



United States Copyright Office

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August 15, 2016

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**RE: Second Request for Reconsideration for Refusal to Register Café de Coral Design;
Correspondence ID: 1-11SP5GC**

Dear Ms. Tune:

The Review Board of the United States Copyright Office ("Board") has considered Café de Coral Assets Limited's ("Café de Coral's") second request for reconsideration of the Registration Program's refusal to register a two-dimensional artwork copyright claim in the work titled "Café de Coral Design" ("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, black and white graphic design consists of the words "CAFÉ DE CORAL" printed in the lower center of the design. An outer partial oval surrounds the design, except for a gap filled by the aforementioned words. In the middle of this oval are the Chinese characters for "big," "family," and "happy." Portions of the characters of "big" and "happy" blend into an inner boarder in the shape of an oval.

The Work is depicted below:



II. ADMINISTRATIVE RECORD

On March 12, 2014, Café de Coral filed an application to register a copyright claim in the Work. In an August 6, 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 Rebecca Barker, Registration Specialist, to Cydney A. Tune, Pillsbury Winthrop Shaw Pittman LLC (Aug. 6, 2014).

In a November 3, 2014 letter, Café de Coral requested that the Office reconsider its initial refusal to register the Work. Letter from Cydney A. Tune, Pillsbury Winthrop Shaw Pittman LLC, to U.S. Copyright Office (Nov. 3, 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 Cydney A. Tune, Pillsbury Winthrop Shaw Pittman LLC (Apr. 8, 2015).

In a July 2, 2015 letter, Café de Coral 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 Cydney A. Tune, Pillsbury Winthrop Shaw Pittman LLC, to U.S. Copyright Office (July 2, 2015) (“Second Request”). In that letter, Café de Coral 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, Café de Coral claimed that the Work contained an “appreciable amount of pictorial authorship” and “shows the minimum amount of artistic expression or ‘creative spark’ sufficient under the *Feist* test to warrant copyright protection for the overall design.” *Id.* at 2. Further, Café de Coral claimed that “[t]he creative and artistic depiction of the three Chinese characters, namely with unusually thick semi-circular strokes with rounded ends, which form repeated upturned arcs, goes beyond mere typographic ornamentation to comprise a pictorial representation of three human forms with stylistic heads, arms and legs representing the three groups identified in [Café de Coral’s] corporate ideal, namely ‘customers, employees, and shareholders,’” suggesting that those groups “should be ‘all happy together.’” *Id.* (emphasis omitted).

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).

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). 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 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 the Work's constituent elements—three Chinese characters for “big,” “happy,” and “family,” partial ovals, and the words “Café de Coral”—are not individually subject to copyright protection. See 37 C.F.R. § 202.1(a), (e) (prohibiting registration of “familiar symbols or designs” and “mere variations of typographic ornamentation, lettering or coloring”); COMPENDIUM (THIRD) § 913.1 (“Copyright Office cannot register a claim to copyright in typeface or mere variations of typographic ornamentation or lettering, regardless of whether the typeface is commonly used or truly unique”). One reason that fanciful lettering or calligraphy is refused registration is that “the creative aspects of the character (if any) cannot be separated from the utilitarian nature of that character.” COMPENDIUM (THIRD) § 906.4 (suggesting that a fabric design that used Chinese characters and horizontal stripes on striped grass cloth would not contain enough creativity to warrant registration). Indeed, and specific to the characters used in the Work, “Chinese words . . . do not receive copyright protection simply because they are designed more ornately or with greater embellishment” and to do so “would effectively give [an author] a monopoly on renditions of [those] Chinese characters” and “not serve the objectives of copyright.” *Zhang v. Heineken N.V.*, No. CV 08-6506 GAF (RCx), 2010 WL 4457460, at *5 (C.D. Cal. May 12, 2010) (finding that a design of five ornate Chinese characters did not warrant copyright protection). Similarly, the Copyright Act does not protect common geometric shapes like the half ovals included in the Work. COMPENDIUM (THIRD) § 906.1. The question then is whether the combination of uncopyrightable elements is protectable under the legal standards described above.

The Board finds that, viewed as a whole, the Chinese characters, partial ovals, and words in Roman type that comprise the Work are not sufficient to render the Work original, including in any selection, coordination, or arrangement as a compilation. As explained in the *Compendium of U.S. Copyright Office Practices*, the “mere use of different fonts . . . standing alone or in combination” does not satisfy the requirements for copyright registration. COMPENDIUM (THIRD) § 913.1; see also *Coach*, 386 F. Supp. 2d at 498 (upholding the Office's determinations that designs consisting of little more than “variations and arrangements of the letter ‘C’” were not sufficient to warrant registration on grounds that “letters of the alphabet cannot be copyrighted” and that “the mere arrangement of symbols and letters is not copyrightable”). Here, combining of the Work's uncopyrightable elements did not result in a work with sufficient creativity for registration. See COMPENDIUM (THIRD) § 913.1 (identifying works using either mere scripting or lettering or uncopyrightable use of borders as examples of works that do not contain sufficient creativity for registration).

Café de Coral contends that the Work, by including characters suggestive of human forms, conveys the message that “customers, employees, and shareholders . . . should be ‘all happy together.’” Second Request at 2 (emphasis omitted). But the intangible attributes that Café de Coral ascribes to the Work are not evident in the deposit itself and therefore cannot be

examined in an objective manner. Even if these attributes were present in the deposit, the Board does not assess the espoused intentions of a design's author, or a design's visual impact, in determining whether a design contains the requisite minimal amount of original authorship necessary for registration. *See Bleistein*, 188 U.S. at 251. Accordingly, the fact that Café de Coral attributes anthropomorphic characteristics to design elements of the Work does not qualify the Work for copyright protection.

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