



Copyright Review Board
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000

December 8, 2023

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Re: Second Request for Reconsideration for Refusal to Register Billy Bob's Texas Design (SR # 1-11347506721; Correspondence ID: 1-5GMMQPW)

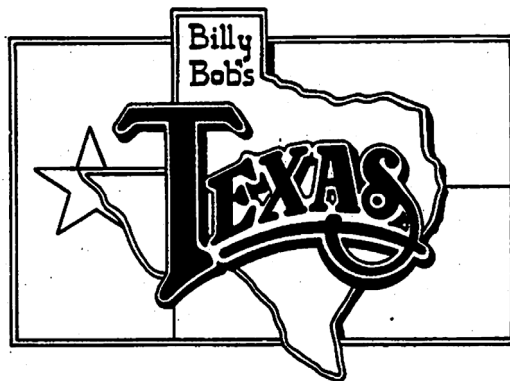
Dear Ms. Brock:

The Review Board of the United States Copyright Office ("Board") has considered Billy Bob's Texas IP Holding, LLC's ("Billy Bob's") second request for reconsideration of the Registration Program's refusal to register a two-dimensional artwork claim in the work titled "Billy Bob's Texas Design" ("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 black and white design that consists of three overlaying elements: (1) the Texas state flag; (2) an outline of the state of Texas; and (3) the words "Billy Bob's Texas." The words "Billy Bob's" are positioned in the Texas panhandle while the word "Texas" is centrally featured across the outline of Texas. The word "Texas" is spelled with capital letters, is partially underlined, and the end of the "S" is elongated to swoop below the underline. The flag, state outline, and the word "Texas" all have a thin border. The state outline and the word "Texas" have opaque shading.

The Work is as follows:



II. ADMINISTRATIVE RECORD

On April 29, 2022, Billy Bob's filed an application to register a copyright claim in the Work. On May 3, 2022, a Copyright Office registration specialist refused to register the claim, determining that the work lacks the authorship necessary to support a copyright claim. Initial Letter Refusing Registration from U.S. Copyright Office to Scott Harper at 1 (May 3, 2022).

On July 12, 2022, Billy Bob's requested that the Office reconsider its initial refusal to register the Work, arguing that although the Work's individual elements are familiar symbols and designs, the elements were selected, coordinated, arranged, and shaded in a sufficiently creative manner to make the Work eligible for copyright protection. Letter from Scott Harper to U.S. Copyright Office at 3 (July 12, 2022) ("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 could not be registered. Refusal of First Request for Reconsideration from U.S. Copyright Office to Scott Harper (Nov. 2, 2022). The Office explained that the neither the "obvious, garden-variety configuration" of the Work's elements nor their selective shading demonstrates the necessary creativity required to support a claim in copyright. *Id.* at 4–5.

In a letter dated February 2, 2023, Billy Bob'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 Laura Brock to U.S. Copyright Office (Feb. 2, 2023) ("Second Request"). While conceding that the individual elements comprising the Work are not protectable, Billy Bob's again argued that the Work's selection, arrangement, and combination of those elements is sufficiently creative. *Id.* at 3–4. Specifically, Billy Bob's contends that the elements were creatively arranged, overlapped, and juxtaposed, and the use of shading, white space, contrast, and variations in typeface, when combined, make the Work more than garden-variety. *Id.* at 4.

III. DISCUSSION

After carefully examining the Work and considering the arguments made in the First and Second Requests, the Board finds that the Work does not contain the creativity necessary to sustain a claim to copyright.

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. *See Feist Publ'ns, Inc. v. Rural Tel. Serv. 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. *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 elements of a work that possess more than a *de minimis* quantum of creativity." *Id.* at 363.

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 claim. Nevertheless, not every combination or arrangement will be sufficient to meet this test. *See id.* 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, 883 (D.C. Cir. 1989); *Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 498–99 (S.D.N.Y. 2005). A mere simplistic arrangement of non-protectable elements does not demonstrate the level of creativity necessary to warrant protection. See *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) (“[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.”).

The Office’s regulations implement the longstanding requirement of originality set forth in the Copyright Act and described in the *Feist* decision. See 37 C.F.R. § 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”). As set out in the Office’s regulations, copyright does not protect “[w]ords and short phrases such as names, titles, and slogans; familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering or coloring.” *Id.* § 202.1(a); see also U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES §§ 313.4(C), 313.4(J), 906.2, 906.3, 906.4 (3d ed. 2021) (“COMPENDIUM (THIRD)”) (outlining registration practices for examining deposits consisting of words and short phrases, familiar symbols, and mere variations on typographic ornamentation).


Applying the legal standard for originality here, the Board concludes that neither the Work’s individual elements nor arrangement as a whole is sufficiently creative to be protected by copyright. Turning first to the individual elements, Billy Bob’s acknowledges that each of these individual elements is not separately protectable under U.S. Copyright Law. Second Request at 4. For example, the “Lone Star” Texas flag and map are both in the public domain and thus not copyrightable.¹ The opaque shading on the right side of the state map outline does not add sufficient creative authorship to this preexisting uncopyrightable element. See *Darden v. Peters*, 488 F.3d 277, 287 (4th Cir. 2007) (“Additions to . . . preexisting maps such as color, shading, and labels using standard fonts and shapes fall within the narrow category of works that lack even a minimum level of creativity.”); COMPENDIUM (THIRD) § 919.2 (same). And the phrase “Billy Bob’s Texas” is not copyrightable because copyright does not protect words and short phrases, including names. See 37 C.F.R. § 202.1(a); COMPENDIUM (THIRD) § 313.4(C). Further, the sizes of the text and the fonts, including the swooping “S” in the word “Texas” and the shading and outlining around letters, are “mere variations of typographic ornamentation [and] lettering” that are not protected by copyright. See 37 C.F.R. § 202.1(a); COMPENDIUM (THIRD) § 313.3(D).

¹ See *Christianson v. W. Publ’g. Co.*, 53 F. Supp. 454, 455 (N.D. Cal. 1944) (explaining that “fundamental map outlines are in the public domain”), *aff’d*, 149 F.2d 202 (9th Cir. 1945); *Flag and Seal Design by Peter Krag, approved January 25, 1839*, TEXAS STATE LIBR. AND ARCHIVES COMM’N (Apr. 25, 2016), <https://www.tsl.texas.gov/treasures/flagsandmaps/flags/lone-star-design.html> (noting that the design was sketched by Peter Krag and adopted by the state of Texas on January 25, 1839).

After considering the Work as a whole, the Board also finds the combination of the individual elements unprotectable. The state flag and state map outline, along with the word “Texas,” are an expected combination of Texas-related elements. *See Satava*, 323 F.3d at 811–12 (noting that “the quantum of originality . . . added in combining . . . standard and stereotyped elements must be considered ‘trivial’” and thus not subject to copyright). Further, the Work’s elements are mostly center- and middle-aligned, not arranged in an unexpected manner or juxtaposed creatively. *See* COMPENDIUM (THIRD) § 905 (“[A] visual art work must contain a sufficient amount of creative expression. Merely bringing together only a few standard forms or shapes with minor linear or spatial variations does not satisfy this requirement.”). The non-central positioning of the words “Billy Bob’s” in the panhandle portion of the state map outline is not enough to push the work across the minimum threshold for creativity. At most, the Work contains only a *de minimis* amount of original expression, which is insufficient to satisfy the threshold for copyrightability. *See* COMPENDIUM (THIRD) § 313.4(B) (providing, as an example of a *de minimis* visual artwork, “[a]n outline map of South Carolina with a blue heart in the center of the design featuring the white crescent moon and white palmetto tree from the state flag”).

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
Suzanne V. Wilson, General Counsel and
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Maria Strong, Associate Register of Copyrights and
Director of Policy and International Affairs
Mark T. Gray, Assistant General Counsel