



Copyright Review Board
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000

June 29, 2021

Gregory A. Clarick
Clarick Gueron Reisbaum
220 Fifth Avenue
New York, NY 10001

**Re: Second Request for Reconsideration for Refusal to Register *EN* Set Design
(Correspondence ID: 1-40LL0F5; SR # 1-8181160040)**

Dear Mr. Clarick:

The Review Board of the United States Copyright Office (“Board”) has considered Jessica Lang-Segawa’s second request for reconsideration of the Registration Program’s refusal to register a sculptural claim in the work titled “EN Set Design” (“Work”). After reviewing the application, deposit copies, and relevant correspondence, along with the arguments in the second requests for reconsideration, the Board affirms the Registration Program’s denial of registration.

I. DESCRIPTION OF THE WORK

The Work is a claim in sculpture consisting of a black circle on a pedestal (with a backlight capable of changing colors) and a globe that can project light, suspended from a string that swings in front of the large circle.¹ As a deposit, Lang-Segawa submitted a 10-second video featuring the sculptural work,² in which the smaller globe swings in front of the larger circle while a dance performance proceeds in the foreground.

Though the deposited video clip depicts the Work in motion, the Board does not consider the Work’s potential for movement because such elements are not “fixed” as required for copyright protection. *See* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES §§ 305 (Office “may refuse registration if the work or the medium of expression only exists for a transitory period of time, if the work or the medium is constantly changing”), 904 (“the fact that uncopyrightable material,” such as a fireworks display, “has been fixed through reproduction does not make the underlying material copyrightable”) (3d ed. 2021) (“COMPENDIUM (THIRD)”).

¹ The Work is titled “EN Set Design” because it is the main set design for the dance performance *EN*. *See* Gia Kourlas, *Rewview: Alvin Ailey Returns to Lincoln Center with a Tribute to Women*, N.Y. Times (June 14, 2018), <https://www.nytimes.com/2018/06/14/arts/dance/review-alvin-ailey-celebrate-women.html> (discussing the dance performance and set design).

² Applicants for sculptural claims may deposit identifying material consisting of “photographic prints ... or similar two-dimensional reproductions or rendering of the work.” 37 C.F.R. §§ 202.21(a), § 202.20(c)(2)(xi)(A)(1) (identifying material permitted for “three-dimensional sculptural work”).

A screenshot from the video depicting the Work is provided below.



II. ADMINISTRATIVE RECORD

On October 28, 2019, Lang-Segawa filed an application to register a copyright claim in the Work. In a November 4, 2019 letter, a Copyright Office registration specialist refused to register the claims, finding that because copyright does not protect basic geometric shapes, the Work lacked copyrightable material. Initial Letter Refusing Registration from U.S. Copyright Office to Stacy J. Grossman (Nov. 4, 2019).

In a January 14, 2020 letter, Lang-Segawa requested that the Office reconsider its initial refusal to register the Work. Letter from Gregory A. Clarick to U.S. Copyright Office (Jan. 14, 2020) (“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 creative authorship. The Office made this determination because it concluded that the work only “consist[ed] of variously-sized unprotectable geometric shapes,” and they were combined in an uncreative way. Refusal of First Request for Reconsideration from U.S. Copyright Office to Gregory A. Clarick at 3 (Apr. 16, 2020).

In a letter dated June 1, 2020, Lang-Segawa requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Work. Lang-Segawa conceded that the work employed common geometric shapes, but argued that their combination was sufficiently creative to meet the statutory threshold for copyright registration. Letter from Gregory A. Clarick to U.S. Copyright Office at 3 (June 1, 2020) (“Second Request”).

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 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. *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 stereotypical elements in a glass sculpture of a jellyfish including clear glass, an oblong shroud, bright colors, vertical orientation, and the 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.

Finally, Copyright Office registration specialists (and the Board) do not make aesthetic judgments in evaluating the copyrightability of particular works. *See* COMPENDIUM (THIRD) § 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 concludes that Work lacks sufficient authorship to support registration.

As the Office previously noted, the constituent elements of the Work are simple geometric shapes: a large circle placed on a pedestal in the background and a smaller sphere that is suspended in front of it, both of which feature lighting elements. Lang-Segawa concedes this point, describing the work as being made up of “two circles—one larger in the background, and in the foreground . . . a smaller, three-dimensional, glowing orb with which dancers interact.” Second Request at 1.

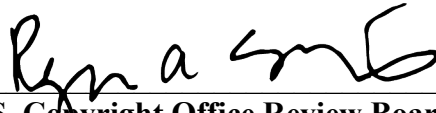
The Office generally “will not register a work that merely consists of common geometric shapes unless the author’s use of those shapes results in a work that, as a whole, is sufficiently creative.” COMPENDIUM (THIRD) § 906.1. Viewing the Work as a whole, the Board concludes that the Work fails to combine its constituent elements in a sufficiently creative way that goes beyond a garden-variety configuration. The Work arranges the larger circle and smaller sphere by placing the smaller object in front of the larger one, with the sphere suspended on a string. This is not a sufficiently creative arrangement to sustain a copyright claim.

The two cases Lang-Segawa cites in support of registration do not sway the Board from its conclusion here. First, the star and cloud design in *Prince Group, Inc. v. MTS Prods.* contained multiple stars and clouds, expressed in a “cartoon-like motif and style,” among other elements. 967 F. Supp. 121, 126 (S.D.N.Y. 1997). By contrast, the Work contains only a single circle and single sphere, with the latter suspended in front of the former. Similarly, the Spiral

Motion sculpture in *Runstadler Studios, Inc. v. MCM Ltd. P'ship* combined and arranged “39 clear glass rectangles” in a spiral that rotated across 405 degrees, resulting in a sufficiently creative work to sustain a claim to copyright when viewed as a whole. 768 F. Supp. 1292, 1294–96 (N.D. Ill. 1991). Because the Work employs fewer shapes in a simpler fashion, *Runstadler* is not analogous.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms 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

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