



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

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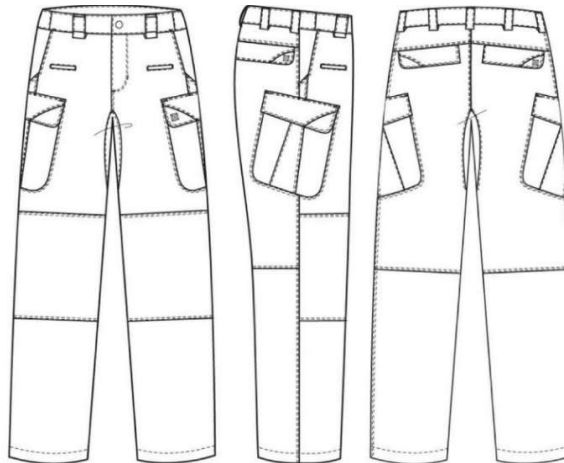
Re: Second Request for Reconsideration for Refusal to Register 74369 Stryke Pant (SR # 1-8744120551; Correspondence ID: 1-4P8HSN4)

Dear Mr. Flaherty:

The Review Board of the United States Copyright Office (“Board”) has considered 5.11, Inc.’s (“Applicant”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the work titled “74369 Stryke Pant” (“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, black-and-white line drawing depicting a front, back, and side view of a pair of cargo pants with pockets. The drawing shows two large side pockets that sit at an angle on each leg of the pants, two narrow rectangular front pockets, and two back pockets. Flaps of materials cover the two back pockets. Two of the pockets (one larger side pocket and one back pocket) contain on their respective flaps a geometric design consisting of a plus sign centered within four overlapping squares that alternate between straight and curved edges. As depicted in the deposit submitted with the application, the Work is as follows:



II. ADMINISTRATIVE RECORD

On April 29, 2020, Applicant filed an application to register a copyright claim in the Work. In a July 10, 2020 letter, a Copyright Office registration specialist refused to register the claim, determining that the Work was a useful article that does not contain any separable design elements with sufficient copyrightable authorship to support a registration. Initial Letter Refusing Registration from U.S. Copyright Office to Sean Flaherty at 1 (July 10, 2020).

On October 10, 2020, Applicant requested that the Office reconsider its initial refusal to register the Work, arguing that the Work is not a useful article, but rather a “two-dimensional line drawing artwork which portrays the appearance of an article,” which could be used for marketing and promotional purposes for Applicant’s products. Letter from Sean Flaherty to U.S. Copyright Office at 2 (Oct. 10, 2020) (“First Request”). Applicant further argued that even if the Work were a useful article, it would be registrable under the two-step separability test articulated in *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017). *Id.* at 2–4.

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 Sean Flaherty at 1 (Mar. 5, 2021) (“Refusal of First Request”). The Office agreed that the Work is not a useful article, but determined that the Work does not contain the requisite level of creativity to support a claim in copyright. *Id.* Specifically, the Office explained that the individual components of the Work and the Work as a whole—simple common shapes in a “simple, garden-variety” arrangement portraying a pair of pants—fail to demonstrate sufficient creativity. *Id.* at 3.

In a letter dated June 4, 2021, Applicant 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 Sean Flaherty to U.S. Copyright Office at 1 (June 4, 2021) (“Second Request”). Applicant argued that the particular use of lines, shapes, curves, and patterns resulted in a sufficiently creative work. *Id.* at 2. Applicant considered the selection and arrangement of the features in the design to be “unique choices” and argued that the Work is “the unique result of significant creative efforts,” as detailed in a declaration by its CEO describing the development and design of the Work. *Id.* at 2, 5; *id.*, Decl. of Francisco Morales (June 3, 2021) (“Morales Decl.”). Finally, Applicant highlighted three cases in which courts have found designs comprising familiar shapes and patterns to be copyrightable, and argued that those legal standards support registration of the Work. Second Request at 5–6.

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 requisite 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. *See, e.g.*, 37 C.F.R. § 202.1(a) (prohibiting registration of “familiar symbols or designs”); *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”). Through its regulations, the Office provides guidance that copyright does not protect familiar shapes or designs. *Id.* § 202.1(a); *see also* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.4(J) (3d ed. 2021) (“COMPENDIUM (THIRD)”) (noting that familiar symbols and designs are not protectable). Applying these legal standards, the Board finds that the individual elements of the Work and the Work as a whole fail to demonstrate sufficient creativity.

Turning to the individual elements, the Work consists of common shapes and designs—namely, lines, rectangles, and circles—forming a standard depiction of a pair of cargo pants with pockets. The flaps on two of the pockets contain a design that is likewise formed from common shapes. The design, which Applicant refers to as its “Scope Logo,” consists of a plus sign centered within four overlapping squares that alternate between straight and curved edges. Second Request at 3. Applicant included the following colorized close-up of the Scope Logo in its Second Request, not the original deposit¹:

¹ The Board reminds Applicant and future applicants of the requirements for deposits. A complete deposit copy includes all content for which registration is sought. 37 C.F.R. § 202.20(b)(2).



Id. These individual elements of the Work are not more than common shapes and designs and are not protectable by copyright. 37 C.F.R. § 202.1(a); COMPENDIUM (THIRD) §§ 313.4(J), 906.2.

Nor is the Work as a whole sufficiently creative. Applicant argues that its specific use of the shapes and patterns results in a sufficiently creative work, because of the “unique choices” as to the selection and arrangement of elements of the design, particularly the half-moon arc design on the back pockets, the geometric “Scope Logo,” the angled pleats and rounded lower corners on the side pockets, and the two front utility pockets. Second Request at 2–4. Yet as Applicant acknowledges, “many pant designs certainly use lines and pockets.” *Id.* at 5. Here, these lines and pockets are spatially placed in a manner that is typical of line designs that depict this style of pants.² Indeed, the placement and arrangement of these elements merely reflect how they are functionally used on cargo pants—*i.e.*, pockets placed on the front, back, and side that are equipped to carry items of various sizes within a convenient arm’s reach.³ Similarly, Applicant’s placement of the “Scope Logo” on the flaps of the back and side pockets is also typical; cargo pants commonly include a logo on pocket flaps.⁴

While some of the shapes and lines in the Work are angled and curved, these variations are slight and do not rise to the level of creativity necessary to be eligible for copyright protection. COMPENDIUM (THIRD) § 906.2; *see also id.* § 905 (“Merely bringing together only a few standard forms or shapes with minor linear or spatial variations does not satisfy this requirement.”). Applicant further notes that the combination of these various shapes and lines in the Work “does not represent ‘the only way’ a designer can depict pants with pockets.” Second Request at 5. But the fact that other choices exist does not render the choices that were made copyrightable. *See Hoberman Designs, Inc. v. Gloworks Imports, Inc.*, No. 14-CV-6743, 2015 WL 10015261, at *7 (C.D. Cal. Nov. 3, 2015).

² *See, e.g., Beige Cargo Pants Illustration*, SHUTTERSTOCK, <https://www.shutterstock.com/image-vector/beige-cargo-pants-illustration-27284659> (last visited Aug. 16, 2023); *Cargo Pants Technical Fashion Illustration*, SHUTTERSTOCK, <https://www.shutterstock.com/image-vector/cargo-pants-technical-fashion-illustration-jeans-2231570647> (last visited Aug. 16, 2023); *Cargo Pants Flat Technical Drawing Illustration*, SHUTTERSTOCK, <https://www.shutterstock.com/image-vector/cargo-pants-flat-technical-drawing-illustration-2145718593> (last visited Aug. 16, 2023).

³ *See The Best Cargo Pants for Work*, 5.11 TACTICAL (Dec. 19, 2022), <https://www.511tactical.com/de-en/blog/the-best-cargo-pants-for-work/>.

⁴ *See, e.g., Vanguard Cargo Pant 2.0*, OAKLEY, <https://www.oakley.com/en-us/product/FOA402594?variant=193517213091> (last visited Aug. 16, 2023); *Men’s Extreme Motion Cargo Twill Pant in Tumbleweed*, LEE, <https://www.lee.com/shop/mens-extreme-motion-cargo-twill-pant-42771.html> (last visited Aug. 16, 2023); *RVCA Americana Mens Cargo Pants*, TILLYS, https://www.tillys.com/product/rvca-americana-mens-cargo-pants/466182100.html?dwvar_466182100_color=100 (last visited Aug. 16, 2023).

Applicant’s arguments surrounding the creative effort and intent behind designing the Work do not alter the outcome here. Applicant states that the Work is sufficiently original because the designs are “the unique result of significant creative efforts.” Second Request at 5. Applicant argues that its designer “has put far more into the work” than the requisite small amount of creativity, and its CEO describes in his declaration the development and design of the Work, including prototyping and repeated iterations of the Work. *Id.*; Morales Decl. ¶ 13. However, the Office focuses on the appearance of the work and “will not consider the amount of time, effort, or expense required to create the work.” COMPENDIUM (THIRD) § 310.7. Those issues have no bearing on whether a work possesses the minimum creative spark required by the Copyright Act and the Constitution. *See, e.g., Feist*, 499 U.S. at 352–54, 364 (rejecting the so-called “sweat of the brow” doctrine that provided copyright protection solely as a “reward for the hard work” of creating a work).

With respect to intent, Applicant notes that the “design choices and creative developments . . . all create ‘visual weight,’” and that “[b]y drawing an observer’s eye from rear to front, the design further conjures the impression of forward movement.” Second Request at 4; *see also* Morales Decl. ¶ 14 (“The aesthetic I sought to capture in the Stryke Pant was to make the design feel ‘fast’ and look like it is moving *forward*.”). The Office does not consider the author’s creative intent or intended meaning when assessing copyrightability. COMPENDIUM (THIRD) § 310.5. The Supreme Court has made it clear that copyrightability is based on how a work is perceived, not how or why it was designed. *Star Athletica*, 137 S. Ct. at 1015.

Lastly, Applicant’s comparison of the Work to works at issue in three court cases is inapposite. In *Prince Group, Inc. v. MTS Productions*, the polka dot design contained shading, irregular shaping, and an irregular arrangement. 967 F. Supp. 121, 125 (S.D.N.Y. 1997). And in *Folio Impressions, Inc. v. Byer California*, the roses were not just arranged in a straight line, but were also turned in various directions. 937 F.2d 759, 764–65 (2d Cir. 1991). Further, in *Hoberman Designs, Inc. v. Gloworks Imports, Inc.*, the court noted that the joints, trusses, and cross pieces of the expandable, three-dimensional spheres at issue were non-mechanical and non-utilitarian elements that could be original, but stopped short of conducting its own analysis of these elements for purposes of summary judgment. No. 14-CV-6743, 2015 WL 10015261, at *7 (C.D. Cal. Nov. 3, 2015). These cases are all distinguishable from the Work, which incorporates only standard placements of common shapes and designs—some with minor angling and curving—to form a common depiction of a pair of pants.

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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