



United States Copyright Office

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June 27, 2016

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RE: Second Request for Reconsideration for Refusal to Register Rosen Tagescreme 30 ml FS; Correspondence ID: 1-12U6GAV

Dear Ms. Finkenbinder:

The Review Board of the United States Copyright Office (the "Board") has considered WALA-Heilmittel GmbH's ("WALA's") second request for reconsideration of the Registration Program's refusal to register a two-dimensional artwork copyright claim in the work titled "Rosen Tagescreme 30 ml FS" (the "Work"). After reviewing the application, deposit copy, and relevant correspondence in the case, 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 two-dimensional, graphic logo design. The design consists of product packaging for skin cream. Centered at the top of the design is the name "Dr. Hauschka." Directly underneath is a set of three nested "U" shapes with flared ends and a solid black circle in the center. Right-justified at the bottom of the design are the words "1.0 fl oz / 30 ml" and a stylized "e" (the "estimated" symbol). Directly above these words is a solid yellow rectangle with shading underneath. Directly above the yellow rectangle are the words "Rose Day Cream" and "nurtures, protects and soothes."

A photographic reproduction of the Work is set forth at the right:

II. ADMINISTRATIVE RECORD

On September 25, 2014, WALA filed an application to register a copyright claim in the Work. In an October letter, a Copyright Office registration specialist refused to register the Work, finding that it “lacks the authorship necessary to support a copyright claim.” Letter from Paula Gillaspie, Registration Specialist, to Rebecca A. Finkenbinder, McNees Wallace & Nurick LLC (Oct. 7, 2014).

In a December 30, 2014 letter, WALA requested that the Office reconsider its initial refusal to register the Work. Letter from Michael A. Doctrow, McNees Wallace & Nurick LLC, to U.S. Copyright Office (Dec. 30, 2014) (“First Request”). After reviewing the Work in light of the points raised in the First Request, the Office reevaluated the claims and again concluded that the Work lacked a sufficient amount of original and creative artistic authorship to support copyright registration. Letter from Jaylen S. Johnson, Attorney-Advisor, to Michael A. Doctrow, McNees Wallace & Nurick LLC (Apr. 30, 2015).

In a July 23, 2015 letter, WALA 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 Rebecca A. Finkenbinder, McNees Wallace & Nurick LLC, to U.S. Copyright Office (July 23, 2015) (“Second Request”). In that letter, WALA disagreed with the Office’s conclusion that the Work, as a whole, did not include the minimum amount of creativity required to support registration under the Copyright Act. Specifically, WALA claimed that “the fact that the Applicant hired a designer to create its logo to convey two meanings . . . is the ‘creative spark’ necessary for copyright protection” and the Work “is neither an ‘obvious’ design or a ‘typical’ design used by others, nor is it a ‘practically inevitable’ design.” *Id.* at 2. Further, WALA claimed that “the Work contains a unique, creative design that, by itself and when viewed with the other elements on the label, as a whole, renders the Work copyrightable.” *Id.*

III. DECISION

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 long-standing 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).

Finally, Copyright Office registration specialists (and the Board) do not make aesthetic judgments in evaluating the copyrightability of particular works. *See* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 310.2 (3D ED. 2014) (“COMPENDIUM (THIRD)”). The attractiveness of a design, the espoused intentions of the author, the design’s visual effect or appearance, 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* 17 U.S.C. § 102(b); *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903). Thus, the fact that a work required effort to create, or has commercial or aesthetic appeal, does not necessarily mean that the work constitutes a copyrightable work of art.

B. *Analysis of the Work*

After careful examination, the Board finds that the Work fails to satisfy the requirement of creative authorship and thus is not copyrightable.

Here, it is undisputed that many of the Work's constituent elements—the name “Dr. Hauschka,” the words “Rose Day Cream,” “nurtures, protects and soothes,” and “1.0 fl oz / 30 ml,” the estimated symbol, and the yellow rectangle—are not individually subject to copyright protection. “Words and short phrases, such as names, titles, and slogans, are not copyrightable because they contain a *de minimis* amount of authorship.” COMPENDIUM (THIRD) § 313.4(C) (using examples of an individual's name, a business, a product, or catchwords, catchphrases, mottoes, slogans, or other short expressions as not being copyrightable); *see also* 37 C.F.R. § 202.1(a) (“[w]ords and short phrases such as names, titles, and slogans” and “mere listing of ingredients or contents” are not copyrightable). Nor are basic shapes, symbols, or coloring copyrightable. 37 C.F.R. § 202.1(a) (prohibiting registration of “familiar symbols or designs; . . . lettering or coloring”); *see also* COMPENDIUM (THIRD) §313.4(K). Indeed, WALA does dispute that the design of three nested “U” shapes with flared ends and a solid black circle in the center does not qualify for copyright protection. Second Request at 2. Whether described as a nested “U” design, a variation on a very long fermata (musical notation), or a variation on the Arabic symbol for nun (ﻥ), the design does not contain sufficient creativity for registration. As the *Compendium* explains, “the Office cannot register a work consisting of a simple combination of a few familiar symbols or designs with minor linear or spatial variations.” COMPENDIUM (THIRD) § 313.4(J). In sum, none of the Work's design elements are individually subject to copyright protection.

The question then is whether the combination of elements is protectable as a compilation under the legal standards discussed above. The Board finds that, viewed as a whole, the selection, combination, and arrangement of the Work's constituent elements are not sufficient to render the Work original. *See Feist*, 499 U.S. at 359. The Office does not register “labels that consist of only . . . [m]ere spatial placement or format of trademark, logo, or label elements . . . [u]ncopyrightable use of color, frames, borders, or differently sized font, [and] [m]ere use of different fonts or functional colors, frames, or borders, either standing alone or in combination.” COMPENDIUM (THIRD) § 913.1. The selection, combination, and arrangement of the Work's elements are typical of product labels.

WALA cites *Parfums Givenchy, Inc. v. C&C Beauty Sales, Inc.*, 832 F. Supp. 1378, 1391 (C.D. Cal. 1993) for the proposition that “artistic packaging designs” are copyrightable. Second Request at 6. This argument is misplaced for two reasons. First, as identified in *Parfums Givenchy*, the Office will register “an artistic packaging design or label,” but only if the work “contains the requisite qualifications for copyright.” *Parfums Givenchy*, 832 F. Supp. at 1391-92 (citing, among others, 37 C.F.R. § 202.10(c) (1992)). Second, the issue addressed by the court in *Parfums Givenchy* was utility rather than the originality requirement of copyright. *Id.* at 1391-92 (“[Defendant] contends that the design is not entitled to copyright protection because it is *inseparable from the useful article* to which it is attached.”) (emphasis added). As *Parfums Givenchy* focused on whether the artistic design in that case was *separable* from the useful parts of the product packaging, its reference is not helpful in this request for reconsideration to determine whether the Work is *original*.

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.

BY:



Catherine Rowland
Copyright Office Review Board