United States Copyright Office
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July 19, 2016

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Re: Second Request for Reconsideration for Refusal to Register VV Design; Correspondence ID: 1-100QANV

Dear Mr. Glasgow:

The Review Board of the United States Copyright Office ("Board") has examined Morris Hoffman, Jr.'s ("Hoffman's") second request for reconsideration of the Registration Program's refusal to register a two-dimensional artwork copyright claim in the work titled "VV" ("Work"). After reviewing the application, deposit copy, and relevant correspondence, along with the arguments set forth 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 design that consists of both a large and a small stylized capital letter "V" with blue and yellow coloring, with each having a white border. The smaller letter "V" is on top of the larger letter "V," which has an additional blue border.

The Work is depicted below:

II. ADMINISTRATIVE RECORD

On September 12, 2013, Hoffman filed an application to register a copyright claim in the Work. In a September 15, 2014 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 Sandra Ware, Registration Specialist, to Richard Glasgow, Wright, Lindsey & Jennings LLP (Sept. 15, 2014).

In an October 13, 2014 letter, Hoffman requested that the Office reconsider its initial refusal to register the Work. Letter from Richard Glasgow, Wright, Lindsey & Jennings LLP, to U.S. Copyright Office (Oct. 13, 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 Stephanie Mason, Attorney-Advisor, to Richard Glasgow, Wright, Lindsey & Jennings LLP (Feb. 27, 2015).

In a March 24, 2015 letter, Hoffman 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 Richard Glasgow, Wright, Lindsey & Jennings LLP, to U.S. Copyright Office (Mar. 24, 2015) ("Second Request"). In that letter, Hoffman 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, Hoffman claimed the Work "possesses a creative spark and sails over the low bar of a modicum of creativity necessary to support [] copyright [registration]." *Id.* at 2. In support of its claim, Hoffman argued that its claims to copyright are directed to four creative elements:

> (1) the yellow lightning bolt designs on the uprights of the small "V" and the large "V"; (2) two downward pointing arrows formed between the uprights of the small "V" and the large "V"; (3) the end-to-end alignment of the two downward pointing arrows; and (4) the small "V" positioned on top of and overlapping with the bottom portion of the large "V."

Id. Hoffman further asserted that "copyright has . . . been recognized in shading, size and arrangement of typeface," though he claims the Work contains "much more" creativity. *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 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.

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.

In asserting registerability, Hoffman points to the Work's constituent elements—yellow "lightning bolt" designs on the uprights of the small "V" and the large "V," two downward pointing arrows formed between the uprights of the small "V" and the large "V," the end-to-end alignment of the two downward pointing arrows, and the small "V" positioned on top of and overlapping with the bottom portion of the large "V." Second Request at 2. But, none of these elements is individually subject to copyright protection. *See* 37 C.F.R. § 202.1(a), (e) (prohibiting registration of "familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring" and "[t]ypeface as typeface"). Neither typeface, nor familiar symbols such as arrows or lightning bolts, are protected by copyright law.

The question then is not whether the Work's constituent elements are protectable, but whether the combination of elements is protectable based on the legal standards set forth above. The Board finds that, viewed as a whole, the Work is not original, including in any selection, coordination, or arrangement as a compilation. The two-dimensional Work consists of little more than two overlapping, stylized "V" letters that are colored to depict a three-dimensional typeface. As explained in the *Compendium*, neither "mere scripting or lettering, either with or without uncopyrightable ornamentation," nor "mere use of different fonts . . . standing alone or in combination," nor "typeface [including typefonts or letterforms] or mere variations of typographic ornamentation or lettering" satisfy the requirements for copyright registration. COMPENDIUM (THIRD) § 313.3(D); *see also id.* § 913.1(explaining the types of logo designs that the Office typically refuses to register). In a case with facts comparable to those here, 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," finding that the stylized "C" designs were not sufficient to warrant registration, as "letters of the alphabet cannot be copyrighted" and "the mere arrangement of symbols and letters is not copyrightable." *Coach* at 386 F. Supp. 2d at 496, 498.

Hoffman contends that "copyright has . . . been recognized in shading, size and arrangement of typeface." Second Request at 2. Hoffman cites one district court case decided under the Copyright Act of 1909 for this assertion. *Id.* (citing *Amplex Mfg. Co. v. A.B.C. Plastic Fabricators, Inc.*, 184 F. Supp. 285, 288 (E.D. Pa. 1960)). Later cases make clear, however, that typeface is not protected by copyright. *See, e.g., Eltra Corp. v. Ringer*, 579 F.2d 294, 298 (4th Cir. 1978) ("typeface has never been considered entitled to copyright under the provisions of [the 1909 Copyright Act]"). *Eltra* recognized that, although many parties have asked Congress to amend the law to provide copyright protection to typeface, "[j]ust as consistently Congress has refused to grant the protection." *Id.* The House Report to the Copyright Act of 1976 reflects this congressional choice, stating: "The Committee does not regard the design of typeface, as thus defined, to be a copyrightable 'pictorial, graphic, or sculptural work' within the meaning of this bill . . . ." H.R. REP. NO. 94-1476, at 55 (1976), *reprinted in* 1976 U.S.C.C.A.N. at 5668-69. Thus, Hoffman's argument is unpersuasive.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the U.S. Copyright Office affirms the refusal to register the copyright claims in the Work. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action on this matter.

BY: Catherine Rowland
Copyright Office Review Board