



United States Copyright Office

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December 27, 2019

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1776 Ash Street
Northfield, IL 60093

**Re: Second Request for Reconsideration for Refusal to Register BLACKA,
Correspondence IDs: 1-3DO9Q86; SR # 1-5851028981**

Dear Ms. Claerbaut:

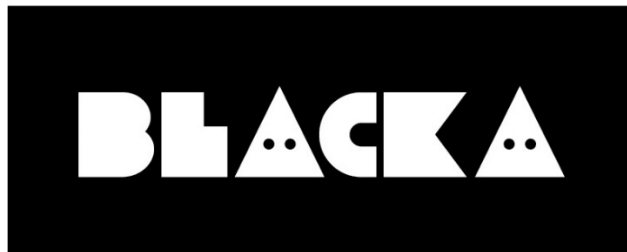
The Review Board of the United States Copyright Office (“Board”) has considered Forty Acres and a Mule Filmworks, Inc.’s (“Forty Acres”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the work titled “BLACKA” (“Work”). After reviewing 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 two-dimensional artwork consisting of the word “BLACKA” in block lettering, with the two “A” letters replaced by a solid triangle. The triangles contain two small circles positioned symmetrically across the middle of the triangle.

The Work is as follows:

BLACKA



II. ADMINISTRATIVE RECORD

On September 25, 2017, Forty Acres filed an application to register a copyright claim in the Work. In an April 17, 2018 letter, a Copyright Office registration specialist refused to register the claim because the Work does not “contain a minimum amount of creative pictorial, graphic, or sculptural authorship” and copyright “does not protect familiar symbols or designs [or] basic geometric shapes.” Letter from J. Ernst, Registration Specialist, to Rochelle Claerbaut, Neal & McDevitt, LLC (Apr. 17, 2018).

In a letter dated July 24, 2018, Forty Acres requested that the Office reconsider its initial refusal to register the Work. Letter from Rochelle Claerbaut, Neal & McDevitt, LLC, to U.S. Copyright Office (July 24, 2018) (“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 sufficient creative authorship because it merely “accent[ed] a word with a common shape” and combined “a few uncopyrightable elements in an expected, garden-variety configuration.” Letter from Stephanie Mason, Attorney-Advisor, to Rochelle Claerbaut, Neal & McDevitt, LLC at 3 (Jan. 25, 2019).

In a letter dated April 25, 2019, Forty Acres 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 Rochelle Claerbaut, Neal & McDevitt, LLC, to U.S. Copyright Office (Apr. 25, 2019) (“Second Request”). In that letter, Forty Acres emphasized the low threshold of creativity necessary for copyrightability, citing prior copyright registrations issued by the Office. Second Request at 1–3. Forty Acres further characterized the Work as “a collection of non-standard shapes of various sizes,” emphasizing that even if many of them were similar to letters, they lacked internal spacing and did not employ uniform width. Second Request at 4. Forty Acres describes the triangles as “stylized” in a way such that they “depict hoods with holes for the wearer’s eyes,” comparing again to prior registrations approved of by the Board that employed “variations” and “slightly adjusted shapes.” Second Request at 4.

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 Publications, Inc. v. Rural Telephone Service 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.” U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § § 906.1 (3D ED. 2014) (“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.

Copyright Office registration specialists (and the Board) do not make aesthetic judgments in evaluating the copyrightability of particular works. *See id.* § 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 finds that it does not contain the requisite authorship necessary to sustain a claim to copyright.

Initially, the Work consists of stylized letters and shapes for the text “BLACKA,” none of which can individually support a copyright claim. Font and typographic ornamentation alone are not protected by copyright law. *See* 37 C.F.R. § 202.1(a), (e) (“Words and short phrases ... [and] mere variations of typographic ornamentation, lettering or coloring” are ineligible for copyright protection); *see also CMM Cable Rep, Inc. v. Ocean Coast Props., Inc.*, 97 F.3d 1504, 1519 (1st Cir. 1996) (citing the Office’s regulation and noting, “[i]t is axiomatic that copyright law denies protection to ‘fragmentary words and phrases’”). That the “A” letters in “BLACKA” are depicted as triangles with circles, intended to “depict hoods like those worn by the Ku Klu Klan” is unavailing. Such a design is too simplistic, with the only addition to a triangle being two evenly-spaced small circles at the middle of the triangle. Moreover, the use of common geometric shapes such as triangles and circles generally will not support a copyright registration absent additional creativity elements such as unusual patterns and significant variation in size and color; a “standard symmetrical arrangement” will not suffice. COMPENDIUM (THIRD) § 906.1. The use of a common triangle and circles to depict a hood is may be novel and clever, but that is not a consideration when assessing whether a work is copyrightable. *Id.* at § 310.3 (the “symbolic meaning or impression of a work is irrelevant” to copyright eligibility).

Additionally, the Work’s selection, coordination, and arrangement of the letters (composed of shapes) are not sufficient to render the Work original. Ultimately, the arrangement of the triangle shapes is used to replace the letter “A” in the word “BLACKA,” a substitution that is not sufficiently creative. For a combination of uncopyrightable elements to be protectable, the “elements [must be] numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.” *Satava*, 323 F.3d at 811. Here, the Work consists of four letters and two identical triangles replacing letters, which does not provide the requisite creativity.

Forty Acres invites the Board to consider past registration decisions and compare the creativity in those works with the Work here. Copyrightability decisions are made “on a case-by-case basis” and “[t]he fact that the U.S. Copyright Office registered a particular work does not necessarily mean that the Office will register similar types of works or works that fall within the same category.” COMPENDIUM (THIRD) § 309.3. Regardless, consideration of works cited by Forty Acres does not require a different outcome. Unlike the American Airlines logo, which the Board found registrable because it “transformed” standard shapes by use of shading and “axial

color gradients,” the Work here uses simple black and white colors and no shading. Copyright Office Review Board, *Re: Registration Decision Regarding American Airlines Flight Symbol*; SR 1-3537494381 at 6 (Dec. 7, 2018), <https://www.copyright.gov/rulings-filings/review-board/docs/american-airlines.pdf>. Similarly, the use of simple shapes in black and white in the Work evinces less copyrightable authorship than present in the decisions cited by Forty Acres, which employed original spacing and colors with gradients (*Pattern for Paper and Textile Products*), uncommon shapes (*TBPF16*), or irregular edges (*Sandy Starfish*).

Instead, the Work is most similar to the claim rejected by the Board in January 2018, in which the stylized text “LIV” created using intersecting lines was rejected for registration because the work contained only an unprotectable “three-letter word” containing “trivial variations on a basic building block of expression.” See Copyright Office Review Board, *Re: Second Request for Reconsideration of Refusal to Register “LIV Logo”*; SR 1-3769977371 at 5 (Jan. 31, 2018), <https://www.copyright.gov/rulings-filings/review-board/docs/liv-logo.pdf>. Here, too, the additional variations beyond the text of the Work are insufficient to rise to the level of copyrightable authorship.

In sum, the ordinary textual expression and common geometric shapes that make up the Work, as a whole, lack the requisite amount of creativity in their selection, coordination, and arrangement to warrant copyright protection. See *Feist*, 499 U.S. at 359; see also COMPENDIUM (THIRD) § 913.1 (explaining the types of logo designs that the Office typically refuses to register). Thus, we find that the level of creative authorship involved in this combination of unprotectable elements is, at best, *de minimis*, and too trivial to merit copyright registration.

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

Karyn A. Temple, Register of Copyrights
and Director, U.S. Copyright Office

Regan A. Smith, General Counsel and
Associate Register of Copyrights

Catherine Zaller Rowland, Associate Register of
Copyrights and Director, Public Information and
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