



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

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**Re: Second Request for Reconsideration of Refusal to Register Golf Glass  
(SR # 1-10567330231; Correspondence ID: 1-52KE7B7)**

Dear Mr. Steinmetz:

The Review Board of the United States Copyright Office (“Board”) has considered Mark Sanders LLC (“Sanders”) request for reconsideration of the Registration Program’s refusal to register a sculptural claim in the work titled “Golf Glass” (“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 drinking glass with a concave base. The base is textured with a pattern of numerous, closely spaced circular and hexagonal indentations.

The Work<sup>1</sup> is as follows:



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<sup>1</sup> Sanders submitted deposit images that depict the Work with and without the drink, ice cubes, and silver piece at the top of the glass. Because Sanders did not claim authorship in those elements in any correspondence, the Board does not consider them as part of the claim to the sculptural Work.

## II. ADMINISTRATIVE RECORD

On June 15, 2021, Sanders filed an application to register a copyright claim in the Work. In a July 14, 2021 letter, a Copyright Office registration specialist refused to register the claim, determining that the Work is a useful article that does not contain any separable elements that contain sufficient copyrightable authorship to support a claim to copyright. Initial Letter Refusing Registration from U.S. Copyright Office to Michael Steinmetz at 1 (July 14, 2021).

On August 3, 2021, Sanders requested that the Office reconsider its initial refusal to register the Work, arguing that the Work’s “golf ball shaped impression on the bottom of the cup” is a separable design element that “exceed[s] the minimum amount of creativity and authorship required for copyright protection.” Letter from Michael Steinmetz to U.S. Copyright Office at 1–2 (Aug. 3, 2021) (“First Request”). After reviewing the Work in light of the points raised in the First Request, the Office reevaluated the claim and again concluded that the Work could not be registered. Refusal of First Request for Reconsideration from U.S. Copyright Office to Michael Steinmetz (Dec. 10, 2021). The Office explained that while the design on the bottom of the glass has sculptural qualities that are separable from the useful article, the design consists of “common and familiar shapes” and “the combination and arrangement of those shapes does not contain the requisite amount of creativity” to support a claim to copyright. *Id.* at 2.

In a letter dated January 28, 2022, Sanders 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 Michael Steinmetz to U.S. Copyright Office (Jan. 28, 2022) (“Second Request”). Sanders argued that “[the Work] is an abstract depiction of a golf ball” comprised of creative choices that, when taken together, make the Work sufficiently creative for registration. *Id.* at 4–5. Sanders also asserted that “the cylinder encasing around the golf pattern . . . enhances the sculptural elements of [the Work]” and therefore “is a part of the separable design.” *Id.* at 4. Furthermore, Sanders points to “other geometric-based works” that the Office registered and suggests that the refusal to register his Work “may evidence a level of inconsistency in application of [copyright’s originality standard] and an abuse of discretion.” *Id.* at 7.

## III. DISCUSSION

After carefully examining the Work and considering the arguments made in the First and Second Requests, the Board concludes that the Work does not contain the creativity necessary to sustain a claim to copyright.

Because the Work is a glass, it is a “useful article” under the Copyright Act and must be analyzed under this framework. *See* 17 U.S.C. § 101; U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 924.1 (3d ed. 2021) (“COMPENDIUM (THIRD)”) (noting that useful articles have an inherent useful function that is “objectively observable or perceivable from the appearance of the item”). The Copyright Act defines useful articles as 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 (defining “useful article”). When determining whether the design of a useful article is eligible for copyright protection, the Office examines the item for any separable features that would qualify as a protectable work “if it were imagined separately

from the useful article into which it is incorporated.” COMPENDIUM (THIRD) § 924.3 (quoting *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 409 (2017)).

In defining “pictorial, graphic, or sculptural work,” the Act provides that “the design of a useful article . . . [can be] considered a pictorial, graphical, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.” 17 U.S.C. § 101. As the Supreme Court articulated in *Star Athletica*, a feature incorporated into the design of a useful article can be copyrightable only if that 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.” 580 U.S. at 409.

To warrant registration, the separable features must constitute an “original work[] of authorship.” 17 U.S.C. § 102(a). The Supreme Court has explained that the test for originality requires that works are “independently created by the author” and contain “some minimal degree of creativity.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). Only a modicum of creativity is necessary, but some works fail to meet even this low threshold. *Id.* The Court has 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.

With useful articles, the Office must consider whether any separable features satisfy the *Feist* standard for originality. 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 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.”).

Applying the above framework to the Work, the Board finds that the Work contains separable, non-utilitarian features, but those features do not contain sufficient creativity to be protected under the Copyright Act. The separable features that can be perceived in the Work are the circular and hexagonal design on the glass’s base. These features are not protectable, however, because they lack, individually or in combination, the requisite degree of creativity required for copyright protection. As set out in the relevant regulations, copyright does not protect standard designs and common geometric shapes, in either two- or three-dimensional form. *See* 37 C.F.R. § 202.1(a) (identifying “familiar symbols or designs” as examples of works

not subject to copyright); *see also* COMPENDIUM (THIRD) § 906.1 (noting that common geometric shapes are not protectable). Hexagonal indents are common geometric shapes. While Sanders notes that the hexagons “are not smooth like a traditional golf ball but are more angular and deeper,” Second Request at 6, minor variations of common geometric shapes and designs are also not protectable. *See* COMPENDIUM (THIRD) § 906.2 (“[T]he copyright law does not protect mere variations on a familiar symbol or design, either in two- or three-dimensional form.”).

Sanders asserts that the “cylinder encasing” at the bottom of the glass is part of the separable design. Second Request at 4.



The cylinder encasing is not a separable element because it cannot be perceived separately from the utilitarian aspects of the glass itself. It is the glass’s base. The perimeter of the cylinder is clearly dictated by the contours of the glass, and the top concave curve is a standard utilitarian feature in drinkware. As described above, the bottom concave curve is separable from the utilitarian features of the glass, and we address its creativity below. Its separability, however, does not make the cylinder encasing a separable element of the Work.


The combination of the individual separable features, including their selection, arrangement, and coordination, is also insufficiently creative to sustain copyright protection. The combination of numerous uncopyrightable hexagons similar to the arrangement of dimples found in a standard golf ball is a common design arrangement that is not sufficiently creative to warrant protection. COMPENDIUM (THIRD) § 905 (“Merely bringing together only a few standard forms or shapes with minor linear or spatial variations does not satisfy [the creativity] requirement.”); *see Satava*, 323 F.3d at 805, 811. Sanders also notes that the base is elongated and “disproportionate when compared to an actual golf ball.” Second Request at 5. This curvature appears due to the shape of the glass rather than a creative choice. Even if this design element was not dictated by the shape of the glass, the curve of the base is a minor variation on a round golf ball that does not rise to the level of creativity necessary for registration.

Lastly, Sanders suggests that the Office has arbitrarily applied the standard for copyrightability. *Id.* at 7. Sanders points to other geometric-based works that the Office registered to suggest that the Office is “inconsisten[t] in [its] application of an important standard,” which may be evidence of an abuse of discretion. *Id.* (citing 5 U.S.C. § 706(2)(A)). The Board does not compare works; it makes determinations of copyrightability on a “case-by-case basis” and “[a] decision.” COMPENDIUM (THIRD) § 309.3. The Board’s prior decisions that Sanders cites have no bearing on the Board’s determination as to copyrightability of the Work. Sanders also points to works containing geometric shapes that various district courts found to be eligible for copyright protection. Second Request at 3 (citing *Cooley v. Target Corp.*, No. 20-cv-2152, 2021 WL 1175164 (D. Minn. Mar. 29, 2021); *Titlecraft, Inc. v. Nat’l Football League*, No. 10-cv-758, 2010 WL 5209293 (D. Minn. Dec. 20, 2010); *Prince Grp., Inc. v. MTS Prods.*, 967 F. Supp. 121 (S.D.N.Y. 1997); *Olem Shoe Corp. v. Wash. Shoe Co.*, No. 9-cv-23494, 2011 WL

6202282 (S.D. Fla. Dec. 1, 2011), *aff'd* 591 F.App'x 873 (11th Cir. 2015). Again, the Office does not compare works and makes copyrightability determinations on a “case-by-case basis.” *See* COMPENDIUM (THIRD) § 309.3. Still, the Board notes that the work at issue in each cited case appears to be distinguishable. While the work in *Cooley*, like the Work here, contains one repeating geometric shape, the court found sufficient creativity in the work’s “irregularly shaped, imperfect circles, shaded in different colors and aligned imperfectly at varying distances from each other.” 2021 WL 1175164, at \*4. Here, the Work has no similar irregularity in the shapes, no color, and no variation in alignment or spacing of the shapes. Similarly, the court in *Prince Grp.* found creativity in “the shape and the shading of the dots” and their placement in “imperfect and conflicting diagonal lines at varying distances from each other giving the appearance of randomness.” 967 F. Supp. at 125. The Work here has no shading or irregularity in the shapes nor are the shapes imperfectly placed. Rather, they are in a common and predictable pattern. And in *Olem Shoe Corp.*, the court found that the “particular arrangement of different sized dots at varying distances along vertical and horizontal planes” met the level of creativity required for copyright protection. 2011 WL 6202282, at \*11. The shapes in Golf Glass have no similar differences in size and are placed in a common pattern.

#### IV. CONCLUSION

For the reasons stated herein, the Board 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.

  
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**U.S. Copyright Office Review Board**  
Maria Strong, Associate Register of Copyrights and  
Director of Policy and International Affairs  
John R. Riley, Acting Deputy General Counsel  
Nicholas R. Bartelt, Assistant General Counsel