



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

November 8, 2024

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576 Broad Hollow Rd.
Melville, NY 11747

**Re: Second Request for Reconsideration of Refusal to Register Darkglass Design
(SR # 1-11646701281; Correspondence ID: 1-5QAB0YL)**

Dear Ms. Campagna:

The Review Board of the United States Copyright Office (“Board”) has considered Douglas Andres Castro Borquez’s (“Borquez”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the work titled “Darkglass 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 black and white two-dimensional artwork consisting of six black bass clef symbols arranged in a circular design with the bottoms of the symbols in the center. A bass clef symbol consists of an apostrophe-like shape and two dots positioned to the right of the shape. Each bass clef is arranged concentrically within a black circle.

The Work is as follows:



II. ADMINISTRATIVE RECORD

On August 24, 2022, Borquez filed an application to register a copyright claim in the Work. In a letter dated September 9, 2022, a Copyright Office registration specialist refused to register the claim, determining that the Work lacked the authorship necessary to support a copyright claim. Initial Letter Refusing Registration from U.S. Copyright Office to Pina Campagna at 1 (Sept. 9, 2022).

On December 2, 2022, Borquez requested that the Office reconsider its initial refusal to register the Work, arguing that the selection and combination of elements created a sufficient amount of authorship to support copyright protection. Letter from Pina Campagna to U.S. Copyright Office at 1 (Dec. 2, 2022) (“First Request”). After reviewing the Work in light of the points raised in the First Request, the Office reevaluated the claims again and concluded that the Work could not be registered. Refusal of First Request for Reconsideration from U.S. Copyright Office to Pina Campagna (Apr. 19, 2023). The Office explained that the “obvious, expected arrangement” of the repeating elements of the Work were insufficiently creative to support a claim in copyright. *Id.* at 3.

In a letter dated July 7, 2023, Borquez 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 Pina Campagna to U.S. Copyright Office (July 7, 2023) (“Second Request”). While conceding that the individual shapes and symbols alone are not copyrightable, Borquez again argued that the Work’s selection, combination, and arrangement of shapes and symbols create a sufficient amount of original authorship to warrant copyright protection. *Id.* at 1. Specifically, Borquez contends that the organization of bass clefs creates an illusory two-dimensional structure with a spiraling effect when placed within the larger circle. *Id.* at 2.

III. DISCUSSION

After carefully examining the Work and considering the arguments made in the First and Second Requests, the Board concludes that the Work does not contain the 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.

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 “words 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”). Through its regulations, the Office provides guidance that copyright does not protect familiar shapes or designs. *Id.* § 202.1(a); *see also* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 906.2 (3d ed. 2021) (“COMPENDIUM (THIRD)”) (noting that familiar symbols and designs are not protectable).

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. *See Feist*, 499 U.S. at 358 (noting that 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).

Applying the legal standard for originality here, the Board concludes that neither the Work’s individual elements nor arrangement as a whole is sufficiently creative to be protected by copyright. First, considering the individual elements, the placement of dots near the apostrophe-like shape is expected in the context of a bass clef musical symbol and not independently creative.¹ The bass clef symbol, which necessarily includes the two dots, itself is a familiar symbol and thus not copyrightable. COMPENDIUM (THIRD) § 313.4(J) (listing examples of familiar symbols and designs not protected by copyright law including “musical notes and symbols”).

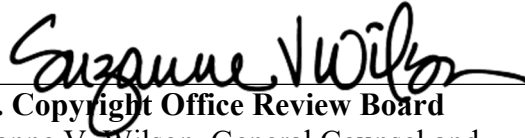
Second, the Board also finds that the Work as a whole does not contain enough elements, nor a sufficiently original composition, to be eligible for copyright protection. *See Satava*, 323 F.3d at 811. Here, one familiar symbol, the bass clef, is repeated concentrically six times in the common spatial arrangement of the spiral. *See* COMPENDIUM (THIRD) § 905 (“Merely bringing together only a few standard forms or shapes with minor linear or spatial variations does not satisfy this requirement.”). Moreover, merely enclosing the clef spiral in a circle is an obvious arrangement and does not rise to the level of creativity required for copyright protection. *Id.* § 906.1 (The Office will refuse combinations of geometric shapes that do not “culminat[e] in a creative design that goes beyond the mere display of a few geometric shapes in a preordained or obvious arrangement . . . [and] contain a sufficient amount of creative expression.”).

With respect to both the individual elements, as well as their selection and arrangement, as a whole, the Board finds that the Work does not satisfy the *de minimis* amount of original expression necessary to satisfy the low threshold for copyrightability. *Id.* § 313.4(B).

¹ *Introduction to the F Clef*, ALLABOUTMUSICTHEORY.COM, <https://www.allaboutmusictheory.com/musical-staff/f-clef/> (last visited Nov. 6, 2024).

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
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