



United States Copyright Office

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May 27, 2020

Heather Smith-Carra, Esq.
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Banner & Witcoff, Ltd.
1100 13th Street NW, Suite 1200
Washington, DC 20005

Re: Second Request for Reconsideration for Refusal to Register CD Projekt S.A. – Cyberpunk 2077; Correspondence ID: 1-3BQUMAW; SR#: 1-6857964571

Dear Ms. Smith-Carra and Mr. Dannenberg:

The Review Board of the United States Copyright Office (“Board”) has considered CD Projekt S.A.’s (“CDP’s”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the work titled “CD Projekt S.A. – Cyberpunk 2077” (“Work”). After reviewing the application, deposit copy, and relevant correspondence, 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 Work is a two-dimensional graphical artwork with stylized yellow letters with blue accents and stylized blue numerals, spelling the phrase “Cyberpunk 2077.” The Work also includes lines and circles in the blue accent color. The Work is depicted as follows:



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II. ADMINISTRATIVE RECORD

On August 16, 2018, CDP filed an application to register the Work. A Copyright Office Registration Specialist refused to register the claim for the Work, finding that it lacked sufficient authorship to support a copyright claim. Initial Letter Refusing Registration from U.S. Copyright Office, to Heather Smith-Carra, Banner & Witcoff, Ltd. 1 (Dec. 19, 2018).

CDP subsequently requested that the Office reconsider its initial refusal to register the Work. Letter from Heather Smith-Cara, Banner & Witcoff, Ltd., to U.S. Copyright Office 1 (Sept. 12, 2019). CDP contended that the Work met the low level of creativity enumerated by the Supreme Court. *Id.* at 1–2 (citing *Feist Publ'ns., Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991) and *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 252 (1903)). CDP asserted that the Work's details, including the contrast of colors and the arrangement of the letters and numbers, are sufficiently original and creative for registration. *Id.* at 2.

The Office, however, denied CDP's first request to reconsider the refusal to register. The Office assessed the Work's individual elements as well as the Work as a whole and concluded that it lacked the authorship necessary to support a copyright claim. First Refusal of Request for Reconsideration from the U.S. Copyright Office, to Heather Smith-Carra, Banner & Witcoff, Ltd. 1 (June 19, 2019). The Office observed that copyright cannot protect the Work's component elements, which consist of common and familiar shapes, words and short phrases, or minor variations thereof. *Id.* at 2–3 (citing 37 C.F.R. § 202.1(a)). While the Office agreed that some combinations of unprotectable elements could give rise to sufficient creativity for copyright registration, the combinations in the Work were insufficiently creative to support registration. *Id.* at 3.

CDP then submitted a second request for consideration reiterating their arguments that the Work contains sufficient authorship. Letter from Ross A. Dannenberg, Banner & Witcoff, Ltd., to U.S. Copyright Office 1 (Sept. 12, 2019) (“Second Request”). CDP's also compared the Work to the registered *American Airlines Flight Symbol* copyright claim, noting both that logos with minimal creativity can be protected by copyright and, similar to the *American Airlines Flight Symbol* application, the creative details in the Work's deposit copy may have been difficult to perceive. *Id.* at 4.

III. DISCUSSION

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: independent creation and sufficient creativity. *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.* Only a modicum of creativity is necessary, but the Supreme Court has ruled that some works (such as the alphabetized telephone directory at issue in *Feist*) fail to meet even this low threshold. *Id.* The Court observed that “[a]s a constitutional matter, copyright protects only those constituent

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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 virtually nonexistent.” *Id.* at 359.

The Office’s regulations implement the longstanding requirement of originality set forth in the Copyright Act. *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”); *id.* § 202.10(a) (stating “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 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 test. *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”). A determination of copyrightability in the combination of standard design elements depends 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.C. Cir. 1989).

A mere simplistic arrangement of non-protectable elements does 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 has held that a glass sculpture of a jellyfish consisting of clear glass, an oblong shroud, bright colors, 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 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. (internal citations omitted).

Finally, Copyright Office registration specialists (and the Board) do not make aesthetic judgments in evaluating the copyrightability of particular works. *See* U.S. COPYRIGHT OFFICE, COMPENDIUM OF THE U.S. COPYRIGHT OFFICE PRACTICES § 310.2 (3d ed. 2017) (“COMPENDIUM (THIRD)”). The attractiveness of a design, the espoused intentions of the author, the design’s visual effect or its symbolism, the time and effort it took to create, or the design’s commercial

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success in the marketplace are not factors in determining whether a design is copyrightable. *See, e.g., Bleistein*, 188 U.S. 239.

B. Analysis of the Work

After carefully examining the Work and applying the legal standards discussed above, the Board finds that the Work does not contain the necessary authorship to sustain a claim to copyright.

Both the Work’s individual elements and the Work as a whole fail to demonstrate copyrightable authorship. The Work consists of a short phrase in typeface and familiar geometric shapes—lines, dotted lines, and circles—that are not protected by copyright. 37 C.F.R. § 202.1(a) (noting that copyright registration cannot be obtained for “[w]ords and short phrases such as names, titles, and slogans; familiar symbols or designs; [or] mere variations of typographic ornamentation, lettering or coloring”); COMPENDIUM (THIRD) §§ 313.3(D), 313.4(J), 906.1, 906.2; *see also Eltra Corp. v. Ringer*, 579 F.2d 294, 298 (4th Cir. 1978) (noting Congress has consistently refused copyright protection for typeface); *Tompkins Graphics, Inc. v. Zipatone, Inc.*, No. 82-5438, 1983 U.S. Dist. LEXIS 14631, at *4 (E.D. Pa. Aug. 15, 1983) (“[B]asic geometric shapes have long been in the public domain and therefore cannot be regulated by copyright.”).

When passing the 1976 Copyright Act, Congress “considered, but chose[] to defer, the possibility of protecting the design of typefaces” and did not “regard the design of typeface, as thus defined, to be a copyrightable ‘pictorial, graphic, or sculptural work.’” H.R. Rep. No. 94–1476 at 55, 1976 U.S.C.C.A.N. 5659, 5668. Carrying out Congress’s policy decision, the Office does not register typeface, “regardless of how novel and creative the shape and form of the typeface characters may be.” COMPENDIUM (THIRD) § 906.4. Although some graphical works largely comprised of lettering may be copyrightable, those “very limited cases” are when such characters include original pictorial art that forms the entire shape of typeface characters, such as, where the work is “an add-on to the beginning and/or ending of the [typeface] characters.” *Id.* For example, this might include an oak tree for a “T” or an “O” with flourishes that make the letter appear as a wreath. *See id.* But the “mere use of text effects (including chalk, popup papercraft, neon, beer glass, spooky-fog, and weathered-and worn [effects]), while potentially separable, is *de minimis* and not sufficient to support a registration.” *Id.*

The Work’s characters are unprotectable typeface with text effects. Those text effects suggest science fiction or futuristic aesthetics commonly used in typeface design.¹ CDP suggests that “it is hard to imagine a book or magazine or newspaper that is printed using such a highly stylized font as the letters found in [the Work,]” because “[t]hey would be very difficult to read, and . . . there are only 9 of 26 letters included in the subject work [making] it is incomplete for

¹ *See, e.g.,* Essqué Productions, *Dark Future Font* (last visited May 5, 2020), <http://fontpro.com/dark-future-font-543>; Maria Jose, *50 Free Futuristic Fonts to Help Make Your Designs Look Uniquely Alternative* (last visited May 5, 2020), <https://www.canva.com/learn/futuristic-fonts/>; Mitchell Smith, *Dystopia Font* (last visited May 5, 2020), <http://fontpro.com/dystopia-font-13473>; Youssef Habchi, *Indelible Font*, (last visited May 5, 2020), <https://indieground.net/product/indelible-font/>, *Kill the Noise* (last visited May 5, 2020), <https://www.dafont.com/kill-the-noise.font>.

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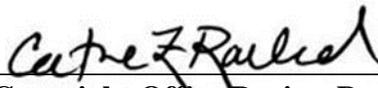
use as a font.” Second Request, Oman decl. at 8. In fact, a complete “Cyberpunk” typeface that shares the Work’s aesthetic is currently available online for others to use.² The Work’s use of serifs, blurring/smearing, or other minor aesthetic flourishes reflect only “mere variations of uncopyrightable letters or words, which in turn are the building blocks of expression.” COMPENDIUM (THIRD) § 906.4.

CDP suggests that the Office would register the Work if it was placed along the edge of a dinner plate, referencing a case in which an uncopyrightable arrangement of familiar shapes were included on dinnerware. Second Request, Oman decl. at 6 (citing *Homer Laughlin China Co. v. Oman*, No. 90-3160, 1991 U.S. Dist. LEXIS 10680 (1991)). This hypothetical does not account for Congress’s policy decision to not include typeface as copyrightable subject matter, even if it would otherwise register ornamental designs on plates, flatware, or other useful articles. H.R. Rep. No. 94–1476 at 55, 1976 U.S.C.C.A.N. 5659, 5668 (referencing copyrightability of ornamental designs on chairs and flatware). In any case, the Board necessarily limits its decision on the submitted deposit, not on hypothetical variations of the Work.

Finally, CDP argues that works with “minimal creativity” are registerable and that the Work is at least as original other works that the Office registered. Second Request at 4. The Office will not “compare . . . deposit copy(ies) with other works that have been previously registered with the Office” for the purpose of granting copyright registration. COMPENDIUM (THIRD) § 309.1. Furthermore, the examples provided by CDP do not contain any typeface and thus are not suitable for comparison.

IV. CONCLUSION

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



U.S. Copyright Office Review Board

Regan A. Smith, General Counsel and
Associate Register of Copyrights

Catherine Zaller Rowland, Associate Register of
Copyrights and Director, Public Information and
Education

Kimberley Isbell, Deputy Director of Policy and
International Affairs

² Lyon ArtZ, *Cyberpunk*, (last visited May 5, 2020), <https://www.fonts4free.net/cyberpunk-font.html>.