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

September 24, 2013

Hayes Bostock & Cronin LLC
Attn: Paul J. Hayes
300 Brickstone Square, 9th Floor
Andover, MA 01810

Re: Drop Comfort Assessment
Correspondence ID: 1-EJCW7H

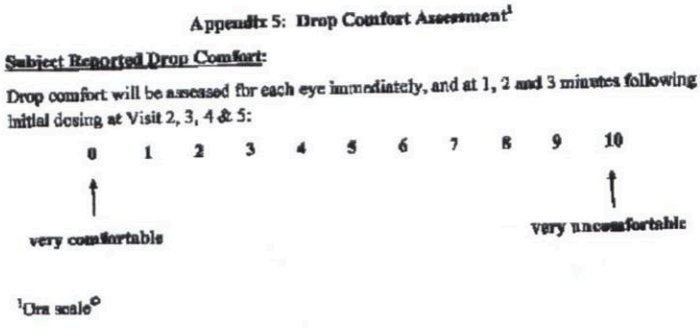
Dear Mr. Hayes:

The Review Board of the United States Copyright Office (the "Board") is in receipt of your second request for reconsideration of the Registration Program's refusal to register the work entitled: *Drop Comfort Assessment*. You submitted this request on behalf of your client, Ora, Inc., on April 12, 2013.

The Board has examined the application, the deposit copies, and all of the correspondence in this case. After careful consideration of the arguments in your second request for reconsideration, the Board affirms the Registration Program's denial of registration of this copyright claim. The Board's reasoning is set forth below. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action on this matter.

I. DESCRIPTION OF THE WORK

Drop Comfort Assessment (the "Work") is a chart designed to determine the safety and tolerability of new and existing eye drops. The Applicant's claim of copyright is directed to the Work's textual aspects. Namely, the sentence "Drop comfort will be assessed for each eye immediately, and at 1, 2, and 3 minutes following initial dosing at Visit 2, 3, 4, & 5:", the 0-10 scale that follows the sentence, and the phrases "vey comfortable" and "very uncomfortable" that appear beneath the scale. The below image is a photographic reproduction of the Work from the deposit materials:


Appendix 5: Drop Comfort Assessment[1]

Subject Reported Drop Comfort:

Drop comfort will be assessed for each eye immediately, and at 1, 2 and 3 minutes following initial dosing at Visit 2, 3, 4 & 5:

0 1 2 3 4 5 6 7 8 9 10

very comfortable

very uncomfortable

[1]Ora scale©

II. ADMINISTRATIVE RECORD

On August 3, 2012, the United States Copyright Office (the "Office") issued a letter notifying Ora, Inc. (the "Applicant") that it had refused registration of the above mentioned Work. *Letter from Registration Department to Dean Bostock* (August 3, 2012). In its letter, the Office stated that it could not register the Work because "the material deposited represents less than the required minimum amount of original authorship on which to base a claim." *Id.*

In a letter dated October 5, 2012, your firm requested that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusal to register the Work. *Letter from Dean Bostock to Copyright RAC Division* (October 5, 2012) ("First Request"). Upon reviewing the Work in light of the points raised in the letter, the Office concluded that the Work does not contain a sufficient amount of original and creative literary authorship and again refused registration. *Letter from Attorney-Advisor, Stephanie Mason, to Dean Bostock* (January 17, 2013).

Finally, in a letter dated April 12, 2013, you 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 Paul Hayes to Copyright R&P Division* (date) ("Second Request"). In arguing that the Office improperly refused registration, you claim the Work includes at least the minimum amount of creativity required to support registration under the standard for originality set forth in *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). *Second Request* at 2. In support of this argument, you claim that the author's selection and arrangement of the Works' constituent elements possess a sufficient amount of creative authorship to warrant registration under the Copyright Act.

You also argue that the Work should be registered because, despite being "small in quantity," it "has a significant quality associated with its use." *Id.* (referencing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564-65 (1985) Specifically, you state "the Work has proven over the years since its creation to have provided great value to [the Applicant] in assessing the safety, efficacy, and tolerability of various experimental and existing eye drops." *Id.* at 2.

III. DECISION

A. *The Legal Framework*

All copyrightable works must qualify as "original works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a). As used with respect to copyright, the term "original" consists of two components: independent creation and sufficient creativity. *See Feist*, 499 U.S. at 345. 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.* While only a modicum of creativity is necessary to establish the requisite level, the Supreme Court has ruled that some works (such as the telephone directory at issue in *Feist*) fail to meet this 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 nonexistent." *Id.* at 359.

The Office's regulations implement the long-standing requirements of originality and creativity set forth in the law and, subsequently, the *Feist* decision. *See* 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"); *see also* 37 C.F.R. § 202.10(a) (stating "[i]n order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form").

Of course, 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 grade. *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"). Ultimately, the determination of copyrightability in the combination of standard design elements rests 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.D.C. 1989).

To be clear, the mere simplistic arrangement of unprotectable elements does not automatically establish the level of creativity necessary to warrant protection. For example, the Eighth Circuit upheld the Copyright Office's refusal to register a simple logo consisting of four angled lines which formed an arrow and the word "Arrows" in a cursive script below the arrow. *See John Muller & Co., Inc. v. NY Arrows Soccer Team, Inc. et. al.*, 802 F.2d 989 (8th Cir. 1986). Likewise, the Ninth Circuit held that a glass sculpture of a jellyfish that consisted of elements including clear glass, an oblong shroud, bright colors, proportion, 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 court's language in *Satava* is particularly instructional:

> [i]t 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) (emphasis in original).

Finally, Copyright Office Registration Specialists (and the Board, as well) do not make aesthetic judgments in evaluating the copyrightability of particular works. They are not

influenced by the attractiveness of a work or design, the espoused intentions of the author, the design's uniqueness, its visual effect or appearance, its symbolism, the time and effort it took to create, or its commercial success in the marketplace. *See* 17 U.S.C. § 102(b); *see also Bleistein v. Donaldson*, 188 U.S. 239 (1903). The fact that a work consists of a unique or distinctive shape or style for purposes of aesthetic appeal does not automatically mean that the work, as a whole, constitutes a copyrightable "work of art."

B. *Analysis of the Work*

After carefully examining the Work, and applying the legal standards discussed above, the Board finds that *Drop Comfort Assessment* fails to satisfy the requirement of creative authorship.

First, the Board finds that none of the Work's constituent elements, considered individually, are sufficiently creative to warrant protection. As noted, 37 C.F.R. § 202.1(a), identifies certain elements that are not copyrightable. These elements include: "[w]ords and short phrases such as names, titles, slogans; familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering, or coloring." *Id.* Here, the textual aspects of the Work includes the following elements: (1) the sentence "[d]rop comfort will be assessed for each eye immediately, and at 1, 2, and 3 minutes following initial dosing at Visit 2, 3, 4, & 5"; (2) the "0-10" scale that follows the sentence; and, (3) the phrases "very comfortable" and "very uncomfortable" that appear beneath the scale. Consistent with the above regulations, the descriptors "very comfortable" and "very uncomfortable" are short phrases that are prohibited from registration. *See Racenstein & Co., Inc. v. Wallace dba ABC Window Cleaning Supply*, 51 U.S.P.Q. 2d 1031 (S.D.N.Y. 1999) (indicating a word or short phrase, alone, generally cannot support a copyright claim). Likewise, the "0-10" scale is a common, public domain concept that is not eligible for copyright protection. *See* 37 C.F.R. § 202.1(a) (prohibiting the registration of basic symbols or designs). Regarding the short sentence, we find that this basic, explanatory statement is simply too *de minimis* to warrant copyright protection as a textual work. Indeed, it is well settled that such ordinary, explanatory statements or instructions are ineligible for registration under the Copyright Act. *See, e.g., Magic Mktg., Inc. v. Mailing Servs. of Pittsburgh, Inc.*, 643 F. Supp. 769, 772 (W.D. Pa. 1986) (stating expressions communicating an idea which may only be conveyed in a more or less stereotyped manner are not copyrightable); *and see Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F.2d 541 (2d Cir. 1959) (indicating instructions, such as the serving directions on a frozen dessert package, are not copyrightable). Accordingly, we conclude that none of the Work's constituent elements qualify for registration under the Copyright Act.

Second, the Board finds that the Work, considered as a whole, fails to meet the creativity threshold set forth in *Feist*. 499 U.S at 359. As explained, the Board accepts the principle that combinations of unprotectable elements may be eligible for copyright registration. However, in order to be accepted, such combinations must contain some distinguishable variation in the selection, coordination, or arrangement of their elements that is not so obvious or minor that the "creative spark is utterly lacking or so trivial as to be nonexistent." *Id.*; *see also Atari Games,* 888 F.2d at 883 (finding a work should be viewed in its entirety, with individual

uncopyrightable elements judged not separately, but in their overall interrelatedness within the work as a whole). Viewed as a whole, the textual aspects of the Work consists of the simple arrangement of a short, instructive sentence, followed by an ordinary, unprotectable "0-10" scale, followed by two basic, short phrases. This simple configuration of unprotectable textual elements is, at best, *de minimis*, and fails to meet the threshold for copyrightable authorship. *Feist,* 499 U.S at 359; *see also Atari Games,* 888 F.2d at 883. Accordingly, we conclude that the Work's combined textual aspects, as a whole, lack the requisite "creative spark" necessary for registration. *Feist,* 499 U.S at 359; *Satava*, 323 F.3d at 811.

Finally, your assertions that the Work "has a significant quality associated with its use" and that it "has proven over the years since its creation to have provided great value to [the Applicant] in assessing the safety, efficacy and tolerability of various experimental and existing eye drops" do not add to your claim of sufficient creativity. *Second Request* at 2. As discussed above, the Board does not assess the time and effort it took to create work or a work's commercial success in the marketplace in determining whether the work contains the requisite minimal amount of original authorship necessary for registration. *See* 17 U.S.C. § 102(b); *see also Bleistein*, 188 U.S. 239. Thus, even if accurate, the mere fact that the Applicant has derived "great value" from the Work would not qualify the Work, as a whole, as copyrightable. *Id.*

In sum, the Board finds that both the individual textual elements that comprise the Work, as well as the selection, organization, and arrangement of those textual elements lack the sufficient level of creativity to make the Work eligible for registration under the Copyright Act.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the work entitled: *Drop Comfort Assessment*. This decision constitutes final agency action on this matter. 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

BY: _____
William J. Roberts, Jr.
Copyright Office Review Board