United States Copyright Office
Library of Congress · 101 Independence Avenue SE · Washington, DC 20559-6000 · www.copyright.gov

May 2, 2013

Maginot, Moore & Beck, LLP
Attn: Michael Beck
1 Indiana Square, Suite 2200
Indianapolis, IN 46204

RE: BRAILLE
SR 1-646536078
SR 1-628282097

Dear Mr. Beck:

On behalf of the Copyright Office Review Board I am responding to your request for reconsideration of the Registration Program's refusal to register a copyright claim in a work entitled "Braille." You have submitted this claim on behalf of your client, Inhabit, Inc. The Review Board has carefully examined the application, the identifying reproduction, and all the correspondence in this case. After careful consideration of the arguments in your letter, the Board affirms the denial of registration of this copyright claim because the work does not contain a sufficient amount of original and creative pictorial or sculptural authorship to support a copyright registration.

I. ADMINISTRATIVE RECORD

A. Initial submissions

On June 28, 2011, the Copyright Office received from you an electronic submission for registration of a work entitled "Braille" for your client, Inhabit, Inc. Registration Specialist Tom Brina refused registration of the work on the grounds that the work lacked the authorship necessary to support a claim of copyright. Mr. Brina stated that copyright protects original works of authorship, meaning that claims in works of the visual arts must contain a sufficient amount of pictorial, graphic, or sculptural authorship. He also noted that copyright does not protect familiar symbols or designs, words and short phrases, ideas, concepts, or mere variations of typographic ornamentation, lettering or coloring, citing 17 U.S.C. § 102(b) and 37 C.F.R. § 202.1. He further stated that neither the aesthetic appeal, nor commercial value of a work, nor the amount of time and effort expended to create the work were factors to be considered under the copyright law. In applying these principles,

Mr. Brina concluded that the work could not support a copyright claim. Letter from Brina to Beck of 7/05/2011.

B. First request for reconsideration

By letter dated August 1, 2011, you filed a request for reconsideration of the refusal to register "Braille," asserting that the work qualifies as an original work of authorship which should be accorded copyright protection. Letter from Beck to Copyright Office of 8/1/2011. You began by clarifying that the work in issue was a three-dimensional wall-covering used for decoration. The design consisted of braille lettering, with three braille letters on the top, and three on the bottom. Viewed at one angle, the top row contained braille symbols for "n," "z," and "er," and on the bottom row the braille symbols designated "of," "ed," and "z." Rotated 180 degrees, the symbols represented "ed," "z," and "er" at the top, and "of," "ed," and "the" at the bottom.

You acknowledged that the braille characters themselves were not copyrightable. However, you contended that the authors' particular arrangement of the braille characters displayed sufficient originality and creativity to support copyright protection. Citing *Feist Publications, Inc. v. Rural Telephone Service Co.,* 499 U.S. 340, 445 (1991) and 1 M. Nimmer & D. Nimmer, *Nimmer on Copyright* §§ 2.01[A] & [B] (1990), you argued that the test for originality merely required that the work was independently created by the author and possessed at least some minimal degree of creativity. Citing several additional cases, you asserted that while the component parts were not copyrightable by themselves, the work was transformed into a copyrightable work by a creative and original arrangement with the requisite level of creativity.

After reviewing your first request for reconsideration, Attorney-Advisor Stephanie Mason responded in a letter dated December 12, 2011. She upheld the refusal to register the work on the grounds that it did not contain a sufficient amount of original and creative artistic, graphic or sculptural authorship to support a copyright registration. Letter from Mason to Beck of 12/12/2011 at 1.

Ms. Mason stated that a work must not only be original, but must possess more than a *de minimis* quantum of creativity, citing *Feist*, 499 U.S. 340. She elaborated that originality, as interpreted by the courts, meant that the authorship must constitute more than a trivial variation of public domain elements, citing *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951). *Id.* at 1. She stated that in applying that standard, the Copyright Office examines a work to determine whether it contains any elements, either alone or in combination, on which a copyright can be based. She added that because the Copyright Office does not make aesthetic judgments: the attractiveness of a design; its

uniqueness; its visual effect or appearance; the time, effort, and expense it took to create; or its commercial success in the marketplace are not factors in the examining process. *Id.* at 1. The question, she said, is whether there is a *sufficient* amount of original and creative authorship within the meaning of the copyright law and settled case law. *Id.* at 1.

Ms. Mason described the work in question as a single-color 3-dimensional graphic design consisting of six oversized representations of braille characters. She stated that while oversized, the six characters conformed to the expected appearance of braille characters in that they were formed by a series of raised semi-circles. The six characters were arranged in a basic three-over-three grid. She repeated your acknowledgment that the braille characters were not copyrightable, and added that short phrases, words, and letters also were not copyrightable. She clarified that the Office viewed the particular placement and arrangement of elements as noncopyrightable layout. The resulting work, she concluded, was *de minimis*, consisting of a simple combination of noncopyrightable characters in a rather simple configuration, citing *Compendium II, Copyright Office Practices* § 503.02(a) ("*Compendium II*"). *Id.* at 2.

Ms. Mason stated that the above principles have been confirmed by several judicial decisions, including *John Muller & Co. v. New York Arrows Soccer Team, Inc.*, 802 F.2d 989 (8th Cir. 1986) (a logo consisting of four angled lines forming an arrow, with the word "arrows" in cursive script below, lacked the minimal required creativity to support registration); *Forstmann Woolen Co. v. J. W. Mays, Inc.*, 89 F. Supp. 964 (E.D.N.Y. 1950) (label with words "Forstmann 100% Virgin Wool" interwoven with three fleur-de-lis held not copyrightable); *Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q.2d 1074 (D.D.C. 1991) (upholding refusal to register "gothic" pattern composed of simple variations and combinations of geometric designs due to insufficient creative authorship to merit copyright protection); and *Jon Woods Fashions, Inc. v. Curran*, 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988) (upholding refusal to register a design consisting of two-inch stripes with small grid squares superimposed upon the strips).

Ms. Mason agreed that it is true that even a slight amount of creativity will suffice to obtain copyright protection. However, she went on to cite *Nimmer* § 2.01(B), which states that "there remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright." *Id.* at 2. In explaining this conclusion, she stated that the Copyright Office believed that even the low requisite level of creativity required by *Feist* was not met by six braille characters arranged in a basic configuration.

Ms. Mason concluded that while other choices could have been made in designing this particular work, it is not the possibility of choices that determines copyrightability. Instead, the issue is whether the resulting expression contains copyrightable authorship. In this instance, she concluded that six oversized braille characters in a basic configuration

simply did not contain any authorship that would support a copyright registration. *Id.* at 3.

C. Second request for reconsideration

In a letter dated February 13, 2012, you requested that the Office reconsider its refusal to register the copyright claim in this Work. Letter from Beck to Review Board of 2/13/2012, at 1. You argue that you believe that this work is an original work of authorship which deserves copyright protection. *Id.* at 1.

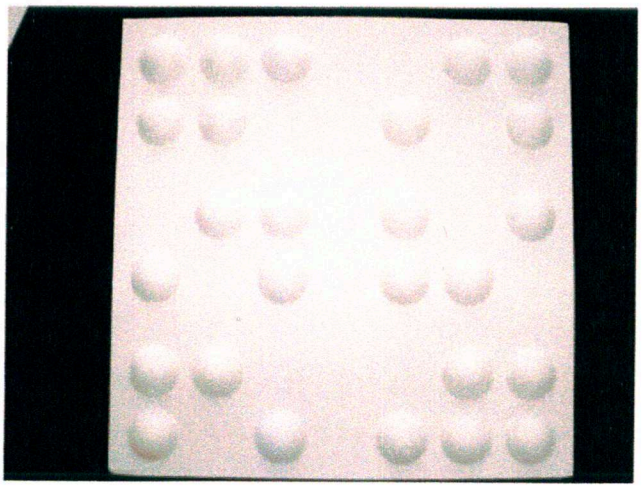
You revise your description of the arrangement by pointing out what you claim is the creative aspect of the arrangement of dots. You characterize the four-dot arrangement in each upper corner as a mirror image of the four-dot arrangement in the lower opposite corner.

Countering the assertion of Ms. Mason that the arrangement of the braille characters was "arranged in a basic configuration," you cite to the iconic sculpture of "Love" by Robert Indiana. You claim there can be no doubt as to the copyrightability of the sculpture, and your client's work embodies at least a modicum of artistic effect by selecting and arranging the characters in inverted orientations.

II. DECISION

A. Description of the work

The work at issue in this reconsideration is a wall covering consisting of six enlarged braille images. Each character appearing in a corner is a reversed image of the character appearing diagonally to it. A reproduction of the design appears below:



B. The Legal Framework

1. Copyrightable Subject Matter

In reviewing requests for second reconsideration, the Review Board conducts a de novo review which takes a fresh look at issues concerning whether the copyright claim at issue can be registered. The Board studies carefully the deposit of the work, as well as the arguments raised by the applicant and two staff members who previously considered registration of the claim.

In your letter for second reconsideration, you state that your client's work embodies at least a modicum of artistic effect by selecting and arranging the six braille characters. For the purposes of this response, the Review Board will discuss the arrangement issue after an analysis of the creativity standards applying to works of the graphic arts.

All copyrightable works, be they graphic designs or otherwise, must also qualify as "original works of authorship." 17 U.S.C. § 102(a). As used with respect to copyright, the term "original" consists of two components: independent creation and sufficient creativity. *Feist Publications, Inc. v. Rural Telephone Service 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. The Copyright Office accepts at face value your assertion that your client, Inhabit Inc., independently created a wall-covering entitled "Braille." Therefore, the first component of the word "original" is not at issue in the analysis set forth herein. Second, the work must possess sufficient creativity. For the reasons set forth below, the Board has determined that the subject wall-covering fails to embody the requisite amount of creativity, and therefore it is not entitled to copyright registration.

2. Creativity requirement

In determining whether a work embodies a sufficient amount of creativity to sustain a copyright claim, the Board adheres to the standard set forth in *Feist*, where the Supreme Court held that only a modicum of creativity is necessary to support a copyright. *Feist*, 499 U.S. 340. However, the Court also ruled in *Feist* that some works (such as the telephone directory at issue in that case) fail to meet the standard. It 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," and 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 363; *see also* 37 C.F.R. § 202.10(a) ("In order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form."); 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.01[B] (2002) ("[T]here remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright.").

Moreover, making simple alterations to otherwise standard shapes or familiar designs will not inject the requisite level of creativity. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102-03 (2d Cir. 1951) (what "is needed to satisfy both the Constitution and the statute is that the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own'"); *Compendium II* § 503.02(a) ("[Registration cannot be based upon] a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations.").

Even prior to the *Feist* decision, the Office recognized the modest, but requisite, level of creativity necessary to sustain a copyright claim. As *Compendium II* states, "Works that lack even a certain minimum amount of original authorship are not copyrightable." *Compendium II* §202.02(a). With respect to pictorial, graphic and sculptural works, *Compendium II* states that a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." *Compendium II* § 503.02(a).

In implementing this threshold, the Office and courts have consistently found that standard designs, figures and geometric shapes, such as individual braille symbols, are not sufficiently creative to sustain a copyright claim. *Compendium II* § 503.02(a) ("[R]egistration cannot be based upon the simplicity of standard ornamentation . . . . Similarly, it is not possible to copyright common geometric figures or shapes . . . ."); *id.* § 202.02(j) ("Familiar symbols or designs . . . or coloring, are not copyrightable."); *see also id.* § 503.03(b); 37 C.F.R. § 202.1(a).

In your letter for second reconsideration, you argue that the pairs of four or five-dot arrangements are presented as inverted mirror images, and as such, constitute more than simply a lineup of braille characters. Letter from Beck to Review Board of 2/13/2012, at 2. Copyright Office regulation 202.1(a) precludes copyright registration of "mere variations of typographic ornamentation, lettering or coloring." 37 C.F.R § 202.1(a). This regulation was upheld in *Coach, Inc. v. Peters*, 386 F. Supp. 2d 495 (S.D.N.Y. 2005), in a case involving the Register's decision to refuse registration of a handbag designer's fabric pattern consisting of variations and arrangements of the letter "C." The court in that case stated as follows:

> Having determined that the works were essentially arrangements of the letter "C," [the Copyright Office] noted that letters, mere variations of letters, and familiar symbols can not be copyrighted. . . . [The Copyright Office] cited a number of cases which held that simple arrangements of such items are similarly uncopyrightable. *See, e.g., Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 113 L. Ed. 2d 358, 111 S.Ct. 1282 (1991); *John Muller & Co. v. N.Y. Arrows Soccer Team, Inc.*, 802 F.2d 989 (8th Cir. 1986); *The Homer Laughlin China Co. v. Oman*, 1991 U.S. Dist. LEXIS 10680; *Jon*

> *Woods Fashions, Inc. v. Curran*, 1988 U.S. Dist. LEXIS 3319, 1988 WL 38585; *Magic Mktg., Inc. v. Mailing Servs. of Pittsburgh, Inc.*, 634 F. Supp. 769 (W.D. Pa. 1986); *Forstmann Woolen Co. v. J.W. Mays, Inc.*, 89 F. Supp. 964 (E.D.N.Y. 1950).
>
> Plaintiffs fail to argue persuasively that [the Copyright Office] incorrectly relied on these cases, much less that this reliance was so improper as to amount to an abuse of discretion.

Id. at 498-99.

All of the above cases cited by the Southern District of New York involved works which in their simplicity were comparable to the "Braille" wall covering. These works included a logo consisting of four angled lines forming an arrow, with the word "arrows" in cursive script below, (*John Muller*); a chinaware design pattern composed of simple variations or combinations of geometric designs (*Homer Laughlin China Co.*); and a fabric design consisting of striped cloth over which a grid of 3/16-inch squares was superimposed (*Jon Woods Fashions*). To this list could have been added *Tompkins Graphics, Inc. v. Zipatone, Inc.*, 222 U.S.P.Q. 49 (E.D. Pa. 1983) ("[B]asic geometric shapes have long been in the public domain and therefore cannot be regulated by copyrights."); *Past Pluto Prods. Corp. v. Dana*, 627 F. Supp. 1435 (S.D.N.Y. 1986) (a hat entitled "Crown of Liberty" consisting of seven identical, evenly-spaced radiating foam spikes); *Bailie v. Fisher*, 258 F.2d 425 (D.C. Cir. 1958) (a cardboard star with two flaps which, when folded back, enabled it to serve as a stand for a display); and *Banzai, Inc. v. Broder Bros.*, 91 U.S.P.Q.2d 1062 (E.D. Pa. 2009) (tie-dye t-shirts).

3. Compilation, selection, and arrangement.

In your letter for second reconsideration, you assert that your client's work is copyrightable "because the authors' particular *arrangement* of braille characters display sufficient originality and creativity to support protection." You also claim that the "authors' expressive choice of braille symbols for the artistic patterns they create, rather than for the meaning of the symbols (which amounts to nonsense), evinces sufficient creativity and originality to be considered a work of authorship." Letter from Beck to Review Board of 2/13/2012, at 2-3. It is true that some combinations of common or standard shapes or other non-protectable elements can embody sufficient creativity with respect to how the elements are combined or arranged to support a copyright. *See Feist*, 499 U.S. at 358 (the Copyright Act "implies that some 'ways' [of compiling or arranging uncopyrightable material] will trigger copyright, but that others will not"; determination of copyright rests on creativity of coordination or arrangement). However, merely combining non-protectable elements does not automatically establish creativity where the combination or arrangement itself is

simplistic. The numerous cases already cited in the preceding section discussing creativity illustrate this point. *Coach, Inc. v. Peters* affirms the conclusion of the Copyright Office that "not simply that the letter 'C' is not copyrightable, but that 'the elements embodied in this work, individually, *and in their particular combination and arrangement*, simply do not contain a sufficient amount of original and creative authorship to be copyrightable.'" 386 F. Supp. 2d at 499 (quoting Administrative R. of Coach 1, Ex. 3).

The Copyright Office follows the principle that works should be considered as a whole. Therefore, the Board agrees that it is possible for the selection and combination of commonplace elements or simple designs to rise to the level of copyrightability, even though individual elements in a work, taken alone, would not be copyrightable. Works based on public domain elements may be copyrightable if there is some original aspect in their selection, arrangement or modification that reflects choice and authorial discretion and that is not so obvious or so minor that the "creative spark is utterly lacking or so trivial as to be nonexistent." *Feist*, 499 U.S. at 359; *see also* 17 U.S.C. § 101 (definitions of "compilation" and "derivative work"). It is the opinion of the Review Board that a basic three-over-three grid consisting of braille letters fails to meet this test.

The Review Board additionally notes that in theory an author creating any work has an unlimited choice of alternatives. However, it is not the possibility of choices that determines copyrightability, but whether the resulting expression contains copyrightable authorship. *See Florabelle Flowers, Inc. v. Joseph Markovits, Inc.*, 296 F. Supp. 304, 307 (S.D.N.Y. 1968) (an "aggregation of well known components [that] comprise an unoriginal whole" cannot support a claim to copyright). The fact that an author had many choices does not necessarily mean that the choices the author made meet the modest creativity requirement of the copyright law. The choices in this particular design are relatively few, and the arrangement is commonplace.

Another case, *Darden v. Peters*, 402. F. Supp.2d 638 (E.D.N.C. 2006), *aff'd,* 488 F.3d 277 (4th Cir. 2007), specifically dealt with the arguments you raise in your letter for second reconsideration on the issue of selection and arrangement of standard elements. *Darden* involved a copyright claim in a website providing an online referral service allowing consumers to locate real estate appraisers throughout the United States. The copyright claimant used preexisting census maps, and asserted copyright protection in the "overall design, his special combination of font and color selection and arrangement of geographic locations, such as counties, visual effects such as relief, shadowing, and shading, labeling, and call-outs." 488 F.3d at 281. The courts affirmed the refusal of the Copyright Office to register the copyright claim.

In *Satava v. Lowry*, 323 F.3d 805 (9th Cir. 2003), the court acknowledged that an original combination of elements, each of which individually was unoriginal, could be copyrightable if that combination as an entirety met the minimal standards of creativity.

However, the court explained further that not "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." 323 F.3d at 811.

In other instances where copyright claimants attempted to secure copyright protection in the positioning of a few public domain shapes, the courts have consistently found a lack of copyrightability. In *Lamps Plus, Inc. v. Dolan*, 345 F.3d 1140 (9th Cir. 2003), the Ninth Circuit held that the mechanical combination of four preexisting ceiling lamp elements did not constitute original authorship. Likewise, in *DBC of New York, Inc. v. Merit Diamond Corp.*, 768 F. Supp. 414, 415 (S.D.N.Y. 1991), the court held: "DBC's gestalt theory that the whole is greater than the sum of its parts is rejected by the great weight of evidence indicating that these two rings are, on whole, not exceptional, original, or unique."

Finally, in arguing against the assertion that the six oversized braille characters were arranged in a basic configuration, your letter of second reconsideration cites to the iconic "Love" statue by Robert Indiana. Beck Letter of 2/13/2012 at 2. This argument does not elevate your client's basic configuration of six braille symbols into a work possessing sufficient originality for copyright protection. Indiana's more complex three-dimensional sculptural work is not comparable to your client's wall-covering design. In the view of the Review Board, neither the braille symbols themselves nor the basic configuration in which they are arranged can support a copyright.

III. CONCLUSION

The Board has reviewed the subject work as to its individual elements as well as the work as a whole and has determined that it cannot be registered because it does not contain a sufficient amount of original and creative authorship to support a copyright registration. Accordingly, for the reasons stated above, the Review Board affirms the refusal to register the work. This decision constitutes final agency action.

Sincerely,

Jacqueline C. Charlesworth
Senior Counsel to the Register
for the Review Board
United States Copyright Office