



United States Copyright Office

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December 23, 2019

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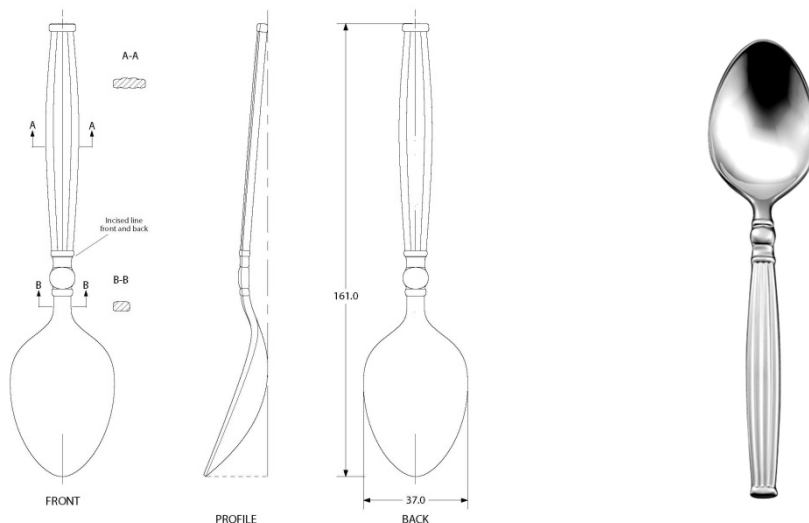
Re: Second Request for Reconsideration for Refusal to Register Colosseum Flatware Artwork; Correspondence ID: 1-3H7MI85; SR 1-6342140861

Dear Mr. Garritano:

The Review Board of the United States Copyright Office (“Board”) has considered Oneida Ltd.’s (“Oneida’s”) second request for reconsideration of the Registration Program’s refusal to register a copyright claim in the work titled “Colosseum Flatware Artwork” (“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 three-dimensional design applied to a spoon handle. The design contains a raised thin rectangular band on each end of the handle. The band nearest to the spoon mouth is adjacent to a raised oval followed by an indented wider rectangular band with concave sides. Atop the wider rectangle is another raised thin rectangular band. The length of the handle contains alternating raised and shallow lines that are perpendicular to the rectangular bands on either end. The Work is as follows:



II. ADMINISTRATIVE RECORD

On March 2, 2018, Oneida filed an application to register a copyright claim in the Work. In a September 7, 2018, letter, a Copyright Office registration specialist refused to register the claim, finding that the work is a useful article that does not contain the separable copyrightable authorship needed to sustain a claim to copyright. Letter from L. Pastuchiv, Registration Specialist, to Melissa Kern, Frost Brown Todd, LLC (Sept. 7, 2018).

In a letter dated December 6, 2018, Oneida requested that the Office reconsider its initial refusal to register the Work arguing that “the round embellishment, surrounding incised lines, the fluting and the endcaps” are separable designs that can be perceived as a work of art separate from the spoon that would qualify as a protectable sculptural work. Letter from Carlos P. Garritano, Tucker Ellis LLP, to U.S. Copyright Office (Dec. 6, 2018) (“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 separable features of the Work “do not satisfy the originality requirement regardless of whether they are considered individually or as a part of the overall design.” Letter from Stephanie Mason, Attorney-Advisor, to Carlos Garritano (Apr. 4, 2019) (“First Request Refusal”).

In a letter dated May 16, 2019, Oneida 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 Carlos Garritano, Tucker Ellis LLP, to U.S. Copyright Office (May 16, 2019) (“Second Request”). In that letter, Oneida focused on the creativity of the separable features and asserted that the sculptural elements contained in the Work amount to “much more than basic shapes.” *Id.* Oneida also argued that the selection, arrangement, and combination of the elements indicate ingenuity that amounts to the requisite level of creativity, stating that “each of the design elements have been arranged in a distinctive manner such that the elements elegantly flow into one another and are connected in an appealing fashion.” *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 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. 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 carefully examining the Work and applying the legal standards discussed above, the Board finds that it is a useful article that does not contain the requisite separable authorship necessary to sustain a claim to copyright.

As an initial matter, Oneida and the Copyright Office agree that the Work is a useful article that contains elements that "can be perceived as a two- or three-dimensional work of art separate from the useful article." *Star Athletica* 137 S. Ct. at 1007; *see also* First Request

Refusal at 2-3; Second Request at 1. The Office, therefore, focuses on the copyrightability of the separable design.

Reviewing the Work carefully, it is clear that the separable features do not qualify as a protectable pictorial, graphic or sculptural work because they lack, individually or in combination, the requisite minimum degree of creativity required for copyright protection.

The constituent elements of the Work—evenly spaced stripes, a sphere and basic lines—are standard geometric shapes that are not copyrightable. *See* 37 C.F.R. 202.1(a) (prohibiting registration of “familiar symbols or designs...”); COMPENDIUM (THIRD) § 906.1 (“the Copyright Act does not protect common geometric shapes, either in two-dimensional or three-dimensional form...including...straight or curved lines...”). No element alone is sufficiently creative to support a claim to copyright.

Nor does the workaday combination of these elements make the Work sufficiently creative. While some combinations of common or standard design elements may contain sufficient creativity to support a copyright, not every combination will meet this threshold. *See Feist*, 499 U.S. at 358, 363. Here, the design is typical and predictable, repeating a few elements in a symmetrical and expected manner. The Work combines a rounded feature at the base of the handle flanked by rectangles with perpendicular symmetrical lines on the handle. This arrangement merely brings together few standard shapes with minor spatial variations, lacking sufficient creative expression. *See* COMPENDIUM (THIRD) § 905. In fact, the entire design merely follows the shape and arrangement of a standard neoclassical-style column or pillar found in a colosseum,¹ as the Work’s title suggests. Likewise, this particular combination of shapes is standard and commonly found in contemporary flatware designs.²

Because the Work does not have protectable separable authorship, the Board affirms the refusal to register the Work.

¹ *See, e.g., Colosseum Column PNG*, IMGBIN, <https://imgbin.com/png/9ekDs5zP/colosseum-column-png> (last visited Sept. 30, 2019); *Pair of Neoclassical Fluted Wood Columns*, 1STDIBS, https://www.1stdibs.com/furniture/building-garden/pedestals-columns/pair-of-neoclassical-fluted-wood-columns/id-f_9196121/ (last visited Sept. 30, 2019).

² *See, e.g., William Roberts Pillar Flatware*, MILES KIMBALL, <https://www.mileskimball.com/buy-william-roberts-pillar-45-pc-stainless-steel-flatware-set-367550?rrec=true> (last visited Sept. 30, 2019); *Lincoln*, LIBERTY TABLETOP, <https://www.libertytabletop.com/product/lincoln/> (last visited Sept. 30, 2019); *Nyssa*, FORTESSA TABLEWARE SOLUTIONS <https://shop.fortessa.com/flatware/by-pattern/nyssa.html> (last visited Sept. 30, 2019); *Veranda (Stainless) by Ralph Lauren Flatware*, REPLACEMENTS.COM <https://www.replacements.com/webquote/lrfver.htm> (Last visited Sept. 30, 2019).

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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and Director, U.S. Copyright Office

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