



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

June 16, 2021

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Re: Second Request for Reconsideration for Refusal to Register TB Diamond Logo (Correspondence ID: 1-42UMH5I; SR # 1-8313812653)

Dear Ms. Calvaruso:

The Review Board of the United States Copyright Office (“Board”) has considered Burberry Limited’s (“Burberry’s”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional art claim in the work titled “TB Diamond Logo” (“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 black and white, two-dimensional graphic design featuring the letters “T” and “B.” The letters are placed one on top of the other and enclosed within the center of concentric quadrilateral diamond shapes. The entire logo is tilted and positioned at an angle. The design uses one color, black, and has no shading or other visual effects. The Work is as follows:



II. ADMINISTRATIVE RECORD

On December 4, 2019, Burberry filed an application to register a copyright claim in the Work. In a December 5, 2019, letter, a Copyright Office registration specialist refused to register the claim, finding that it “lacks the authorship necessary to support a copyright claim.”

Initial Letter Refusing Registration from U.S. Copyright Office to Andrea Calvaruso (Dec. 5, 2019).

In a letter dated February 28, 2020, Burberry requested that the Office reconsider its initial refusal to register the Work. Letter from Andrea Calvaruso to U.S. Copyright Office (Feb. 28, 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 consisted of only common shapes and letters and “does not contain a sufficient amount of original and creative artistic or graphic authorship to support a copyright registration.” Refusal of First Request for Reconsideration from U.S. Copyright Office, to Andrea Calvaruso at 1 (May 29, 2020). The Office noted that the “slightly stylized [] positioning” of the Work’s elements “does not transform either into copyrightable works of art.” *Id.* at 3.

Burberry subsequently 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 Andrea Calvaruso, to U.S. Copyright Office (Aug. 28, 2020) (“Second Request”). In this request, Burberry contends that the Work is copyrightable because it consists of an “abstract design that includes multiple types of geometric shapes, some of which may be viewed as an approximation of the letters ‘T’ and ‘B,’ presented in a non-obvious and artistic arrangement.” Second Request at 2. In particular, the artistic arrangement consists of “an approximation” of the letter “B,” “placed at an unusual angle,” which intersects with “crossing lines of varying thickness” which allude to “multiple letter ‘Ts,’” that are “displayed in a unique diamond-like arrangement surrounded by a thick black border and thinner white border, the combination of which approximates the appearance of a window pane with an inlay.” *Id.* at 3. Burberry asserts that there is sufficient creativity in the selection and arrangement of how the shapes and letters intersect, which “creates dimension and an illusion of different depths.” *Id.*

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 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. 2021) (“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.

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 finds that the Work does not contain the requisite authorship necessary to sustain a claim to copyright.

Neither the work's individual elements nor the Work as a whole exhibit copyrightable authorship. Rather, the individual elements of the Work consist merely of common geometric shapes (diamonds, rectangles, and semicircles), the letters "T" and "B," and the single, unembellished color black. *See* Second Request at 2–3. The geometric shapes and letters alone are not individually copyrightable subject matter. *See* 37 C.F.R. § 202.1(a) (articulating that "familiar symbols or designs" and "mere variation of typographic ornamentation, lettering or coloring" are not registrable); COMPENDIUM (THIRD) § 906.1 ("There are numerous common geometric shapes, including without limitation, straight or curved lines, circles . . . rectangles, diamonds . . ."). Similarly, using a single color, with no shading, gradations, or other visual effects, is, by itself, not protectable. All of the individual elements in the Work fall under the category of unprotectable lines, shapes, and letters.

Nor does the specific combination of the elements in the Work display copyrightable authorship. While it is true that combinations of unprotectable elements like those present in the Work can be, as a whole, protectable, such a combination must include "elements [that] are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship." *See Satava*, 323 F.3d at 811. At best, the Work here includes minor variations of unprotectable shapes and letters that do not rise to the level of sufficient creativity "regardless of how novel and creative" they are. COMPENDIUM (THIRD) § 906.4 ("The Office typically refuses claims based on individual alphabetic or numbering characters . . . calligraphy, or other forms of typeface."). Specifically, the choices here parallel those in traditional monograms.¹ The "T" and "B" refer to Burberry's founder, Thomas Burberry,² and placing letters inside a diamond is a standard monogram style. Similarly, placing the black block letters on top of one another and tilting to them to the side constitutes no more than a minimal variation on the standard style. The Work incorporates only minor spatial variations, particularly with respect to the horizontal line at the top of the "T," and the lines and shapes are otherwise arranged to intersect in ways that have merely an unoriginal, symmetrical effect. *See, e.g., Coach*, 386 F. Supp. 2d at 496 (refusing to register a design that positioned

¹ "Monogram Maker," Mark & Graham, https://www.markandgraham.com/pages/monogram-guide/monogram-maker.html?Kenshoo=k_Cj0KQCQjwnueFBhChARIsAPu3YkQIPO7cAXVZCCic3P34bDf0E8AdDNK6E5KL6U08NkxFciBQeLzlj2MaAg10EALw_wcB_k_&cm_ven=NonBrandSearch&cm_cat=Google&cm_pla=NonBrand_Sear ch_DSA&cm_ite=&gclid=Cj0KQCQjwnueFBhChARIsAPu3YkQIPO7cAXVZCCic3P34bDf0E8AdDNK6E5KL6U08NkxFciBQeLzlj2MaAg10EALw_wcB (last accessed June 4, 2021); "Diamond Monogram Acrylic Stir Sticks," Artisan Stamp, <https://artisanstamp.com/products/diamond-monogram-acrylic-stir-sticks> (last accessed June 4, 2021); "3 letter Diamond Monogram," Saratoga Horsecworks, <https://www.horsecworks.com/products/3-letter-diamond-monogram> (last visited June 4, 2021).

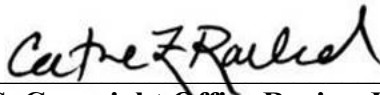
² "About Us," BURBERRY, <https://us.burberry.com/our-history/> ("1856: Thomas Burberry Establishes Burberry in Basingstoke at just 21 years old . . .") (last visited June 10, 2021).

letter “C”s in a mirrored arrangement because it was not sufficiently creative); COMPENDIUM (THIRD) § 906.1 (slight linear and spatial variations among common shapes does not constitute creative expression). As a result, the selection and arrangement of elements in this design are not sufficiently creative to warrant copyright protection.

Nevertheless, Burberry asserts that the Work’s unique elements create an appearance of an inlaid windowpane with differing depths and dimensions. *Id.* at 3. Perceived appearance and artistic intent, however, are not factors when evaluating a work for copyright protection. *See* COMPENDIUM (THIRD) §§ 310.2–310.3. Additionally, Burberry encourages the Board to compare the Work to other two-dimensional designs that the Board registered and argues that “it is well-settled under copyright law that even small amounts of creativity give rise to authorship and originality.” Second Request at 2. The Board, however, arrives at its determinations looking at the specifics of the case before it and thus will not compare previously registered works when examining a work for sufficient creativity. *See* COMPENDIUM (THIRD) § 309.3; *see also Homer Laughlin China Co. v. Oman*, No. 90 Civ. 3160, 1991 WL 154540, at *2 (D.D.C. July 30, 1991) (stating that court was not aware of “any authority which provides that the Register must compare works when determining whether a submission is copyrightable”).

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

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