

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

GOLD VALUE INTERNATIONAL  
TEXTILE, INC.,

Plaintiff,

v.

SANCTUARY CLOTHING, LLC, et al.,

Defendants.

Case No. 2:16-cv-00339-JAK-FFM

**RESPONSE OF THE REGISTER OF COPYRIGHTS  
TO REQUEST PURSUANT TO 17 U.S.C. § 411(b)(2)**

On March 24, 2017, pursuant to 17 U.S.C. § 411(b)(2), the Court requested advice from the Register of Copyrights (“Register”) by May 1, 2017, on the following question (the “Request”):

Would the Register of Copyrights have rejected Plaintiff’s Registration No. VAu 1-151-509 for 2-dimensional artwork (“Grp.029-Spring/Summer 2014,” filed October 24, 2013) with respect to Design 1461? Thus, would it have done so if, at the time of the application, the Register of Copyrights had known that, although Plaintiff had characterized the work as an unpublished collection that included the 1461 Design, Plaintiff previously had published the 1461 Design when it sold to its customers fabric samples that used the 1461 Design, without limiting further distribution or sale by those customers?<sup>1</sup>

The Register hereby submits her response.

**BACKGROUND**

A review of the Copyright Office’s records shows the following:

On October 24, 2013, the U.S. Copyright Office (“Copyright Office” or “Office”) received an application to register a collection of two-dimensional artwork collectively titled “Grp.029-Spring/Summer 2014.” The application listed 34 individual titles, including

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<sup>1</sup> Request at 2-3.

“1461 - Crochet emb.” (“1461 Design”), which is the subject of this Request. The application identified “Gold Value Int’l. Textile, Inc.”, as the work-made-for-hire author and copyright claimant of the two-dimensional artwork. The application stated that the collection was created in 2013, and that it was unpublished. The application did not state that any of the individual works contained in the collection had been previously published. The Office registered the collection with an effective date of registration (“EDR”)<sup>2</sup> of October 24, 2013, and assigned registration number VAu 1-151-509. Based on the information provided in the application, the Office had no reason to question the representations in the application and accepted them as true and accurate.<sup>3</sup>

In the Order accompanying the Request, the Court found that Plaintiff’s “actions constitute[d] publication as a matter of law because Plaintiff sold fabric with the 1461 Design to its customers,” and that “Plaintiff knew that the statement in the application as to the date of publication of the 1461 Design was inaccurate.”<sup>4</sup> The Court has requested the Register to consider whether, given this information, the Office would have refused to register the claim.

### ANALYSIS

An application for copyright registration must comply with the requirements of the Copyright Act set forth in 17 U.S.C. §§ 408(a), 409, and 410. Regulations governing applications for registration are codified in title 37 of the Code of the Federal Regulations at 37 C.F.R. §§ 202.1 to 202.21(2016). The principles that govern how the Office examines registration applications are found in the *Compendium of U.S. Copyright Office Practices, Third Edition* (“*Compendium*”). The statutory requirements, regulations, and *Compendium* practices most relevant to the Court’s request are as follows:

In pertinent part, under the Copyright Act, works may be published via the “distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease or lending.”<sup>5</sup> The Act, additionally, provides that “[t]he offering to distribute

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<sup>2</sup> The EDR is the date that the Office received a completed application, the correct deposit copy, and the proper filing fee.

<sup>3</sup> The principles that govern how the Office examines registration applications are found in the *Compendium of U.S. Copyright Office Practices, Third Edition*. One such principle is that the Office generally “accepts the facts stated in the registration materials, unless they are contradicted by information provided elsewhere in the registration materials or in the Office’s records.” Additionally, “the Office does not conduct investigations or make findings of fact to confirm the truth of any statement made in an application.” COMPENDIUM (THIRD) § 602.4(D). The application for registration number VA 1-151-509 was filed in 2013. The governing principles that the Office would have applied at the time of application are set forth in the *Compendium of U.S. Copyright Office Practices, Second Edition*. Throughout this response, however, the Office cites the third edition of the *Compendium* because the relevant practices have not materially changed.

<sup>4</sup> Order on Defs’ Mot. for Summ. J.; Pl.’s Mot. for Summ. Adjudication as to Liability for Copyright Infringement, Willfulness, and Infringing Revenues at 6, 10 (Mar. 24, 2017).

<sup>5</sup> 17 U.S.C. § 101 (definition of “publication”).

copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication.”<sup>6</sup> The *Compendium* illustrates that “[p]ublication occurs when fabric, carpet, or wallpaper samples are offered to sales representatives for the purpose of selling those works to wholesalers and retailers.”<sup>7</sup> In applying this latter provision when carrying out its registration functions, the Copyright Office understands the *actual* distribution of (in addition to the mere “offering to distribute”) copies or phonorecords to a group of persons for the enumerated purposes also to constitute a publication.<sup>8</sup>

An unpublished collection is “[a] registration accommodation by the U.S. Copyright Office for registering a number of unpublished works with one application, one filing fee, and one set of deposit copies.”<sup>9</sup> The Office will generally “issue a registration if some of the works set forth in the deposit[] [for an unpublished collection] contain a sufficient amount of original authorship.”<sup>10</sup> Works registered under the unpublished collection option may thus contain both copyrightable and uncopyrightable material;<sup>11</sup> the registration, however, only extends to copyrightable works. In addition, the unpublished collection option may not be used to register published works.<sup>12</sup>

The Copyright Office’s regulations require applicants to make “[a] declaration that information provided within the application is correct to the best of [the applicant’s] knowledge.”<sup>13</sup> Generally, the Office “accepts the facts stated in the registration materials, unless they are contradicted by information provided elsewhere in the registration materials or in the Office’s records.”<sup>14</sup>

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<sup>6</sup> 17 U.S.C. § 101 (definition of “publication”).

<sup>7</sup> COMPENDIUM (THIRD) § 1906.1.

<sup>8</sup> See PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT 3.3.2 (3d ed. Supp. 2011) (noting that the “better” reading of the statute “would make publication occur at the earliest point—the date of an offer to distribute or the date of actual distribution—at which the copyright owner placed its work in the channels of commerce”).

<sup>9</sup> COMPENDIUM (THIRD) Glossary.

<sup>10</sup> COMPENDIUM (THIRD) § 1108.

<sup>11</sup> COMPENDIUM (THIRD) § 1108 (“As a general rule, the U.S. Copyright Office will issue a registration if some of the works set forth in the deposit[] contain a sufficient amount of original authorship [; if] the registration specialist determines that the deposit[] contain[s] material that is copyrightable and material that is clearly uncopyrightable, he or she may register the claim without communicating with the applicant.”).

<sup>12</sup> COMPENDIUM (THIRD) § 1106.1 (“All of the copyrightable elements that are otherwise recognizable as self-contained works must be unpublished . . . Works that do not satisfy these requirements cannot be registered as an unpublished collection. In particular, an applicant cannot use this option to register a number of published and unpublished works. If any of the works have been published, the applicant should not include those works in the claim.”).

<sup>13</sup> 37 C.F.R. § 202.3(c)(2)(iii).

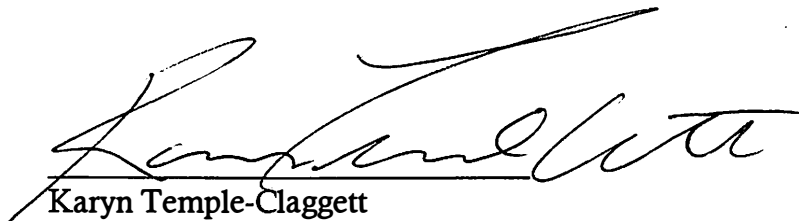
<sup>14</sup> COMPENDIUM (THIRD) §§ 602.4(D), 612.3 (“As a general rule, the Office will accept the applicant’s representation that the work is published or unpublished, unless that statement is implausible or is contradicted by information provided elsewhere in the registration materials.”).

In responding to the Court's question, the Office applies the foregoing governing statutory and regulatory standards, and examining principles.

Based on the foregoing governing statutory and regulatory standards, and its examining practices, had the Office been aware that the 1461 Design had been previously published, the Office would have refused registration of that work using the unpublished collections option because the work was registered as unpublished when in fact it had been published.

The Office notes, however, that it is not unusual for the examiner to correspond with an applicant about factual assertions if the assertions appear to conflict with other information provided in the application materials.<sup>15</sup> Accordingly, if the Office becomes aware of an error at the time of application, such as whether the work was published, or has questions about facts asserted in the application, it provides the applicant an opportunity to correct the error or verify the facts within a specified period of time.<sup>16</sup> If the applicant responds in a timely fashion to the satisfaction of the Office, the Office can proceed with the registration. The Register's response herein is thus premised on the fact that the error identified in the Court's question was not timely corrected through such a process.

Dated: April 25, 2017



Karyn Temple-Claggett  
Acting Register of Copyrights

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<sup>15</sup> COMPENDIUM (THIRD) § 602.4(D).

<sup>16</sup> Generally, an applicant has 20 calendar days to respond via email, and 45 calendar days to respond via U.S. mail to questions concerning issues in the application materials. See COMPENDIUM (THIRD) §§ 605.6(B), 605.6(D).