



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
Artistic features of FAST XP helmet (SR 1-7517981381) and
Artistic features of FAST SF helmet (SR 1-7518220494)
(Correspondence IDs: 1-3OHN6AX, 1-3OHN6AX)**

Dear Ms. Fertig:

The Review Board of the United States Copyright Office (“Board”) has considered Gentex Corporation’s (“Gentex’s”) second requests for reconsideration of the Registration Program’s refusal to register two- and three-dimensional artwork claims in the works titled “Artistic features of FAST XP helmet” (“XP Helmet”) and “Artistic features of FAST SF helmet” (“SF Helmet” and, collectively with XP Helmet, “Works”). After reviewing the applications, deposit copies, and relevant correspondence, along with the arguments in the second requests for reconsideration, the Board affirms the Registration Program’s denials of registration.

I. DESCRIPTION OF THE WORK

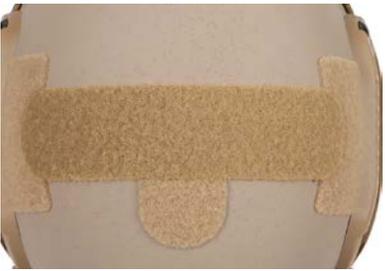
The Works are combat helmets submitted for registration in two separate applications. The applicant claims the two- and three-dimensional “compilation of new and revised artistic features,” which include the shroud on the front, the rails on the sides, and the patches at the top of each Work.

First, the shroud is a pentagon-shaped sculptural design with an interior rectangular cut-out to enable the attachment of Night Vision Goggles (NVGs) and other devices. The SF Helmet features a copper-colored rectangular insert in the interior of the shroud.

Second, the rails are V-shaped connectors located on each side of the Works. The rails have small square and rectangle cut-outs to attach adapters such as masks and goggles.

Finally, the patches are Velcro attachment points for head borne accessories. The XP Helmet’s patches create a barbell pattern with a half circle in the center. The SF Helmet’s patches are geometrically shaped and arranged in a symmetrical pattern.

The features are depicted as follows:

XP Helmet Shroud	SF Helmet Shroud
 A close-up photograph of the interior of an XP helmet shroud. It features a tan-colored plastic frame with a central rectangular cutout. Two black cables are attached to the bottom of the frame. Three black arrows point to specific features: one at the top center, one on the left side, and one on the right side.	 A close-up photograph of the interior of an SF helmet shroud. It features a tan-colored plastic frame with a central rectangular cutout. A blue and black cable is attached to the right side. Two black arrows point to specific features: one at the top center and one on the left side.
XP Helmet Rail	SF Helmet Rail
 A side-view photograph of the XP helmet rail. It shows a tan-colored plastic rail with several rectangular ventilation slots. A black arrow points to the rail's surface.	 A side-view photograph of the SF helmet rail. It shows a tan-colored plastic rail with several rectangular ventilation slots. A black arrow points to the rail's surface.
XP Helmet Patches	SF Helmet Patches
 A photograph showing the interior of the XP helmet with several tan-colored patches attached to the inner shell. The patches are rectangular and appear to be made of a soft, fibrous material.	 A photograph showing the exterior of the SF helmet with several tan-colored patches attached to the outer shell. The patches are arranged in a pattern that covers the top and sides of the helmet.

II. ADMINISTRATIVE RECORD

On March 25, 2019, Gentex filed two applications for the Works. In a March 27, 2019, letter, the Copyright Office refused to register both claims, on the ground that they are “useful article[s] that do[] not contain any copyrightable authorship” necessary to “sustain a claim to copyright.” Initial Letter Refusing Registration from U.S. Copyright Office to Rachel Fertig, at 1 (Mar. 27, 2019).

Gentex then requested that the Office reconsider its initial refusal to register the Works. Letters from Rachel Fertig to U.S. Copyright Office (May 13, 2019) (“First Requests”). After reviewing the Works in light of the points raised in the First Requests, the Office affirmed the refusal to register the claims. The Office concluded that the Works “are useful articles that do not contain any separable, copyrightable features.” Refusal of First Requests for Reconsideration from U.S. Copyright Office to Rachel Fertig, at 1 (Aug. 27, 2019) (“Second Refusal”).

Gentex subsequently requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Works. Letters from Rachel Fertig to U.S. Copyright Office (Nov. 21, 2019) (“XP Second Request” and “SF Second Request”). In the letters, Gentex stated that the helmet accessories that make up the Works “can be physically detached from” and “do not recreate the [h]elmet[s].” XP Second Request at 7, 11; SF Second Request at 6, 10. Contending that, even though “the [s]hroud and [r]ails can make a helmet more useful by allowing night vision goggles or other tools to be hung/attached to a helmet,” Gentex asserted that “there is no longer any usefulness” “when the features are separated from the helmet.” XP Second Request at 11; SF Second Request at 11. Finally, Gentex contended that the Works are “sufficiently creative even though common geometric shapes and familiar symbols are not eligible for registration on their own because [] the Work[s] contain[] many non-standard geometric shapes and artistic contours and [] multiple courts and the Copyright Office have confirmed that even standard geometric shapes and familiar symbols—when combined in a larger design—can demonstrate sufficient creativity to merit registration.” XP Second Request at 12; SF Second Request at 11.

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.

B. Analysis of the Work

After carefully examining the Works and applying the legal standards discussed above, the Board finds that the Works are useful articles that do not contain the requisite separable creative authorship necessary to sustain claims to copyright.

Here, the Works are useful features that are incorporated into the design of two useful articles, the XP and SF combat helmets.¹ To be copyrightable, then, the Works must be able to “be perceived as [] two- or three-dimensional work[s] of art separate from the useful article[s]” that “would qualify as [] protectable pictorial, graphic, or sculptural work[s]—either on [their] own or fixed in some other tangible medium of expression—if [they] were imagined separately from the useful article[s] into which [they are] incorporated.” *Star Athletica*, 137 S. Ct. at 1007.

Applying this test to the Works, the Board finds that they lack separable features entitled to copyright protection. For both Works, the shroud and rails are not “pictorial, graphic, or sculptural” features because they are *themselves* useful, serving an intrinsic utilitarian function as mounting devices and connectors that are normally parts of combat helmets. *Id.* The Board concludes that they lack “the capacity to exist apart from the utilitarian aspects of the article” because these features represent “article[s] that [are] normally a part of a useful article,” and are unprotectable by copyright. *Id.* at 1010.

Indeed, Gentex admits that “the Shroud and Rails can make a helmet more useful by allowing night vision goggles or other tools to be hung/attached to a helmet.” XP Second Request at 11; SF Second Request at 11. Although Gentex argues that “there is no longer any usefulness of hanging goggles or anything else from the Work[s]” “when the features are separated from the helmet[s],” even when viewed separate from the helmets, the shape of the shroud and rails are dictated and constrained by their functional purpose. *Id.* Further, the shroud and rails do not simply make the combat helmets *more* useful. Rather, they are useful on their own. The shroud mounts NVGs, video cameras, and other devices. Similarly, the rails mount adapters, masks, and goggles. Indeed, Gentex advertises that these features are designed to be compatible with, and mount, most NVGs, adapters, masks, and goggles.² These features cannot be separated from their own “utilitarian aspects.”

Gentex contends that the Board should not consider the usefulness of the features because the separability “inquiry is limited to how the article and feature are perceived, not how or why they were designed.” XP Second Request at 10; SF Second Request at 10 (citing *Star Athletica*, 137 S. Ct. at 1013, 1015). This position, however, is unsound. Taken to its conclusion, Gentex’s argument would result in every two-dimensional design being perceived as inherently separable and thus copyrightable if original. The Supreme Court has rejected that argument as “inconsistent with the text of §101.” *Id.* at 1009. The shrouds, including their pentagon shape and rectangular cut-outs, and the rails, including their V-shape and geometric cut-outs, are not merely artistic features that incidentally contribute to the usefulness of the XP and SF helmets. Rather, the features are useful and represent designs that were deliberately engineered to be

¹ There is no dispute that the combat helmets on which the Works are affixed are useful articles. XP Second Request at 4; SF Second Request at 4.

² See GENTEX CORPORATION, HELMET OPERATOR’S MANUAL (2016), <https://shop.gentexcorp.com/content/06-05-160.pdf>; GENTEX CORPORATION, SF HELMET SYSTEMS OPERATOR’S MANUAL (2017), <https://shop.gentexcorp.com/content/UM-1034.pdf>.

compatible with, and mount, multiple types of devices. Thus, these features fail the separability test.

For these reasons the Board concludes that the shroud and rails are inseparable from their intrinsic utilitarian functions, similar to motorcycle accessories that have been deemed useful articles due to the failure of the designs to have any independence from the utilitarian aspect of the accessories. *See, e.g., Custom Chrome, Inc. v. Ringer*, 1995 U.S. Dist. LEXIS 9249, *10, *15–16, 35 U.S.P.Q.2D (BNA) 1714, 1716, 1718 (D.D.C. 1995) (holding that the Office’s “refusal to register the Plaintiff’s motorcycle parts was reasonable”).

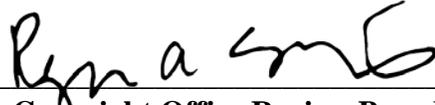
Even if the shroud and rails could be deemed separable, the Board concludes that all of the asserted features, including the pattern of patches, lack sufficient creativity for protection as pictorial, graphic, or sculptural works. Of course, for a work to be eligible for copyright protection, it must “possess more than a *de minimis* quantum of creativity.” *Feist*, 499 U.S. at 363. Neither of the Works’ constituent elements nor the combination of those elements meet this low threshold. The pattern of patches on the XP and SF helmets are a combination of basic, unprotectable geometric shapes. The symmetrical arrangement of those shapes are garden variety and obvious, bringing together “only a few standard forms or shapes with minor linear or spatial variations.” COMPENDIUM (THIRD) § 905. Further, as attachment points for head borne accessories, the patch patterns appear to be designed, in part, to provide sufficient attachment points.³ Likewise, the shroud and rails consist of a few unprotectable elements that are combined in an entirely standard manner, and dictated by non-creative and utilitarian considerations to be compatible with other devices. *See* COMPENDIUM (THIRD) § 313.4(J) (“[T]he Office cannot register a work consisting of a simple combination of a few familiar symbols or designs with minor linear or spatial variations.”).

Finally, Gentex argues that the Works contain at least the same amount of creativity as certain previously-registered works. XP Second Request at 11–15; SF Second Request at 11–14. The Office, however, does not compare works that have been previously registered or refused registration. *See* COMPENDIUM (THIRD) § 309.3. Instead, the Office examines each claim on its own merits, applying uniform standards of copyrightability at each stage of registration. Because copyrightability involves a mixed question of law and fact, differences between any two works can lead to different results. *See Homer Laughlin China Co. v. Oman*, 2 U.S.P.Q.2d (BNA) 1074, 1076 (D.D.C. 1991) (stating that it was not aware of “any authority which provides that the Register must compare works when determining whether a submission is copyrightable”); *accord Coach, Inc.*, 386 F. Supp. at 499 (indicating the Office “does not compare works that have gone through the registration process”). Nonetheless, even if a comparison were required, the works Gentex cites contain creative elements not present in the Works. Here, the claimed separable features merely consist of unprotectable geometric shapes, arranged in a manner dictated by their functional purposes and compatibility requirements. The cited registrations, therefore, are not apt comparisons for the Works here.

³ *See OPS-Core Universal Exterior Loop Kit*, GENTEX CORPORATION, <https://shop.gentexcorp.com/ops-core-universal-exterior-loop-kit/> (noting that the SF patch pattern is designed to “provide[] more attachment points without increasing IR signature”).

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the copyright claims in the Works. 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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