United States Copyright Office
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February 2, 2017

Joel B. Rothman, Esq.
Schneider Rothman Intellectual Property Law Group, LLC
4651 North Federal Highway
Boca Raton, FL 33431

Re: Second Request for Reconsideration for Refusal to Register Kinon Pattern Number 014; Correspondence ID 1-19EQRER; SR# 1-2099138032

Dear Mr. Rothman:

The Review Board of the United States Copyright Office (the "Board") has considered Kinon Surface Design Inc.'s ("Kinon's") second request for reconsideration of the Registration Program's refusal to register a two-dimensional artwork claim in the work titled "Kinon Pattern Number 014" (the "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 wall covering comprised of pigment and resin. The deposit is a black and white specification sheet that shows a free pattern with no easily-discernable shapes, other than a pattern that loosely resembles animal skin or a chemical emulsion. The specification sheet notes that "KINON is a unique product. Various techniques are carefully used to create our different patterns. Therefore like stone and wood, no two panels are ever the same. Over a large panel it will have numerous shades and tones, and the surface will have undulations as well as tiny pores." The bottom-right portion of the deposit contains a partial circle that calls out and magnifies the detail embodied in the Work.

The Work is depicted in Appendix A.

II. ADMINISTRATIVE RECORD

On January 30, 2015, Kinon filed an application to register a copyright claim in the Work. In an April 7, 2015 letter, a Copyright Office registration specialist refused to register the claim, finding that it "lacks the authorship necessary to support a copyright claim." Letter from Larisa Pastuchiv, Registration Specialist, to Joel B. Rothman, Schneider Rothman Intellectual Property Law Group, LLC (Apr. 7, 2015).

In a letter dated June 24, 2015, Kinon requested that the Office reconsider its initial refusal to register the Work. Letter from Joel B. Rothman, Schneider Rothman Intellectual

Property Law Group, LLC, to U.S. Copyright Office (June 24, 2015) ("First Request"). In Kinon's First Request, it claimed that the Work was "created by hand using a process that involves layering pigment on a substrate, manipulating the layers of pigment to create an original design, and then curing the pigment with coats of resin." *Id.* at 1-2. After reviewing the Work in light of the points raised in the First Request, the Office re-evaluated the claims and again concluded that it "does not contain a sufficient amount of original and creative authorship to support a copyright registration." Letter from Stephanie Mason, Attorney-Advisor, to Joel B. Rothman, Schneider Rothman Intellectual Property Law Group, LLC (Sep. 28, 2015). The Attorney-Advisor described the Work as "a cracked pattern with various irregular bumps and lines" which "closely resembles the skin of a large reptile, or dry, cracked terrain or stone." *Id.* at 3. Finally, the Attorney-Advisor considered whether the Work was a useful article, concluding that it was conceptually separable, but that the separable elements as a whole "are not combined in any way that differentiates them from their basic shape and design components, and so they cannot rise to the level of creativity necessary for copyright registration." *Id.* at 3.

In a letter dated February 24, 2016, Kinon requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Work. Joel B. Rothman, Schneider Rothman Intellectual Property Law Group, LLC, to U.S. Copyright Office (Feb. 24, 2016) ("Second Request"). With that letter, Kinon included a physical sample[1] of "the same work, Kinon Pattern Number 014, in a three-dimensional form," that was "made from a small piece of a panel that is normally five feet by twelve feet in size." *Id.* at 1. The sample has a sticker indicating a date of July 2015, six months after the original deposit was submitted. Kinon argued that the sample "demonstrates that the work is not minimally or trivially creative" and imparts a "powerful impression of depth." *Id.* Kinon further asserted that "[t]he work is obviously not the skin of a reptile or dry, cracked terrain or stone," but "something else entirely that defies description." *Id.*

III. DISCUSSION

A. The Legal Framework—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.

[1] A photographic reproduction of the sample is included as Appendix B.

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 "mere variations of . . . 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 id.* § 310.2. The attractiveness of a design, the espoused intentions of the author, the design's visual effect or appearance, 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 the Work does not contain the requisite authorship necessary to sustain a claim to copyright.

As an initial matter, the Board will not consider the physical sample included for the first time with the Second Request as a deposit as it is untimely and was not requested by the Board. 37 C.F.R. § 202.5(c)(1) ("The Board will base its decision on the applicant's *written* submissions.") (emphasis added)); COMPENDIUM (THIRD) § 1704.2 ("If the Board needs additional information to review the second request, it will notify the applicant in writing.").[2]

The Board finds that the design elements in the Work are not creative enough to be copyrightable and also represent an improper attempt to register a process and not a specific work. First, whether described as a reptile or animal skin, dry, cracked terrain or stone, or a chemical emulsion, the design is too familiar and ordinary to qualify for copyright protection. 37 C.F.R. § 202.1(a) (observing "familiar symbols or designs" are not protected by copyright). Second, Kinon is not applying to register a specific design but instead is attempting to copyright a *process*, which the Copyright Act simply does not protect. 17 U.S.C. § 102(b); *see also* 37 C.F.R. § 202.1(b); COMPENDIUM (THIRD) § 313.3(A). That Kinon seeks to register a process is clear from the deposit itself, which explicitly states that "no two panels are ever the same." Moreover, though Kinon purported to send a sample of "the same work, Kinon Pattern Number 014, in a three-dimensional form" to supplement the deposit, a comparison of the supplement to the two-dimensional deposit for the Work shows that the designs were not the same, but instead were made using the same process. Of course, while works that have but one unique copy can be registered, the statement that the supplement and deposit were to be considered the "same work" even though they do not match makes clear that Kinon was not attempting to register the unique copy in the initial deposit. Second Request at 1. Further, a note on the deposit states that each work using Kinon Pattern Number 014 "will have numerous shades and tones, and the

[2] Even if the submission of the physical sample was timely, it is inconsistent with the initial deposit (despite being described as a "small piece" of the larger Work) and thus is of limited relevance. Second Request at 1. The likelihood that the sample is reflective of the original deposit further is undermined by the sample's affixed sticker, which indicates a date six months after the initial application was filed. Moreover, the supplemental physical sample is a three-dimensional work in shades of metallic brown, while the application indicated a copyright claim in a black and white two-dimensional work. COMPENDIUM (THIRD) § 1509.3(C) ("When registering a . . . graphic work, the identifying material should reproduce the actual colors employed in the work.").

surface will have undulations as well as tiny pores." This language is not indicative of authorship, but instead supports the finding that a particular process will create a *similar* pattern with some unpredictable variations. The Board thus finds that the Copyright Office cannot register the Work.

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.

BY: Catherine Rowland
Catherine Rowland
Copyright Office Review Board

APPENDIX A

KINON®
SURFACE DESIGN INC

SPECIFICATION SHEET

PATTERN NUMBER:

014 X0263

AVAILABLE SHEET SUBSTRATES FORMS:

• ALUMINUM HONEYCOMB • DOUBLE CASTE CORE
• MDF (Medex) • FR MDF (Medite) • PHENOLIC

NAME:

SIGNATURE: DATE:

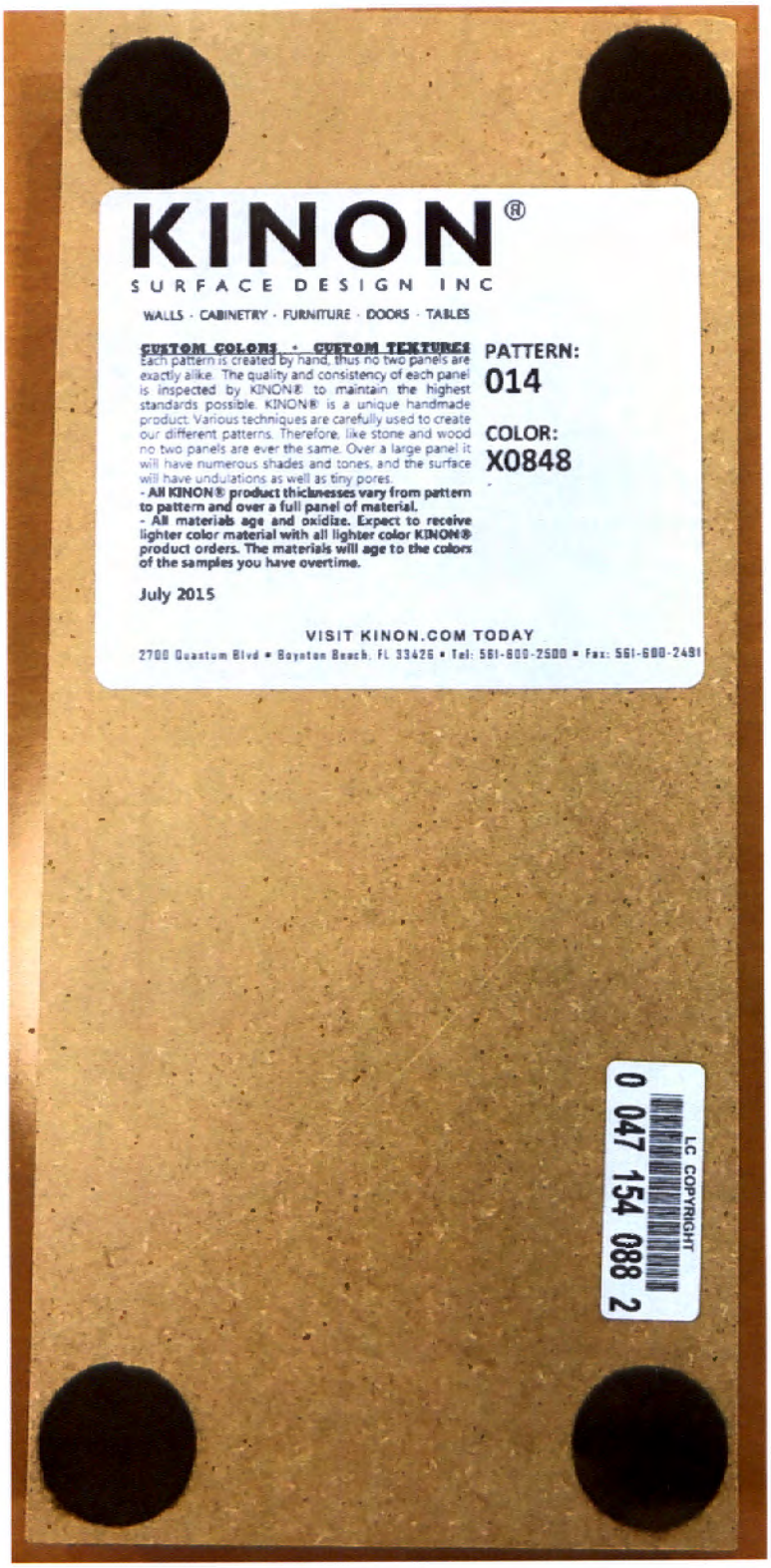
(I HERE BY SIGN AND CONFIRM MY UNDERSTANDING OF THE VISUAL OF THIS KINON PATTERN AND COLOR)

KINON is an unique product. Various techniques are carefully used to create our different patterns. Therefore like stone and wood, no two panels are ever the same. Over a large panel it will have numerous shades and tones. and surface will have undulations as well as tiny pores.

- Pattern direction as shown only
- The image shown on the left represents a Kinon panel with an approximate size of 5' x 12' / 1524 mm x 3660 mm.
- The image of detail close up (below) shows a representation of the pattern at approximately 18 in / 457 mm in diameter.

1 561.600.2500 / www.kinon.com

APPENDIX B


KINON®
SURFACE DESIGN INC
WALLS · CABINETRY · FURNITURE · DOORS · TABLES
CUSTOM COLORS · CUSTOM TEXTURES
Each pattern is created by hand, thus no two panels are exactly alike. The quality and consistency of each panel is inspected by KINON® to maintain the highest standards possible. KINON® is a unique handmade product. Various techniques are carefully used to create our different patterns. Therefore, like stone and wood no two panels are ever the same. Over a large panel it will have numerous shades and tones, and the surface will have undulations as well as tiny pores.
- All KINON® product thicknesses vary from pattern to pattern and over a full panel of material.
- All materials age and oxidize. Expect to receive lighter color material with all lighter color KINON® product orders. The materials will age to the colors of the samples you have overtime.
July 2015
PATTERN:
014
COLOR:
X0848
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