



United States Copyright Office

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July 27, 2017

Duilio Passariello
1266 Morse Street NE #201
Washington, DC 20002

Re: Second Request for Reconsideration of Refusal to Register “Tricorn”; Service Request #: 1-2730232061; Correspondence ID: 1-1PZPW71

Dear Mr. Passariello:

The Review Board of the United States Copyright Office (“Board”) has considered your second request for reconsideration of the Registration Program’s refusal to register a sculpture claim in the work titled “Tricorn” (“Work”). After reviewing the application, deposit materials, and relevant correspondence, along with the arguments in the second request for reconsideration, the Board reverses the Registration Program’s denial of registration.

The Work, for purposes of copyright registration, is the three-dimensional triangular prism structure pictured below, which is comprised of standard geometric shapes, specifically a triangular base and top, three rectangular mesh screens, one cylindrical pole, and eighteen (18) evenly spaced, equally sized circles embedded in the base of the structure.¹



¹ As explained further below, the Board does not consider the Work to include any of the water or lighting elements (natural or artificial) referenced in the requests for reconsideration.

Generally speaking, copyright law does not protect basic geometric shapes. *See* 37 C.F.R. § 202.1(a); COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 906.1 (3d ed. 2017) (“COMPENDIUM THIRD”). Still, works that combine geometric shapes and/or other non-protectable elements into a larger design may be registered if the overall design is sufficiently creative. *See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 358 (1991) (finding the Copyright Act “implies that some ‘ways’ [of selecting, coordinating, or arranging uncopyrightable material] will trigger copyright, but that others will not”); *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.”). In particular, in *Runstadler Studios, Inc. v. MCM Ltd. Partnership*, the court held that the “Spiral Motion” sculpture, comprised of 39 identical, clear-glass rectangles forming a 405° arc, “possesse[d] the required creativity to qualify as an original work of authorship.” 768 F.Supp. 1292, 1294-96 (N.D. Ill. 1991) (finding also that the “choice of location, orientation and dimensions of the glass panes, and the degree of arc of the spiral, show[ed] far more than a trivial amount of intellectual labor and artistic expression”). Similarly, the *Compendium* explains that the Copyright Office would register, for example, a wrapping paper design that consists of circles, triangles, and stars of various colors arranged in an asymmetrical design, but would not register a picture consisting merely of a purple background and symmetrically placed white circles that included no other elements (*e.g.*, additional three-dimensional shapes). COMPENDIUM (THIRD) § 906.1.

Like the protectable examples above, the Work combines multiple geometric shapes—triangles, rectangles, and circles—into a design that illustrates creative choice in the positioning of shapes in the overall Work. Under *Feist*, copyright protection is available so long as there is at least “some creative spark, ‘no matter how crude, humble or obvious’ it might be.” *Feist*, 499 U.S. at 345 (“[T]he requisite level of creativity is extremely low; even a slight amount will suffice.”) (internal citations omitted). Thus, the Work meets the low threshold required for copyright protection. That said, the overall design of the Work is still quite simple, predominated by its standard prism shape with the minimal addition of evenly spaced, equally sized circles and a centrally positioned pole. Accordingly, , the resulting protection is thin. *See Beaudin v. Ben and Jerry's Homemade, Inc.*, 95 F.3d 1, 2 (2d Cir. 1996) (noting the “thin” copyright protection afforded to a design where the “quantum of originality is slight” with regard to a pattern emulating cowhide); *see also Ets-Hokin v. Skyy Spirits, Inc.*, 323 F.3d 763, 766 (9th Cir. 2003) (applying doctrines of merger and scenes a faire to commercial photograph of vodka bottle, concluding that “thin” copyright “protects against only virtually identical copying”) (citations omitted).

Although the Board finds that the Work is protected by copyright law, the Board also recognizes that there are limits to what is within the scope of that protection. As noted above, a registration for the Work as a sculpture will not include the water or lighting elements (natural or artificial). This is because they lack human authorship and fixation, and copyright protection is not available for the underlying optical principles/ideas embodied in the Work. *First*, to warrant copyright protection under U.S. law, a work must be “fixed in [a] tangible medium of expression,” 17 U.S.C. § 102(a), meaning that that creative expression is embodied in a medium that “is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise

communicated for a period of more than transitory duration.” 17 U.S.C. § 101. The “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, or if the medium does not allow the specific elements of the work to be perceived, reproduced, or otherwise communicated in a consistent and uniform manner.” COMPENDIUM (THIRD 2017) § 305. The First and Second Requests for Reconsideration, however, claim a number of dynamic visual effects produced by the interaction of natural elements, *e.g.*, water, air, and sunlight. For example, the first request claimed that:

[T]he [Work’s] creative authorship elements are best describe[d] if we consider the sculpture as a light box that reacts to both sunlight and artificial lighting depending on the position of the viewer, the season of the year, the urban obstacles surrounding the sculpture – building and trees – the hour of the day, and, on how this same viewer moves around the object during the day or night. It is a work of Kinetic Art in its most basic interpretation.

Letter from Duilio Passariello to U.S. Copyright Office at 1 (Feb. 5, 2016) (“First Request”). And the second request also explained that water moving across the surface of the Work “creat[es] ripples [that] alter the image produced when light travels across its surface.” Letter from Duilio Passariello to U.S. Copyright Office 1-2 (Sept. 23, 2016) (“Second Request”). These statements demonstrate that the water and lighting aspects are constantly changing and are therefore not able to “be perceived, reproduced, or otherwise communicated in a consistent and uniform manner.” COMPENDIUM (THIRD) § 305. Accordingly, the Board finds that these visual elements are “not sufficiently permanent or stable” to satisfy the fixation requirement necessary to be eligible for copyright protection. 17 U.S.C. § 101.²

Second, copyright protects *only* original human authorship. *See* 17 U.S.C. § 102(a); *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 304 (7th Cir. 2011) (“authorship is an entirely human endeavor”); COMPENDIUM (THIRD) § 906.7 (“[T]he U.S. Copyright Office will not register . . . a work that is created through naturally occurring processes or events.”); § 313.2 (stating that a “claim based on driftwood that has been shaped and smoothed by the ocean,” lacks the human authorship necessary for copyright protection). Moreover, visual effects “produced by water mixing with air,” as a reaction to sunlight, or as “water moves creating ripples [which] alter the image produced when light travels across its surface,” are the result of natural processes. Results of natural processes do not contain the requisite independently created human expression. *See, e.g., Kelley*, 635 F.3d at 304 (holding that a garden is “not authored [for purposes of the Copyright Act] . . . even though it was designed and planted by an artist” because the visual effects “originated in nature, not in the mind of the gardener”).

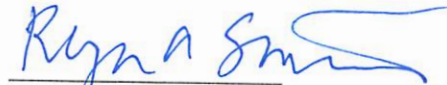
² The Board reiterates that the application to register the Work only identified it as a three-dimensional sculpture and did not claim any audiovisual authorship. The Board takes no position in this proceeding regarding whether there would be adequate audiovisual authorship with regard to the dynamic water and lighting effects to support a copyright claim.

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Finally, copyright cannot extend to “any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” 17 U.S.C. § 102(b). To the extent you seek to register the underlying optical principles of the Work—such as the “*idea* of a bubbly sheet of water as a virtual container of the lighting it traps within by reflection and refraction,” First Request at 1 (emphasis added), or the “visual effect produced by a single surface with [an]other two behind, [being] the basic *optical principle* of this sculpture and the essence of [the] claim for copyright protection,” Second Request at 2 (emphasis added)—these principles are not protectable as part of the registration for the Work. *See* 17 U.S.C. § 102(b).

For the reasons stated herein, the Review Board of the United States Copyright Office reverses the refusal to register the copyright claim in the Work. The Board now refers this matter to the Registration Policy and Practice division for registration of the Work, provided that all other application requirements are satisfied.

BY:



Regan Smith

Copyright Office Review Board