is a blue dolphin with a closed eye depicted by several eyelashes.
- Festival Sunglasses is a pair of sunglasses with circular frames.
- Theatre Masks depict the “comedy and tragedy” drama theater masks, one with a smile and one with a frown.
- Princess Mirror is a pink and yellow oval-shaped hand mirror with a heart at the bottom of the handle.
- Shiny Star is a gold star with round inset crystals around the perimeter.
- Rainbow Sunglasses is a pair of rainbow-colored sunglasses with heart-shaped frames.
- Bestie Heart is a pink heart with the word “bestie” in the center and three yellow stars.

The Works are depicted below:



Dolphin



Festival Sunglasses



Theatre Masks



Princess Mirror



Shiny Star



Rainbow Sunglasses



Bestie Heart

II. ADMINISTRATIVE RECORD

Cross applied to register the Works through separate applications filed in 2021.¹ The Copyright Office refused to register each of the claims, finding that they lacked the sufficient creativity required because “[c]opyright does not protect familiar symbols or designs; basic geometric shapes; words and short phrases . . . or mere variations of typographic ornamentation, lettering or coloring.” *See, e.g.*, Initial Letter Refusing Registration of Princess Mirror from U.S. Copyright Office to Benjamin Fernandez (Mar. 11, 2021).²

Cross sought reconsideration for each Work, arguing that each Work was the “original, cartoon expression” of a familiar object. *See, e.g.*, Letter re: Princess Mirror from Benjamin Fernandez to U.S. Copyright Office at 1 (June 10, 2021).³ After reviewing the Works in light of

¹ Cross submitted Dolphin, Festival Sunglasses, and Theatre Masks on January 5, 2021. Princess Mirror was submitted on January 21, 2021, Shiny Star on April 16, 2021, Rainbow Sunglasses on May 13, 2021, and Bestie Heart on July 2, 2021.

² The Office’s other initial refusal letters reached the same conclusion. Initial Letter Refusing Registration of Festival Sunglasses from U.S. Copyright Office to Benjamin Fernandez (Mar. 3, 2021); Initial Letter Refusing Registration of Dolphin and Theatre Masks from U.S. Copyright Office to Benjamin Fernandez (Mar. 8, 2021); Initial Letter Refusing Registration of Shiny Star from U.S. Copyright Office to Benjamin Fernandez (May 14, 2021); Initial Letter Refusing Registration of Rainbow Sunglasses from U.S. Copyright Office to Benjamin Fernandez (June 23, 2021); Initial Letter Refusing Registration of Bestie Heart from U.S. Copyright Office to Benjamin Fernandez (July 22, 2021).

³ Cross’s first requests for reconsideration of the other Works made the same arguments using similar language. *See* Letter re: Festival Sunglasses from Benjamin Fernandez to U.S. Copyright Office (June 1, 2021); Letter re: Dolphin

the points raised in the first requests for reconsideration, the Office reevaluated the claims and again concluded that the Works contain “common shapes and familiar designs,” and the “combination and arrangement of the component elements . . . [are] insufficiently creative to support a claim in copyright.” Refusal of First Request for Reconsideration of Princess Mirror from U.S. Copyright Office to Benjamin Fernandez at 3 (Oct. 8, 2021) (“Princess Mirror Second Refusal”).⁴

In 2022, Crocs requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusals to register the Works. *See, e.g.*, Letter from Benjamin Fernandez re: Princess Mirror to U.S. Copyright Office (Jan. 7, 2022) (“Princess Mirror Second Request”).⁵ In those letters, Crocs made similar arguments that the Works are not “common shape[s], familiar design[s], or [] minor variation[s] of such,” but instead, the selection and arrangement of the elements make each Work sufficiently creative. *See, e.g., id.* at 1 (arguing Crocs is not claiming “the ‘idea’ of all handheld mirrors, nor even for all two-dimensional cartoonish princess mirrors, but rather for this artist’s specific and unique expression”).

III. DISCUSSION

After carefully examining the Works and applying the relevant legal standards, the Board finds that the Works do 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

from Benjamin Fernandez to U.S. Copyright Office (June 7, 2021); Letter re: Theatre Masks from Benjamin Fernandez to U.S. Copyright Office (June 7, 2021); Letter re: Shiny Star from Benjamin Fernandez to U.S. Copyright Office (Aug. 12, 2021); Letter re: Rainbow Sunglasses from Benjamin Fernandez to U.S. Copyright Office (Sept. 23, 2021); Letter re: Bestie Heart from Benjamin Fernandez to U.S. Copyright Office (Oct. 22, 2021).⁴ The Office concluded the same for each Work. *See* Refusal of First Request for Reconsideration from U.S. Copyright Office of Dolphin to Benjamin Fernandez (Oct. 7, 2021) (Familiar design with common shapes); Refusal of First Request for Reconsideration of Theatre Masks from U.S. Copyright Office to Benjamin Fernandez at 3 (Oct. 7, 2021) (“[a] n expected, inevitable configuration”); Princess Mirror Second Refusal (Common shapes with a simple design expected in a princess mirror); Refusal of First Request for Reconsideration from U.S. Copyright Office of Festival Sunglasses to Benjamin Fernandez at 3 (Oct. 19, 2021) (An “expected, inevitable configuration” of sunglasses); Refusal of First Request for Reconsideration of Shiny Star from U.S. Copyright Office to Benjamin Fernandez at 3 (Dec. 21, 2021) (“[s]imple, garden-variety configuration”); Refusal of First Request for Reconsideration of Rainbow Sunglasses from U.S. Copyright Office to Benjamin Fernandez (Jan. 7, 2022) (Common shapes and familiar design); Refusal of First Request for Reconsideration of Bestie Heart from U.S. Copyright Office to Benjamin Fernandez (Mar. 8, 2022) (Standard shapes with minor linear or spatial variations).⁵ Crocs’s other second requests for reconsideration used near-identical language. *See* Letter from Benjamin Fernandez re: Dolphin to U.S. Copyright Office (Jan. 6, 2022) (“Dolphin Second Request”); Letter from Benjamin Fernandez re: Theatre Masks to U.S. Copyright Office (Jan. 7, 2022) (“Theatre Masks Second Request”); Letter from Benjamin Fernandez re: Festival Sunglasses to U.S. Copyright Office (Jan. 19, 2022) (“Festival Sunglasses Second Request”); Letter from Benjamin Fernandez re: Shiny Star to U.S. Copyright Office (Mar. 21, 2022) (“Shiny Star Second Request”); Letter from Benjamin Fernandez re: Rainbow Sunglasses to U.S. Copyright Office (Apr. 7, 2022) (“Rainbow Sunglasses Second Request”); Letter from Benjamin Fernandez re: Bestie Heart to U.S. Copyright Office (June 8, 2022) (“Bestie Heart Second Request”).

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.

The Office’s regulations implement the longstanding requirement of originality set forth in the Copyright Act and described in the *Feist* decision. As set out in the Office’s regulations, copyright does not protect “[w]ords and short phrases such as names, titles, and slogans; familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering or coloring.” 37 C.F.R. § 202.1(a). Similarly, while the Office may register a work that consists merely of geometric shapes, for such a work to be registrable, the “author’s use of those shapes [must] result[] in a work that, as a whole, is sufficiently creative.” U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 906.1 (3d ed. 2021) (“COMPENDIUM (THIRD)”); see *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) (stating that the combination of unprotectable elements is protected “only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship”).

Jewelry, such as the designs before the Board, are works of artistic craftsmanship. COMPENDIUM (THIRD) § 925.1 (listing examples of works of artistic craftsmanship, including “ornamental jewelry”). The Copyright Act provides that sculptural works “include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned.” 17 U.S.C. § 101 (definition of “pictorial, graphic, and sculptural works”). Though the term “works of artistic craftsmanship,” is not defined in the Act, the Supreme Court has described these works as “works of art that might also serve a useful purpose.” *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1011 (2017) (discussing Copyright Office regulations as considered in *Mazer v. Stein*, 347 U.S. 201 (1954)). When considering the copyrightability of jewelry, the Office applies the “mirror image” of the *Star Athletica* test for useful articles: the Office segregates the “mechanical or utilitarian aspects” of the work, while considering the remainder for registration. COMPENDIUM (THIRD) § 925.2. In evaluating these elements, the Office “will consider both the component elements of the design and the design as a whole,” which may include decoration on the surface of the jewelry, such as engraving, as well as the selection and arrangement of various elements such as shape and color.⁶ *Id.* § 908.3.

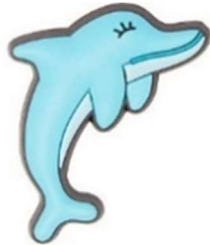
To surmount the low threshold of creativity established in *Feist* required for copyright protection, a jewelry design (like all designs) must demonstrate some spark of creativity. See COMPENDIUM (THIRD) § 908.2 (“The Office will not register [jewelry] pieces that, as a whole, do not satisfy [the creativity] requirement, such as mere variations on a common or standardized design or familiar symbol, designs made up of only commonplace design elements arranged in a common or obvious manner, or any of the mechanical or utilitarian aspects of the jewelry.”). While the use of unprotectable elements does not automatically render a design ineligible for copyright protection, it is “not true that any combination of unprotectable elements automatically

⁶ While the Works were submitted as jewelry designs, Crocs only submitted photos of the design elements of each Work and did not address any mechanical or utilitarian aspects of the Works in the second requests for reconsideration. Thus, the Board only analyzed the design elements of each work. For example, the Board did not consider the parts of each Work that connect the charm to a shoe because those elements serve a utilitarian purpose.

qualifies for copyright protection.” *Satava*, 323 F.3d at 811. Rather, “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.*

The Board has applied these standards to each of the Works and summarized its analysis for each below.

A. *Dolphin*



The Dolphin charm depicts a two-toned blue dolphin with a closed eye depicted by several exaggerated eyelashes. This simplified depiction of a dolphin contains only the standard elements of a dolphin with minor variations to those features.⁷ Such a simplified image of an animal found in nature is not copyrightable. *See Satava*, 323 F.3d at 811 (the “unprotectable ideas and standard elements” of an animal are part of the public domain and not copyrightable); *Folkens v. Wyland Worldwide*, 882 F.3d 768, 776 (9th Cir. 2018) (finding that a depiction of two dolphins swimming vertically and horizontally is not protected because “an artist may not use copyright law to prevent others from depicting [animals] first expressed by nature”).

Moreover, the variation to the standard dolphin image here merely combines expected colors and features and does not make the Work sufficiently creative. *See Satava*, 323 F.3d at 811; *see also Feist*, 499 U.S. at 358 (it is “plain from the statute” that “[n]ot every selection, coordination, or arrangement [of unprotectable elements] will pass muster” to receive copyright protection). Crocs argues that the Work is not a “familiar” rendering of a dolphin because it “combines a specific two-dimensional conception of a dolphin with characteristically human eyelashes, a feature dolphins lack in reality.” Dolphin Second Request at 1. Crocs also argues that the contour of the particular features in the design and its two-toned coloration demonstrate sufficient artistic creativity to warrant registration. *Id.* at 2. These elements, however, are mere variations of common depictions of dolphins. Many dolphins, in art and in nature, have similar contours and two-toned coloration.⁸ While the depiction of a closed dolphin eye with eyelashes may not depict actual dolphin eyes, the variation in eyelash length and shape is a minor variation that is not sufficiently creative to warrant registration of the Dolphin charm. *See Satava*, 323

⁷ *See Dolphin Fact Sheet*, PBS.ORG (Aug. 4, 2020), <https://www.pbs.org/wnet/nature/blog/dolphin-fact-sheet/#:~:text=Appearance%3A,flippers%2C%20and%20a%20dorsal%20fin> (“Dolphins range in color . . . from white . . . to darker shades of . . . blue . . .”).

⁸ *See, e.g., About our Dolphins*, MISSISSIPPI AQUARIUM, <https://www.msaquarium.org/p/animals/animal-guide/bottlenose-dolphins> (last visited July 26, 2023); *How to Draw a Dolphin in Cartoon Style*, EASYDRAWINGGUIDES.COM (Dec. 10, 2022), <https://easydrawingguides.com/how-to-draw-dolphin-in-cartoon-style/>.

F.3d at 810. As a whole, the combination of unprotectable elements and any minor variations thereof are insufficiently creative to warrant registration. *See id.* at 811.

B. Festival Sunglasses



The Festival Sunglasses charm depicts a pair of sunglasses with round blue lenses, a glare accent, and gray frames within a black border. Crocs argues that the coloration, “size, shape and curvature of the lenses and frames,” the black border, and the glare accent distinguish the particular design from a “familiar” sunglasses design. Festival Sunglasses Second Request at 1. At the same time, it is undeniable that the shapes encompassing the design—circles and curved and angled lines—are common shapes that are not copyrightable. COMPENDIUM (THIRD) § 906.1. Something more is needed to support a copyright claim.

The Office concludes that, as a whole, the Festival Sunglasses charm is insufficiently creative to warrant registration. Circular sunglasses are a common sunglass design that are themselves not copyrightable. The selection of predictable blue and grey colors along with the shape of the lenses and frames is not enough to warrant copyright protection because this combination of elements depicts a commonplace design. *See id.* § 908.2 (The Office cannot register jewelry that consists of “designs made up of only commonplace design elements arranged in a common or obvious manner[.]”). The addition of a glare in a predictable location does not add sufficient creativity to make the Work copyrightable. Moreover, any modifications to the shape, size or curvature of the lenses and frames are simply minor variations to an expected depiction of round sunglasses and not sufficient to warrant registration. *See* 37 C.F.R. § 202.1(a); *see Satava*, 323 F.3d at 811; COMPENDIUM (THIRD) § 313.4(J) (“a work consisting of a simple combination of a few familiar symbols or designs with minor linear or spatial variations” is not copyrightable).

C. Theatre Masks



The Theatre Masks charm depicts two half-white, half-black theater masks with a white ribbon in the background. The design consists of common design elements symbolizing comedy and tragedy, with minor linear or spatial variations, which themselves are not copyrightable. 37

C.F.R. § 202.1(a). Similar to a standard fleur de lys design, comedic and tragic theater masks are familiar symbols in the public domain and are themselves not copyrightable.⁹ See COMPENDIUM (THIRD) § 906.2.

Moreover, the combination and horizontal arrangement of common comedy and tragedy theater masks is a common and obvious arrangement that is itself a well-known, familiar symbol and not copyrightable. See COMPENDIUM (THIRD) § 908.2. Crocs argues that the combination and arrangement of the masks, their black-white color scheme, and the inclusion of the ribbon is not an “expected [or] inevitable” design. Theatre Masks Second Request at 1. However, the arrangement of a comedy mask alongside a tragedy mask is a familiar and commonplace design that is expected and obvious. The arrangement, including the black and white coloration and the accompanying ribbon, is a commonplace design that can be traced back to the 5th century BC, during the era of ancient Greek theater.¹⁰ Crocs further argues that the “specific two-dimensional arrangement of two juxtaposed masks” and the “artistic and novel flourish of a ribbon in the background” make the Work sufficiently creative. *Id.* at 1. These elements, however, are mere variations of expected elements of theater masks. A design of two well-known drama theater masks, combining expected colors and shapes with minor variations to the essential elements of the masks, is a commonplace design that does not meet the requisite level of creativity. See *Satava*, 323 F.3d at 811; COMPENDIUM (THIRD) § 308.2 (a work is not creative if it “reflects ‘an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course’ . . . [and] if the author’s expression is ‘obvious’ or ‘practically inevitable’” (citing *Feist*, 499 U.S. at 363)).

D. Princess Mirror



The Princess Mirror charm consists of a yellow and pink handheld mirror with twelve round red gems surrounding an oval, glittery center with a black heart at the bottom of the handle. The individual elements—the oval, rectangle, circles, heart, glitter, and colors—are all

⁹ Derived from Greek mythology, the comedy and tragedy theatrical masks are symbols of the ancient Greek Muses, Thalia and Melpomene. *Thalia*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Thalia-Greek-mythology> (depicted carrying a comedic mask) (last visited July 26, 2023); *Melpomene*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Melpomene> (depicted carrying a tragic mask) (last visited July 26, 2023).

¹⁰ See *The Origins of the Comedy and Tragedy Masks of Theatre*, ONSTAGE BLOG (June 21, 2020), <https://www.onstageblog.com/editorials/comedy-and-tragedy-masks-of-theatre>; *Drama Masks: Thalia + Melpomene*, THE GREEK DESIGNERS (Mar. 7, 2016), <https://thegreekdesigners.com/2016/03/07/drama-masks-thalia-melpomene/>; see also *Theater Masks Comedy Tragedy*, 123RF.COM, https://www.123rf.com/photo_2646042_theater-masks-comedy-tragedy.html (last visited July 26, 2023); *Drama Masks – Stock Illustration*, GETTYIMAGES.COM, <https://www.gettyimages.com/detail/illustration/drama-masks-royalty-free-illustration/97229468> (last visited July 26, 2023); *Illustration of Theater Masks – Stock Illustration*, GETTYIMAGES.COM, <https://www.gettyimages.com/detail/illustration/illustration-of-theater-masks-royalty-free-illustration/1328178197> (last visited July 26, 2023).

common shapes and mere coloration with minor variations, all of which are not copyrightable. *See* 37 C.F.R. § 202.1(a); COMPENDIUM (THIRD) § 906.1.

Crocs argues that the design is “not familiar” because of the combination and arrangement of the colors, the round gems around the perimeter, “the size, shape and curvature of the mirror and handle . . . the glitter used for the surface of the mirror and artistic flourishes . . . in addition to the black heart on the base of the handle.” Princess Mirror Second Request at 1. However, combining these shapes using a similar color scheme is a familiar and expected design typical of a princess-style mirror.¹¹ This combination, and any alterations of this commonplace design, such as the addition of glitter and the colors used, are minor variations and mere coloration, which are not copyrightable. *See Satava*, 323 F.3d at 811; 37 C.F.R. § 202.1(a); COMPENDIUM (THIRD) § 908.2.

E. Shiny Star



The Shiny Star charm depicts a gold five-point star with round, silver inlet gems aligning the perimeter. The individual elements—a star and round gems—are not copyrightable because they are common shapes. COMPENDIUM (THIRD) § 906.1.

Viewing the Work as a whole, the combination, selection, and arrangement of the elements is not creative enough to warrant copyright protection because the design is made up of simple shapes arranged in a symmetrical and expected manner. *See Satava*, 323 F.3d at 811. Crocs argues the “sparkly gems are not just circles” and the quantity of them arranged on the star is numerous enough to reach the level of creativity. Shiny Star Second Request at 2. However, sparkly characteristics are a common and expected element of both a gemstone and a star. When expressed in a simple geometric shape, the combination amounts to a trivial variation that does not inject the necessary level of creativity to warrant registration. *See Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 103 (2d Cir. 1951) (finding that trivial alterations to common shapes may not inject the necessary creativity into a work). Moreover, there is no variation among the gems and their arrangement around the perimeter of the star is a symmetrical and expected arrangement that does not rise to the level of creativity necessary for copyright protection. *See Satava*, 323 F.3d at 811; COMPENDIUM (THIRD) § 908.3 (“common or symmetrical arrangements” are not copyrightable).

¹¹ *See, e.g., Princess Mirror Stock Illustration*, ISTOCKPHOTO.COM (July 29, 2020), <https://www.istockphoto.com/vector/princess-mirror-gm1262288268-369344230>; *Princess magic mirror with shining hearts and diamonds stock illustration*, ISTOCKPHOTO.COM (Feb. 9, 2013), <https://www.istockphoto.com/vector/princess-magic-mirror-with-shining-hearts-and-diamonds-gm166055185-23134921>.

F. Rainbow Sunglasses



The *Rainbow Sunglasses* charm consists of sunglasses with heart-shaped lenses, black glass, and rainbow-colored frames. The individual elements—hearts and colors—are not copyrightable because they are common shapes and colors. 37 C.F.R. § 202.1(a); COMPENDIUM (THIRD) § 906.1. The rainbow coloring is a standard, familiar color combination that also is not copyrightable. COMPENDIUM (THIRD) § 906.3.

Viewing the Work as a whole, a sunglass design, combined with hearts and rainbow elements, including any minor variations, is a familiar and expected design of heart-shaped sunglasses. Crocs argues the design is creative enough based on the shape, color, and size of the sunglasses. *Rainbow Sunglasses Second Request* at 2. Hearts are common shapes and sunglasses featuring heart-shaped lenses and frames are a familiar and commonplace design¹² that alone is not copyrightable. See COMPENDIUM (THIRD) §§ 313.4 (J), 906.1, 908.2. The combination of elements is a common, garden-variety design for sunglasses that does not reach the level of creativity required for copyright protection. See *Satava*, 323 F.3d at 811; COMPENDIUM (THIRD) § 308.2.

G. Bestie Heart



The *Bestie Heart* charm depicts a pink heart with the word “bestie” in the center in white cursive font with three four-pointed stars accenting the heart. The individual shapes—a heart and stars—are common shapes and symbols that are not copyrightable.¹³ See 37 C.F.R. § 202.1(a); COMPENDIUM (THIRD) §§ 313.4(J), 906.1. Words, including slang, typeface, and mere coloration are also not copyrightable. See 37 C.F.R. § 202.1(a); *Eltra Corp. v. Ringer*, 579 F.2d 294, 298 (4th Cir. 1978) (stating that “typeface has never been considered entitled to copyright”); *Zheng v. Heineken N.V.*, No. 08-CV-6506, 2010 WL 4457460, at *5 (C.D. Cal. May 12, 2010)

¹² See, e.g., *Red heart shaped sunglasses stock photo*, ISTOCKPHOTO.COM (Mar. 21, 2019), <https://www.istockphoto.com/photo/red-heart-shaped-sunglasses-gm1137288282-303222584>.

¹³ The four-point stars are not uncommon shapes, in fact, they are called “diamond stars.” See, e.g., *Diamond Star Doodle*, PNGWING.COM, <https://www.pngwing.com/en/free-png-btmzk> (last visited July 26, 2023); *Diamond Star Sparkle Icon Design Vector*, STOCK.ADOBE.COM, <https://stock.adobe.com/ar/images/diamond-star-sparkle-icon-design-vector-rating-review-feedback-satisfaction-quality-symbol-illustration/515311449> (last visited July 26, 2023).

(explaining that “English words[] do not receive copyright protection simply because they are designed more ornately or with greater embellishment”).

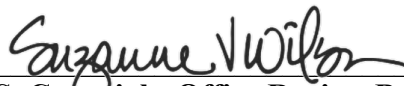
Crocs argues the design meets the standard for creativity because of the combination and arrangement of the shape and curvature of the heart, the four-pointed stars, and the use of slang for the text, along with the font and color. Bestie Heart Second Request at 2. The curvature of the heart and number of points on the stars are merely minor variations to standard shapes. Though the design includes additional variation in the use of a curved heart and asymmetrical stars, simply adding a word to a solid-colored heart and arranging basic stars within it is not creative enough to warrant copyright protection. *See Satava*, 323 F.3d at 811; COMPENDIUM (THIRD) § 908.2.

* * *

Finally, Crocs points the Board to the decision in *Rundstadler Studios, Inc. v. MCM Ltd. P’ship*, 768 F. Supp. 1292, 1295 (N.D. Ill. 1991), and argues that “the elements identified by the [*Rundstadler*] court there which rendered the plaintiff’s art creative are fewer and less varied than the creative aspects of the Work[s].” *See, e.g.*, Princess Mirror Second Request at 2.¹⁴ Crocs contends that, because the court in *Rundstadler* determined that the author’s artistic choices in the glass sculptural work entitled “Spiral Motion” amounted to a valid copyright, Crocs’s artistic decisions in the Works should be sufficient to warrant copyright protection. *See, e.g., id.* at 2. But *Rundstadler* does not say anything at odds with the Office’s position here: not all combinations of shapes will demonstrate the requisite creativity for registration. *See* 768 F. Supp. at 1295 (“combinations of standard shapes *may* possess the requisite creativity necessary for copyright protection”) (emphasis added). While the *Rundstadler* court held that the plaintiff-author’s artistic choices in creating a glass sculpture entitled “Spiral Motion” demonstrated sufficient creativity for copyright protection, the Office must make registration decisions based on an analysis of the individual work presented for registration. *See* COMPENDIUM (THIRD) § 309.3 (prior registration decisions “ha[ve] no precedential value and [are] not binding upon the Office when it examines any other application”).

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office 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.



U.S. Copyright Office Review Board

Suzanne V. Wilson, General Counsel and

Associate Register of Copyrights

Maria Strong, Associate Register of Copyrights and

Director of Policy and International Affairs

Jordana Rubel, Assistant General Counsel

¹⁴ *See also* Dolphin Second Request at 2; Theatre Masks Second Request at 2; Rainbow Sunglasses Second Request at 2; Bestie Heart Second Request at 2.