



United States Copyright Office

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January 24, 2017

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RE: Second Request for Reconsideration for Refusal to Register Cod Liver Packaging Artwork; Correspondence ID 1-1HB10V7; SR# 1-1HB10V7

Dear Ms. Wiser:

The Review Board of the United States Copyright Office (the “Board”) has considered Interpage International Inc.’s (“Interpage’s”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork copyright claim in the work titled “Cod Liver Packaging Artwork” (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. This decision is consistent with the ruling of the United States District Court for the Eastern District of New York, which recently found that the Work is not copyrightable. *Threeline Imp., Inc. v. Vernikov*, No. 1:15-cv-02333, slip op. at 28, 30 (E.D.N.Y. Oct. 28, 2016).

I. DESCRIPTION OF THE WORK

The Work is a rectangular label design for canned cod liver that has rounded edges and a yellow-colored background, with a portion of the background missing from the left of the Work in the location where a metal pull-tab would be. The center of the work contains the words “Cod liver in own oil” in a red stylized font. The right portion of the Work is a government-required nutritional facts label.¹ Along the bottom of the Work are blue waves with the words “PRODUCED FROM FRESH ICELANDIC COD LIVER” in white and “net weight 121g/4.3oz | Best Before: See Can” in black. The top left of the work includes information about the manufacturer, including the words “INTERPAGE INTERNATIONAL,” a solid black line, and the phrases “Importer: Interpage international Phone,” “(347) 492-7018,” “(917) 975-4108,” and “governikov2@gmail.com,” all oriented ninety degrees counterclockwise. On the bottom left of the Work is a kosher certification logo consisting of a two flared lines surrounding Hebrew words and the words “CERTIFIED KOSHER” underneath, all oriented ninety degrees counterclockwise. Dividing the manufacturer information and kosher certification from the remainder of the label are five vertical lines colored blue-white-red-white-blue, which duplicate a portion of the Icelandic flag. In the middle of these lines, where the circle of a pull tabs would be is a white circle with the words “omega 3 vitamins A+D” in red.

¹ See 21 U.S.C. § 343(q).

The Work is depicted below:



II. ADMINISTRATIVE RECORD

On August 19, 2015, Interpage filed an application to register a copyright claim in the Work. In an August 24, 2015 letter, a Copyright Office registration specialist refused to register the claim, finding that it "lacks the authorship necessary to support a copyright claim." Letter from Robin Jones, Registration Specialist, to Jason Drangel, Epstein Drangel LLP (Aug. 24, 2015).

In a letter dated November 23, 2015, Interpage requested that the Office reconsider its initial refusal to register the Work. Letter from Jennette Wiser, Epstein Drangel LLP, to U.S. Copyright Office (Nov. 23, 2015) ("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 a sufficient amount of original and creative artistic authorship to support copyright registration. Letter from Stephanie Mason, Attorney-Advisor, to Jennette Wiser, Epstein Drangel LLP (Mar. 18, 2016).

In a letter dated June 16, 2016, Interpage 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 Jennette Wiser, Epstein Drangel LLP, to U.S. Copyright Office (Jun. 16, 2016) ("Second Request"). In that letter, Interpage 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, Interpage claimed that, although the individual elements of the Work are not copyrightable, "the Work as a whole in the selection, coordination and arrangement of its distinct elements possesses the requisite amount of creativity needed to be original and registrable." *Id.* at 2-3. Interpage further argued that the low threshold for creativity dictates that "[t]he vast majority of works make the grade quite easily." *Id.* at 3-4. Interpage further contended that commercial labels for cod liver produce a variety of differences in their selection, coordination, and arrangement and, although Interpage "cannot prevent others from using the factual information and commonplace shares and designs," it should be granted a registration in its "original artistic contribution in the Work . . . namely the selection, coordination, and arrangement of the [Work's] standard elements." *Id.* at 4-5.

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).

Though commercial labels are subject to copyright protection, those lacking “an appreciable amount of original text or pictorial material” are not copyrightable. *Alberto-Culver Co. v. Andrea Dumon, Inc.*, 466 F.2d 705, 710 (7th Cir. 1972) (quoting *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F.2d 541, 544 (2d Cir. 1959)). In determining the originality of a commercial label, certain features such as “circular, rectangular, or octagonal shapes or the serving directions or the ingredients” were not protected by copyright. *Kitchens of Sara Lee, Inc.*, 266 F.2d at 545.

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, Interpage acknowledges that the Work’s constituent elements—the short phrases of text, nutritional facts, UPC code, manufacturing information, kosher certification, vertical stripes and white circle, blue and white waves—are not individually subject to copyright protection. 37 C.F.R. § 202.1(a). The Copyright Office agrees. Words and short phrases are not copyrightable. *Id.*; see also COMPENDIUM (THIRD) § 313.4(C) (using examples of a business, a product, or catchwords, catchphrases, mottoes, slogans, or other short expressions as not being copyrightable). Nor are basic shapes, symbols, or coloring copyrightable, such as the white circle and the five vertical lines colored blue-white-red-white-blue imitating a portion of the Icelandic flag. 37 C.F.R. § 202.1(a) (prohibiting registration of “familiar symbols or designs; . . . lettering or coloring”); see also COMPENDIUM (THIRD) § 313.4(J) (“Well-known and commonly used symbols that contain a *de minimis* amount of expression” are not copyrightable.), § 906.1 (“straight or curved lines” and “circles” are not copyrightable). The UPC code and contact information are not copyrightable, as they are dictated by functional considerations—for tracking items and contacting the manufacturer, respectively. See 17 U.S.C. § 102(b). The nutritional information is mandated by law, and is not the product of creativity. 37 C.F.R. § 202.1(a); see also COMPENDIUM (THIRD) § 313.4(F) (prohibiting registration of “[a] product label that merely lists the ingredients for the product” or its contents); 21 U.S.C. § 343(q) (nutrition label requirements). Similarly, the kosher certification, as a standard food label, is not copyrightable. See COMPENDIUM (THIRD) § 313.4(J) (“Standard industry designs, such as . . . food labeling symbols” are not copyrightable).

The question then is whether the combination of elements is protectable as a compilation. The Board finds that, viewed as a whole the Work’s constituent elements are not sufficient to render the Work original, including in any selection, combination, and arrangement of the constituent parts. See *Feist*, 499 U.S. at 359. Several of the Work’s design elements are dictated by non-creative considerations or are mandated by government rules, including the nutritional facts, the UPC code, the manufacturing information, and the kosher certification. The other choices, including font, borders, and coloring are not the types of choices that are protected by copyright. For example, the choice of using the colors of the Icelandic flag for a product imported from Iceland is not creative, nor is using a simple ocean wave design on the bottom of a can of fish. These are standard design elements that Interpage cannot claim. The Office will 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. In sum, the selection and placement of the Work’s elements are not the product of a creative choice, but are typical of commercial labels.


Interpage cites to several inapposite commercial label and packaging cases. For example, Interpage references *Parfums Givenchy, Inc. v. C&C Beauty Sales, Inc.*, 832 F. Supp. 1378, 1391 (C.D. Cal. 1993) for the proposition that commercial packaging is copyrightable. Second Request at 7. The Office does not dispute that commercial labels can be registerable, but will register such a work only if it “contains the requisite qualifications for copyright.” 37 C.F.R. § 202.10(c). Further, Interpage’s reliance on *Parfums Givenchy* is misplaced, as the issue in that case was not the originality requirement, but whether the packaging design was a useful article. *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). The other commercial label and packaging cases are similarly unpersuasive. In those cases, the works at issue had been registered by the Copyright Office, and each work displayed more creative authorship than the Work at issue here.² Those courts relied on the Copyright Office Registration certificates as “prima face evidence of the evidence of the originality of the work and the facts stated in the certificates.” *FMC Corp. v. Control Sols., Inc.*, 369 F. Supp. 2d 539, 571-72 (E.D. Pa. 2005) (quoting *Chere Amie, Inc. v. Windstar Apparel, Corp.*, 191 F. Supp. 2d 343, 349 (S.D.N.Y.2001)).

Moreover, as noted above, the Office’s determination in this matter was upheld in a recent court decision. In *Threeline Imp., Inc. v. Vernikov*, No. 1:15-cv-02333, slip op. at 28, 30 (E.D.N.Y. Oct. 28, 2016), the court found that the design “did not rise to a level of creativity that may be copyrighted” in either its design elements or as a compilation. *Id.* at 30-31.

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

² Second Request at 6-10; see, e.g., *Innovation Ventures, LLC v. N2G Distrib., Inc.*, 635 F. Supp. 2d 632, 638 (E.D. Mich. 2008) (registered textual work consisting of a 49-word “medical caution statement”); *FMC Corp. v. Control Sols., Inc.*, 369 F. Supp. 2d 539, 546, 571-72 (E.D. Pa. 2005) (textual works consisting of “multi-page pamphlets describing product uses, instructions for use and required warnings”); *X-IT Prod., L.L.C. v. Walter Kidde Portable Equip., Inc.*, 155 F. Supp. 2d 577, 609 (E.D. Va. 2001) (product label consisting of original photograph and other design elements); *Ushodaya Enterprises, Ltd. v. V.R.S. Int’l, Inc.*, 63 F. Supp. 2d 329, 340 (S.D.N.Y. 1999) (label consisting of a photograph of an ingredient, graphic design, and company logo); *Tienshan, Inc. v. C.C.A. Int’l (N.J.), Inc.*, 895 F. Supp. 651, 654 (S.D.N.Y. 1995) (registered label consisting of a photograph of the products, text, and company logos); see also *Abli, Inc. v. Standard Brands Paint Co.*, 323 F. Supp. 1400, 1402 (C.D. Cal. 1970) (label consisting of a photograph and a notable amount of text).