



United States Copyright Office

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October 27, 2020

Richard W. James, Esq.
The Law Office of Richard W. James
25 Churchill Road
Churchill, PA 15235

Re: Second Request for Reconsideration for Refusal to Register Kitchen Helper Children's Stool (Correspondence ID: 1-30JN911, SR # 1-6843395721)

Dear Mr. James:

The Review Board of the United States Copyright Office ("Board") has considered Guidecraft, Inc.'s ("Guidecraft's") second request for reconsideration of the Registration Program's refusal to register a two-dimensional artwork¹ and sculpture claim in the work titled "Kitchen Helper Children's Stool" ("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 white stool with cutouts of stars, circles, squares, and a half-moon. It also includes a rectangular chalkboard on one side. The Work is as follows:



¹ While the application referenced two-dimensional materials, the deposit did not display any such authorship and Guidecraft has not referenced two-dimensional artwork in any of its submissions to the Office.

II. ADMINISTRATIVE RECORD

On August 13, 2018, Guidecraft filed an application to register a copyright claim in the Work. In an April 10, 2019 letter, a Copyright Office registration specialist refused to register the claim, finding that it “is a useful article that does not contain any copyrightable authorship needed to sustain a claim to copyright.” Initial Letter Refusing Registration from U.S. Copyright Office to Richard James (Apr. 10, 2019).

Guidecraft then requested that the Office reconsider its initial refusal to register the Work. Letter from Richard W. James to U.S. Copyright Office (May 15, 2019) (“First Request”). After reviewing the Work in light of the points raised in the First Request, the Office re-evaluated the claims and again concluded that the Work “is a useful article that does not contain any separable, copyrightable features.” Refusal of First Request for Reconsideration from U.S. Copyright Office to Richard James (Aug. 28, 2019).

Guidecraft subsequently 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 Richard W. James to U.S. Copyright Office (Oct. 15, 2019) (“Second Request”). Guidecraft asserts that the star, square, circle, and half-moon cutouts meet the low standard of creative expression because they are “arranged in a distinctive, tactile manner that stimulates spatial relationship comprehension in children and incites children’s imaginations.” *Id.* at 2. Guidecraft further suggests that the designer’s intent to stimulate children’s imagination by “combin[ing] the psychology of children’s behavior to shape learning outcomes” contributes to the creative context of the Work. *Id.*

III. DISCUSSION

A. *The Legal Framework*

1) *Useful Articles and Separability*

Copyright does not protect useful articles as such, which are defined in the Copyright Act as “article[s] having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.” 17 U.S.C. § 101. Importantly, however, artistic features applied on or incorporated into a useful article may be eligible for copyright protection if they constitute pictorial, graphic, or sculptural works under sections 101 and 102(a)(5) of the Copyright Act. This protection is limited to the “‘pictorial, graphic, or sculptural features’ [that] ‘can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.’” *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1007 (2017) (quoting 17 U.S.C. § 101).

To assess whether an artistic feature incorporated into the design of a useful article is protected by copyright, the Office examines whether the feature “(1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other

tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated.” *Id.* at 1007; *see also* COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 924 (3d ed. 2017) (“COMPENDIUM (THIRD)”). This analysis focuses on “the extracted feature and not on any aspects of the useful article that remain after the imaginary extraction [because the] statute does not require the decisionmaker to imagine a fully functioning useful article without the artistic feature.” *Star Athletica*, 137 S. Ct. at 1013. Put another way, while useful articles as such are not copyrightable, if an artistic feature “would have been copyrightable as a standalone pictorial, graphic, or sculptural work, it is copyrightable if created first as part of a useful article.” *Star Athletica*, 137 S. Ct. at 1011; 17 U.S.C. § 113(a) (“[T]he exclusive right to reproduce a copyrighted pictorial, graphic, or sculptural work in copies under section 106 includes the right to reproduce the work in or on any kind of article, whether useful or otherwise.”); *see also Esquire, Inc. v. Ringer*, 591 F.2d 796, 800 (D.C. Cir. 1978) (holding that copyright protection is not available for the “overall shape or configuration of a utilitarian article, no matter how aesthetically pleasing that shape . . . may be”).

2) *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. *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.* 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. 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 and described 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”); *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).

Similarly, while the Office may register a work that consists merely of geometric shapes, for such a work to be registrable, the "author's use of those shapes [must] result[] in a work that, as a whole, is sufficiently creative." COMPENDIUM THIRD § 906.1; *see also Atari Games Corp.*, 888 F.2d at 883 ("[S]imple shapes, when selected or combined in a distinctive manner indicating some ingenuity, have been accorded copyright protection both by the Register and in court."). Thus, the Office would register, for example, a wrapping paper design that consists of circles, triangles, and stars arranged in an unusual pattern with each element portrayed in a different color, but would not register a picture consisting merely of a purple background and evenly spaced white circles. COMPENDIUM (THIRD) § 906.1.

Finally, Copyright Office registration specialists (and the Board) do not make aesthetic judgments in evaluating the copyrightability of particular works. *See* COMPENDIUM (THIRD) § 310.2. 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 success in the marketplace are not factors in determining whether a design is copyrightable. *See, e.g., Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

B. Analysis of the Work

After careful examination and analysis, the Board finds that the Work is a useful article that does not contain the requisite separable authorship necessary to sustain a claim to copyright.

As Guidecraft acknowledges, the Work—a stool—is a useful article. *See* First Request at 1.² The question then becomes whether there is any separable original authorship. In *Star Athletica*, the Supreme Court held that such an analysis requires consideration of whether there are features that “(1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated.” *Star Athletica*, 137 S. Ct. at 1007.

Under the first prong, the Office previously found, and Guidecraft did not refute, that the geometric cutouts—four stars, two circles, two squares, and a half-moon—are the only separable elements of the work that have pictorial, graphic, or sculptural qualities. Second Request at 1.

Next, for the separable elements of the work to be eligible for copyright protection, they must “possess more than a *de minimis* quantum of creativity.” *Feist*, 499 U.S. at 363. Here, neither the Work’s separable individual elements nor the combination of those elements meet this threshold. The individual separable elements—four stars, two circles, two squares, and a half-moon—are common and familiar shapes, and, as such, are not copyrightable. *See* 37 C.F.R. § 202.1(a); COMPENDIUM (THIRD) §§ 906.1, 906.2. Moreover, viewed as a whole, the Board finds that the selection, coordination, and arrangement of these shapes are insufficient to render the Work sufficiently creative and original. Here, the arrangement of the stars, circles, and squares are evenly spaced and create a mirror image on either side of the stool. The shapes are each the same size and contain no variation. The half-moon is vertically centered below the step. While a sufficiently creative arrangement of shapes may provide a basis for copyrightability, a mirror image arrangement of evenly spaced shapes amounts to a garden variety pattern that falls short of the Copyright Act’s requirements for protection. *See Satava*, 323 F.3d at 811 (“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”); *Coach*, 386 F. Supp. 2d at 496 (upholding the Copyright Office’s refusal to register 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”); COMPENDIUM (THIRD) § 906.1 (providing example of a solid color rectangle with evenly spaced symmetrical circles as a combination of common shapes that lacks sufficient creative expression).

Finally, Guidecraft asserts that the designer created the design to “combine the psychology of children’s behavior to shape learning outcomes” by arranging the shapes in “a distinctive, tactile manner” intended to “stimulate[] spatial relationship comprehension in children and incite[] children’s imaginations.” Second Request at 2. Guidecraft further suggests that the arrangement is not trivial because it is effective and frequently copied. *Id.* The Board, however, focuses on the actual appearance of the fixed Work and does not consider any meaning

² Additionally, although the work was claimed as a “2-D artwork, sculpture,” Guidecraft does not suggest, nor does it appear, that the Work is, or contains, two-dimensional artwork that may be copyrightable apart from the geometric design elements of the stool. *See supra* n.1.

or significance that the Work may evoke. COMPENDIUM (THIRD) § 310.3. The fact that creative thought may take place in the mind of the person who encounters a work has no bearing on originality. *See id.* Similarly, the Office will not consider the author's inspiration, creative intent, or intended meaning when examining a work. *Id.* § 310.5. And the Office will not consider the commercial appeal or success of the Work. *Id.* § 310.10; *see also Paul Morelli Design, Inc. v. Tiffany & Co.*, 200 F. Supp. 2d 482, 488 (E.D. Pa. 2002) ("Works may experience commercial success even without originality and works with originality may enjoy none whatsoever.").

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

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Associate Register of Copyrights

Catherine Zaller Rowland, Associate Register of

Copyrights and Director, Public Information and
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Kimberley Isbell, Deputy Director of Policy and

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