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

July 16, 2013

Browne, Woods, George, LLP
Attn: Keith Wesley
2121 Avenue of the Stars, Suite 2400
Los Angeles, California 90067

Re: Tokidoki Heart and Crossbones Design
Correspondence ID: 1-5R95II

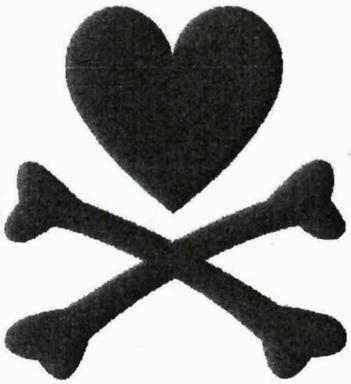
Dear Mr. Wesley:

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: *Tokidoki Heart and Crossbones* ("Work"). You submitted this request on behalf of your client, Tokidoki, LLC., on December 3, 2010. I apologize for the lengthy delay in the issuance of this determination. After periods of inaction, staff departures, and budgetary restrictions, the Register of Copyrights has appointed a new Review Board and we are proceeding with second appeals of registration refusals as expeditiously as possible.

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

The Work consists of a common heart shape underscored by a common crossbones shape. The below image is a photographic reproduction of the Work from the deposit materials:



II. ADMINISTRATIVE RECORD

On March 5, 2010, the Copyright Office (the "Office") issued a letter notifying Tokidoki, LLC. (the "Applicant") that it had refused registration of the above mentioned Work. *Letter from Registration Specialist Larisa Pastuchiv to Jenny Wu* (March 5, 2010). In its letter, the Office indicated that it could not register the Work because it "lacks the authorship necessary to support copyright." *Id.*

In a letter dated April 23, 2010, the Applicant requested that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusal to register the Work. *Letter from Jenny Wu to Copyright RAC Division* (April 23, 2010). The Applicant's letter set forth the reasons it believed the Office improperly refused registration. *Id.* 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 artistic authorship in either the treatment or arrangement of its elements upon which to support a copyright registration" and again refused registration. *Letter from Attorney-Advisor Virginia Giroux-Rollow to Jenny Wu* (September 8, 2010) at 1.

Finally, in a letter dated December 3, 2010, 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 Keith Wesley to Copyright R&P Division* (December 3, 2010). In arguing that the Work should be registered, 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). *Letter from Keith Wesley to Copyright R&P Division* (December 3, 2010). In support of this argument, you claim that the Applicant carefully selected and combined the individual elements that comprise the Work to give the Work a meaning that is not present when the elements are evaluated independently. You also assert that the Work is a "counterintuitive and unique design" that had not previously been created in "the thousands of years that humans have been creating art." *Id.* at 3. Finally, you claim that the Office erred by improperly concluding that a work must possess a "per se minimum number of elements" (greater than two) in order to be acceptable for copyright registration. *Id.* at 2.

In addition to *Feist*, your argument references the following cases: *Mattel, Inc. v. Goldberger Doll Mfg. Co.*, 365 F.3d 133 (2d. Cir. 2004); *Folio Impressions, Inc. v. Byer Cal.*, 937 F.2d 759 (2d. Cir. 1991); *Atari Games Corp. v. Oman*, 888 F.2d 878 (D.C. Cir. 1989); *Tenn. Fabricating Co. v. Moultrie Mfg. Co.*, 421 F.2d 279 (5th Cir. 1970); and, *Concord Fabrics, Inc. v. Marcus Bros. Textile Corp.*, 409 F.2d 1315 (2d. Cir. 1969), among others. *Letter from Keith Wesley to Copyright R&P Division* (December 3, 2010) at 4 nn.2, 3.

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. However, 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 was done in such a way as to result in copyrightable authorship. *Id.*; *see also* 37 C.F.R. §§ 202.1(a), 202.10(a).

To be clear, the mere simplistic arrangement of non-protectable 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.*, 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 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 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 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 the Work fails to satisfy the requirement of creativity.

The Board accepts the principle that combinations of geometric shapes may be eligible for copyright protection. However, in order to be accepted for registration, 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." *Feist,* 499 U.S at 359; *see also Atari Games,* 888 F.2d at 883. Here, the Work consists of the simple combination of a common heart shape with a common crossbones shape. The Applicant has arranged these shapes so that the crossbones shape is centered directly below the heart shape. This basic pairing of two common shapes lacks the requisite "creative spark" for copyrightability and is therefore unregisterable. *See Feist*, 499 U.S. at 359; *see also* 37 C.F.R. §§ 202.1(a), 202.10(a).

Regarding your assertion that there is no *per se* number of elements that a work must possess to be a product of creative authorship, we agree that creativity cannot be measured solely by tallying a work's constituent elements. The Work, however, is not being denied registration based on the sole fact that it contains only two elements; it is being denied registration because the Applicant's arrangement of those two elements is, at best, *de minimis*, and does not contain a sufficient amount of creativity to warrant copyright protection. *See Feist,* 499 U.S at 363. Indeed, the various cases you cite in support of your argument that a creativity analysis should not be merely quantitative, also generally support the principle that there can be no copyrightable authorship in *de minimis* arrangements of common elements. *See Letter from Keith Wesley to Copyright R&P Division* (December 3, 2010) *at* 4 nn.2, 3..

Finally, your assertions that the Applicant's arrangement of the heart and crossbones elements is "counterintuitive" and unique in the course of human history, do not add to your claim of sufficient creativity. *Id. at* 3. Nor does the Applicant's original declaration that the Work "represents a world of opposites, where cute characters and images are infused with punk rock qualities and style." As discussed above, the Board does not assess the attractiveness of a design, the espoused intentions of the author, or the design's uniqueness in determining whether a work contains the requisite minimal amount of original authorship necessary for registration. Thus, even if accurate, the mere fact that the Applicant's Work consists of a unique, aesthetically appealing arrangement of familiar shapes would not qualify the Work, as a whole, as copyrightable.

In sum, the Board finds that the Applicant's selection and arrangement of the common heart and crossbones elements lack a sufficient level of creativity to make the Work registerable under the Copyright Act.

IV. CONCLUSION

For the reasons stated herein, the United States Copyright Office Review Board affirms the refusal to register the work entitled, *Tokidoki Heart and Crossbones*. 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