



United States Copyright Office

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May 8, 2017

Via first class mail & email

Brian Beverly
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Suite 750
Oakland, CA 94612

Re: Second Requests for Reconsideration for Refusals to Register Small Geometrica Fountain and Water Wall Fountain with Base; Correspondence IDs: 1-1TDW713 and 1-GJR6E2; SR#s 1-2772769761 and 1-2789466631

Dear Mr. Beverly:

The Review Board of the United States Copyright Office (“Board”) has considered Marc Fontana and Gerard Fontana’s (“the Fontanas”) second requests for reconsideration of the Registration Program’s refusals to register sculpture claims in the works titled Small Geometrica Fountain and Water Wall Fountain with Base (“Works”).¹ 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 denials of registration.

I. DESCRIPTION OF THE WORKS

The Small Geometrica Fountain is a stone fountain comprised of an upside down triangle in a rectangular prism base. The Water Wall Fountain with Base is a stone fountain comprised of a rectangular basin centered on a square base, with a vertical rectangle centered on top of the basin. Reproductions of the Work are included as Appendix A.

II. ADMINISTRATIVE RECORD

On October 13, 2015, the Fontanas filed applications to register copyright claims in the Works. In March 2, 2016 letters, a Copyright Office registration specialist refused to register the claims, finding that they each “lacked the authorship necessary to support a copyright claim.” Letter from Adrienne Brown, Registration Specialist, to Marc Fontana (Small Geometrica Fountain) (Mar. 2, 2016); Letter from Adrienne Brown, Registration Specialist, to Marc Fontana (Water Wall Fountain with Base) (Mar. 2, 2016).

In letters dated May 16, 2016 that were substantively identical except for the relevant works at-issue, the Fontanas requested that the Office reconsider its initial refusals to register the

¹ Though separate registration applications were submitted for Small Geometrica Fountain and Water Wall Fountain with Base, for administrative purposes the two cases have been consolidated.

Works. See Letter from Marc Fontana and Gerard Fontana to Adrienne Brown, Registration Specialist (Small Geometrica Fountain) (May 16, 2016); Letter from Marc Fontana and Gerard Fontana to Adrienne Brown, Registration Specialist (Water Wall Fountain with Base) (May 16, 2016) (“First Requests”). After reviewing the Works in light of the points raised in the First Requests, the Office re-evaluated the claims and, in separate opinions, again concluded that the Works “do[] not contain a sufficient amount of original and creative sculptural authorship to support . . . copyright registration[s].” The Office described both Works as “common and familiar shape[s]” combined in “simple arrangement[s]” which, taken as a whole, lack the “sufficient amount of original and creative sculptural authorship to support . . . copyright registration[s].” Letter from Stephanie Mason, Attorney-Advisor, to Marc Fontana (Small Geometrica Fountain) (Aug. 31, 2016); Letter from Stephanie Mason, Attorney-Advisor, to Marc Fontana (Water Wall Fountain with Base) (Aug. 31, 2016).

In letters dated November 23, 2016 that were again substantively identical, the Fontanas requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusals to register the Works. Letter from Brian Beverly, Beeson Skinner Beverly LLP, to U.S. Copyright Office (Small Geometrica Fountain) (Nov. 23, 2016); Letter from Brian Beverly, Beeson Skinner Beverly LLP, to U.S. Copyright Office (Water Wall Fountain with Base) (Nov. 23, 2016) (“Second Requests”). In those letters, the Fontanas argued that the Office’s decisions to refuse registration for the Works were contrary to both the low threshold for creativity in copyright set by *Feist*, and cited case law which states that “combinations of standard shapes may possess the requisite creativity for copyright protection.” Second Requests at 2 (citing *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991), quoting *Runstadler Studios, Inc. v. MCM Ltd. P’ship*, 768 F.Supp. 1291, 1296 (N.D. Ill. 1991)). The Fontanas suggested that the Office was “improperly focused on whether the geometric shapes being used were ‘simple,’ rather than on whether those geometric shapes were being used in a traditional manner so commonplace as to be expected.” Second Requests at 4 (citing *Atari Games Corp. v. Oman*, 979 F.2d 242, 246 (D.C. Cir. 1992)). Additionally, the Fontanas argued that the Works “create a mental impression of a sculpture that is at once spare and pleasing,” that is “distinctly greater than would be present if only standard shapes or symbols were being observed.” Second Requests at 6.

III. DISCUSSION

A. *The Legal Framework*

1) *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 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).

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.” COMPENDIUM (THIRD) § 906.1; *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. *Cf. Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

B. Analysis of the Works

After carefully examining the Works and applying the legal standards discussed above, the Board finds that the Works do not contain the requisite creative authorship necessary to sustain claims to copyright.


As described above, both Small Geometrica Fountain and Water Wall Fountain with Base are comprised of common geometric shapes: The Small Geometrica Fountain is a stone fountain comprised of an upside down triangle in a rectangular base. The Water Wall Fountain with Base is a stone fountain comprised of a rectangular basin centered on a square base, with a vertical rectangle centered on top of the basin. These individual geometric shapes, *i.e.*, rectangles and triangles, are not subject to copyright protection. COMPENDIUM (THIRD) § 906.1 (common geometric shapes are not protectable); *see also* 37 C.F.R. § 202.1 (familiar symbols or designs are not copyrightable).

The Board agrees with the Fontanas that the focus of the analysis when determining the copyrightability of works comprised of common geometric shapes is not “whether the geometric shapes being used [are] ‘simple,’ [but] whether those geometric shapes [are] being used in a traditional manner so commonplace as to be expected.” Second Requests at 4 (citing *Atari Games Corp. v. Oman*, 979 F.2d 242, 246 (D.C. Cir. 1992)). Creative authorship sufficient to sustain a copyright claim based on “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*, 323 F.3d at 811. Applying that standard here, however, the Board finds that Small Geometrica Fountain’s arrangement of an upside down triangle in a rectangular base, and Water Wall Fountain with Base’s arrangement of a square base underneath a rectangular basin with a vertical rectangle positioned in the center of that basin, each taken as a whole, both exhibit *de minimis* authorship, *i.e.*, “very small or trifling,” at best—not copyrightable authorship. COMPENDIUM (THIRD) § 313.4(B) (“Works that contain no expression or only a *de minimis* amount of original expression are not copyrightable and cannot be registered with the U.S. Copyright Office.”); *see also Feist*, 499 U.S. at 358 (explaining that “some ‘ways’ [of selecting, coordinating, or arranging uncopyrightable material] will trigger copyright, but that others will not.”).

Finally, the Fontanas argue that the Works produce “a mental effect on an observer distinctly greater than would be present if only standard shapes or symbols were being observed.” Second Requests at 6. Whether this is true or not, as mentioned above, the aesthetic or emotional effects of a design on the viewer are not factors in determining copyrightability. *Cf.* H.R. REP. NO. 94-1476, at 51 (1976), reprinted in 1976 U.S.C.C.A.N. at 5664 (explaining “the standard of originality established by the courts . . . does not include requirements of . . . esthetic merit”).

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 these Works. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action in this matter.

BY: 
Regan A. Smith
Copyright Office Review Board

APPENDIX A
Small Geometrica Fountain
Water Wall Fountain with Base



#3504 Small Geometrica Fountain
Dimensions: 24"D x 18"W x 31"H



#1529 Water Wall Fountain w/Base
22"D x 36"W x 40"H