United States Copyright Office
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December 9, 2015

Tanya Marie Curcio, Esq.
Vorys, Sater, Seymour and Pease LLP
1909 K Street NW, Suite 900
Washington, D.C. 20006-1152

RE: Second Request for Reconsideration for Refusal to Register W & S Logo
Correspondence ID: 1-M7YRMI

Dear Ms. Curcio:

The Review Board of the United States Copyright Office (the "Board") has examined The Western and Southern Life Insurance Company's ("W & S's") second request for reconsideration of the Registration Program's refusal to register a two-dimensional artwork copyright claim in the work titled "W & S Logo." After reviewing the application, deposit copy, and relevant correspondence in the case, 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 W & S Logo (the "Work") is a two-dimensional, graphic logo design. The design consists of a large circle that is blue in coloring. Towards the top of the circle, the blue coloring takes on a lighter blue shade. Positioned along the circle's edge is a thin white circular band, leaving a matching blue circular band to mark the edge of the shape. The letter "W" and a combination of the letter "S" and an ampersand symbol are centered within the circle. The letter "W" and the combination of the letter "S" and ampersand symbol are white in coloring. The letters "W" and "S" are roughly double the size of the ampersand symbol.

A photographic reproduction of the Work is set forth below:



II. ADMINISTRATIVE RECORD

On March 27, 2014, W & S filed an application to register a copyright claim in the Work. In an April 8, 2014 letter, a Copyright Office registration specialist refused to register the Work, finding that it "lacks the authorship necessary to support a copyright claim." Letter from Robin Jones, Copyright Office, to Tanya Marie Curcio, Vorys, Sater, Seymour and Pease LLP (Apr. 8, 2014).

In a July 7, 2014 letter, W & S requested that the Office reconsider its initial refusal to register the Work. Letter from Tanya Marie Curcio, Vorys, Sater, Seymour and Pease LLP, to U.S. Copyright Office (July 7, 2014) ("First Request"). After reviewing the Work in light of the points raised in the First Request, the Office reevaluated the claims and again concluded that the Work does not contain a sufficient amount of original and creative artistic or graphic authorship to support a copyright registration. Letter from Stephanie Mason, Copyright Office, to Tanya Marie Curcio, Vorys, Sater, Seymour and Pease LLP (Nov. 6, 2014).

In a letter dated February 5, 2015, W & S 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 Tanya Marie Curcio, Vorys, Sater, Seymour and Pease LLP, to U.S. Copyright Office (Feb. 5, 2015) ("Second Request"). In that letter, W & S disagreed with the Office's conclusion that the Work, as a whole, does not include the minimum amount of creativity required to support registration under the Copyright Act. Specifically, W & S claimed that the selection and arrangement of the Work's constituent elements have a sufficient amount of creative authorship to warrant copyright protection and that "[t]he thoughtful process undertaken to create the Work supports a finding of copyrightability because it demonstrates the requisite modicum of creativity needed for copyrightability." *Id.* at 4. In support of its claim, W & S submitted a sworn statement from Michael J. Laatsch, Vice President, Public Relations of Western & Southern Financial Group, Inc., asserting that "[e]very design choice [W & S] made in connection with the Work was a deliberate and thoughtful attempt to evoke and reinforce the [W & S] brand promise of leadership, strength, stability and forward-thinking." *Id.*, Ex. A at ¶ 8.

III. DECISION

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: (1) independent creation by the author, *i.e.*, the work is not copied from another work; and (2) sufficient creativity. *See Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). Regarding the threshold for creativity, while only a modicum of creativity is required, the Supreme Court has ruled that some works (such as the alphabetized telephone directory at issue in *Feist*) fail to meet even this low bar. In that case, 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 opined that there is 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 longstanding requirements of originality and creativity that were affirmed in the *Feist* decision. *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"); 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").

Some combinations of common or standard design elements may have enough 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 (explaining 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.*

Accordingly, a mere simplistic arrangement of non-protectable elements will 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 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 (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. at 811 (internal citations omitted) (emphasis original).

In this regard, please note that the Copyright Office registration specialists (and the Board) do not make aesthetic judgments in evaluating the copyrightability of particular works. The Office does not consider the attractiveness of a design; the espoused intentions of the author; the design's uniqueness; its visual impact or symbolism; the time and effort it took to create the design; or the commercial success of the design in the marketplace. *See* 17 U.S.C. § 102(b); *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903). The fact that a work has aesthetic appeal does not 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 it fails to satisfy the requirement of creative authorship.

Here, it is undisputed that the Work's constituent elements—shapes, colors, letters, and a symbol—are not individually subject to copyright protection. It is true that public domain elements may satisfy the requirement for copyrightable authorship as a compilation if they are selected, coordinated, and arranged in a sufficiently creative manner. In this respect, the Copyright Office follows the principle that works should be judged in their entirety and not based solely on the protectability of individual elements within the work. *See Atari Games Corp. v. Oman*, 979 F.2d 242 (D.C. Cir. 1992). Works composed of public domain elements may be copyrightable, but only if there is some distinguishable element in their selection, coordination, and/or arrangement that reflects choice and authorial discretion and 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.

The Board finds that, viewed as a whole, the selection, coordination, and arrangement of the shapes, colors, letters, and symbol that comprise the Work are insufficient to render the Work original. *See id.* at 358. The Work consists of two letters, joined by an ampersand and centered in the middle of a bordered circle. As explained in the *Compendium of U.S. Copyright Office Practices*, neither "mere scripting or lettering, either with or without uncopyrightable ornamentation," nor "mere use of different fonts or functional colors, frames, or borders, either standing alone or in combination," satisfy the requirements for copyright registration. U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 913.1 (3d ed. 2014) ("COMPENDIUM (THIRD)"); *see also Coach* at 386 F. Supp. 2d at 498 (upholding the Office's determination that designs consisting of little more than "variations and arrangements of the letter 'C'" were not sufficient to warrant registration on grounds that "letters of the alphabet cannot be copyrighted" and "the mere arrangement of symbols and letters is not copyrightable"). Here, as noted, this basic combination of mere variations in typographic expression, a simple color scheme, and a standard color shading technique within a circular boarder is not only typical of logo designs but, considered as a whole, lacks the requisite amount of creativity in its selection, coordination and/or arrangement to warrant copyright protection. *See Feist*, 499 U.S. at 359; *see also* COMPENDIUM (THIRD) § 913.1 (explaining the types of logo designs that the Office typically refuses to register). Thus, we find that the level of creative authorship involved in this configuration of unprotectable elements is, at best, *de minimis*, and too trivial to merit copyright registration. *See Feist*, 499 U.S. at 359.

W & S contends that the selection and arrangement of the Work's elements demonstrate the "thoughtful process undertaken to create the Work," but the Board finds that this does not support a claim of sufficient creativity. Nor does W & S's assertion that the Work's design attempts to "evoke and reinforce the [W & S] brand promise of leadership, strength, stability and forward-thinking." These intangible attributes are not evident in the deposit itself and therefore cannot be examined in an objective manner. Moreover, as noted, the Board does not assess the time and effort it takes to create a design, the espoused intentions of the author, or the design's visual impact in determining whether the design 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. Accordingly, the fact that the Work is the fruit of involved deliberation and symbolic in nature does not qualify it for copyright protection.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the copyright claims in the Work. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action on this matter.

Maria A. Pallante
Register of Copyrights

BY: Catherine Rowland
Catherine Rowland
Member of the Review Board