



Copyright Review Board

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

July 23, 2021

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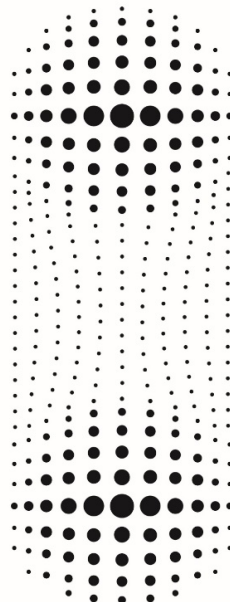
**Re: Second Request for Reconsideration for Refusal to Register Dot Pattern
(Correspondence ID: 1-45ZBP3P; SR # 1-8781014261)**

Dear Mr. Rosenberg:

The Review Board of the United States Copyright Office (“Board”) has considered Resolute Expeditions’ (“Resolute’s”) second request for reconsideration of the Registration Program’s refusal to register a claim in a two-dimensional work titled “Dot Pattern” (“Work”). After reviewing the application, 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.

I. DESCRIPTION OF THE WORK

The Work is a two-dimensional image consisting of an oblong arrangement of black circles of varying sizes that form a pattern of two circular objects at the top and bottom connected by lines of circles that curve slightly inward in an hourglass shape. The Work is reproduced below.



II. ADMINISTRATIVE RECORD

On April 28, 2020, Resolute filed an application to register a copyright claim in the Work. In an April 29, 2020 letter, a Copyright Office registration specialist refused to register the claim, finding that, because copyright does not protect basic geometric shapes, the Work lacked copyrightable material. Initial Letter Refusing Registration from U.S. Copyright Office to Mark Rosenberg (Apr. 29, 2020).

In a May 1, 2020 letter, Resolute requested that the Office reconsider its initial refusal to register the Work. Letter from Mark J. Rosenberg to U.S. Copyright Office (May 1, 2020) (“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 lacked a sufficient amount of creative authorship. The Office concluded that the Work consisted only of “black dots varying in size lined up on eleven non-intersecting axes” in a “garden-variety arrangement.” Refusal of First Request for Reconsideration from U.S. Copyright Office to Mark Rosenberg at 3 (July 28, 2020).

In a letter dated August 17, 2020, Resolute requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Work. Resolute conceded that the “circles/dots are common shapes,” but it argued that it made creative choices in choosing the “size and shading” of the dots, which resulted in a work that “appears to have three-dimensional spheres at the top and bottom and dips down in the middle” and is creative as a whole. Letter from Mark J. Rosenberg to U.S. Copyright Office at 2–3 (Aug. 17, 2020) (“Second Request”).

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 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 the longstanding requirement of originality set forth in the Copyright Act. *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 that “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 stereotypical elements in a glass sculpture of a jellyfish including clear glass, an oblong shroud, bright colors, vertical orientation, and the 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).

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 also Atari Games Corp.*, 888 F.2d at 883 (“[S]imple shapes, when selected or combined in a distinctive manner indicating some ingenuity, have been accorded copyright protection both by the Register and in court.”). Thus, the Office would register, for example, a wrapping paper design that consists of circles, triangles, and stars arranged in an unusual pattern with each element portrayed in a different color, but would not register a picture consisting merely of a purple background and evenly spaced white circles. COMPENDIUM (THIRD) § 906.1.

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 concludes that Work lacks sufficient authorship to support registration.

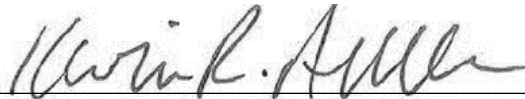
Neither the Work’s individual elements nor the Work as a whole are copyrightable. First, the Board notes that the individual elements—black circles of varying sizes—are not protectable as creative works. 37 C.F.R. § 202.1(a) (identifying familiar symbols and designs as not subject to copyright); COMPENDIUM (THIRD) § 906.1 (“The Copyright Act does not protect common geometric shapes, either in two-dimensional or three-dimensional form”). Here, the circles are a single color, black, with no graphic effects such as shading. They are common circles in their most basic form.

Second, the Work as a whole is not protectable. While it is true that combinations of unprotectable elements such as circles can be protectable in some situations, the protection hinges on whether those 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; *see also* COMPENDIUM (THIRD) § 906.1 (stating that the Office generally “will not register a work that merely consists of common geometric shapes unless the author’s use of those shapes results in a work that, as a whole, is sufficiently creative”). Here, the selection and arrangement are not enough. The circles of different sizes are arranged in a largely symmetrical way, which typically does not denote adequate creativity. *See* COMPENDIUM (THIRD) § 312.2 (noting that “arranging geometric shapes in a standard or symmetrical manner” is an example of a compilation of elements that may not warrant copyright protection). The slight variation regarding the circles’ placement both horizontally and vertically, as well as different circle sizes, does not change this assessment. Indeed, it results in yet another common shape, the illusion of two circular objects connected by an hourglass shape.¹ There is no perceptible shading or color variation of the circles, and any perceived difference in perceived shade is solely a function of the size of the circles. The Board thus finds Resolute’s choices and arrangement too trivial to meet the requirements for copyright protection.

¹ The Board notes that this arrangement of the circles appears to be a two-dimensional representation of the pattern formed by the dots on a grip sock, where the circular shapes correspond to the location of the ball and heel of the foot while the hourglass shape corresponds to the location of the arch of the foot, and is thus in part functional. *See, e.g., LA Active Non-Slip Socks – Yoga Pilates Barre Non-Slip – Ballet*, Amazon, <https://smile.amazon.com/Active-Slip-Grip-Socks-Women/dp/B01M30R5ZV?th=1> (last visited June 24, 2021) (describing the “custom-designed dot pattern [that] maximizes traction on any surface without adding pressure to the bottom of your feet”); *Non-Slip Grip Socks – Classic*, LA Active, <https://www.laactive.com/collections/non-slip-grip-socks-adults/products/classic-non-slip-grip-socks-by-la-active?variant=27927977459735> (last visited June 24, 2021) (stating design “covers the heel and toe for **maximum stability**”) (emphasis in original). To the extent those aspects of the Work’s design are rooted in functional rather than aesthetic considerations, no copyright registration would protect the “utilitarian aspects” of the design. 17 U.S.C. § 101 (stating that the only protectable aspects of a useful article are those “capable of existing independently of, the utilitarian aspects of the article”); *see also Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1014 (2017) (functional aspects of useful article must be “left behind” before remainder can be considered for copyright protection).

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms 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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Associate Register of Copyrights

Catherine Zaller Rowland, Associate Register of
Copyrights and Director, Public Information and
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Kimberley Isbell, Deputy Director of Policy and
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