



United States Copyright Office

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David K. Friedland
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**Re: Second Request for Reconsideration for Refusal to Register “Gold Wood”;
Correspondence ID: 1-26ELC75, SR# 1-3400883831; and “Staggered Carbon”;
Correspondence ID: 1-1U5ZPC3, SR# 1-3391838351**

Dear Mr. Friedland and Ms. Vining:

The Review Board of the United States Copyright Office (“Board”) has considered T.W.N. Industries, Inc.’s (“TWN”) second request for reconsideration of the Registration Program’s refusals to register 2-D artwork claims in two works titled “Gold Wood” and “Staggered Carbon” (“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 denial of registration for Gold Wood, but reverses its denial and thus grants registration to Staggered Carbon.

I. DESCRIPTION OF THE WORKS

The Works are two patterns created to be applied onto an object (*e.g.*, an airplane interior) in a repeating pattern. Staggered Carbon is a geometric pattern consisting of repeating rectangular bands of different sizes, shapes, and textures, arranged in a woven pattern. The bands are two distinct gray-colored patterns. One band is dark gray with vertical lines, and the other band is light gray with darker gray lines. Gold Wood is a two-dimensional graphic design consisting of a repeating pattern of striated gold and cream vertical lines, made to resemble a light wood grain.

The Works are depicted as follows:

Staggered Carbon:

Swatch



Repeat



Gold Wood:



II. ADMINISTRATIVE RECORD

On May 9, 2016, TWN filed an application to register a copyright claim in Staggered Carbon; on May 11, 2016, TWN filed an application to register a copyright claim in Gold Wood. In a September 16, 2016 letter, a Copyright Office registration specialist refused to register the claim in Staggered Carbon, and on September 22, 2016, a different Copyright Office registration specialist refused to register the claim in Gold Wood, in both cases finding that the Works “will not support a claim to copyright” because “a work of the visual arts must contain a minimum amount of creative pictorial, graphic or sculptural authorship,” and the Works do not. Letter from Adrienne Brown, Registration Specialist, to Jaime Vining (Sept. 16, 2016); Letter from Robin Jones, Registration Specialist, to Jaime Vining (Sept. 22, 2016).

In two letters dated November 7, 2016 and November 8, 2016, TWN requested that the Office reconsider its initial refusals to register the Works. Letter from TWN to U.S. Copyright Office (Nov. 7, 2016) (“Staggered Carbon First Request”); Letter from TWN to U.S. Copyright Office (Nov. 8, 2016) (“Gold Wood First Request”). In these letters, TWN described the processes used to create each of the Works. As to Staggered Carbon, TWN noted that it is made up of three layers within Photoshop, all hand-drawn with Photoshop brushes “to create horizontal lines of varying width, feathering, and texture,” “with drop shadows to depict 3D imagery rather than a flat layer that sits on top of the layer below” using “various thick and thin brushes . . . [and] effects to create the metallic appearance” and to “simulate authentic carbon fiber weave.” Staggered Carbon First Request at 1. As to Gold Wood, TWN stated that it is also made up of three layers within Photoshop: the “Base Layer” of the background color, the “Wood Layer” that was “created solely with brush strokes and given a hard-edge in order to create a clean and crisp design,” and the “Gold Layer,” created with “Photoshop hard brushes and strokes in order to show a well-defined edge with zero feathering.” Gold Wood First Request at 1.

After reviewing the Works in light of the points raised in the First Request letters, the Office re-evaluated the claims and, in two separate letters sent on the same day, again concluded that the Works “do[] not contain a sufficient amount of original and creative authorship to support a copyright registration.” Letter from U.S. Copyright Office to Jaime Vining re Staggered Carbon (March 29, 2017) (“Staggered Carbon Letter”); Letter from U.S. Copyright Office to Jaime Vining re Gold Wood (March 29, 2017) (“Gold Wood Letter”). Regarding Staggered Carbon, the Office noted that “[t]he elongated rectangular bands that make up this work are a common and familiar shape,” and such shapes are not copyrightable. Staggered Carbon Letter at 2. The Office also noted that “under no circumstance does copyright protect a process, system, or method which may be embodied in a work.” *Id.* Finally, the Office stated that “the features 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. As to Gold Wood, the Office stated that “[t]he lines that make up this work are a common and familiar shape,” which are not copyrightable, and “mere coloration or mere variations in coloring are not copyrightable” either. Gold Wood Letter at 2. Thus, the Office found “that the individual elements of Gold Wood do not reflect a sufficient amount of original and creative authorship to support a copyright registration.” *Id.* Additionally, the Office found that Gold Wood’s features also were not “combined in any way that differentiates them

from their basic shape and design components,” and as such, the features’ combination also was not protectable because it is a “simple configuration”—“the work as a whole consists of vertical lines in shades of gold and cream.” *Id.* at 3.

In two separate letters dated May 30, 2017, TWN requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusals to register the Works. Letter from Jaime Vining to U.S. Copyright Office re Staggered Carbon (May 30, 2017) (“Staggered Carbon Second Request”); Letter from Jaime Vining to U.S. Copyright Office re Gold Wood (May 30, 2017) (“Gold Wood Second Request”). In both letters, TWN claimed that the Works’ “design[s] exceed[] the minimal degree of creative authorship required for obtaining registration with the U.S. Copyright Office.” Staggered Carbon Second Request at 1; Gold Wood Second Request at 1. Regarding Staggered Carbon, TWN claimed that “[c]ourts have already widely recognized the registrability of repeating designs comprised of otherwise common shapes.” Staggered Carbon Second Request at 3. TWN argued that, given Staggered Carbon’s “elements that have been generated and combined by [TWN] to form a unique design,” with its “various layers of colors, brush strokes and textures” created by designers making “specific choices from endless alternatives of shapes, backgrounds and colors,” Staggered Carbon is registrable. *Id.* at 4. Further, the design “is not simply comprised of common and familiar shapes.” *Id.* at 5 (internal quotations omitted). Rather, TWN claimed that it “made independent choices of selection and arrangement” and “compose[d] carbon design elements in creative ways.” *Id.*

Regarding Gold Wood, TWN claimed that “[c]ourts have already recognized the registrability of wood grain designs.” Gold Wood Second Request at 3 (citing *Home Legend, LLC v. Mannington Mills, Inc.*, 784 F.3d 1404 (11th Cir. 2015)). TWN claimed that in *Mannington Mills*, the Eleventh Circuit held that a two-dimensional wood-grain design was eligible for copyright protection, having expressed sufficient creativity so as not to be denied protection as an unprotectable product of nature. The court held that “the decisions Mannington made in the location and character of the marks it added to the boards render its contributions creative enough to hurdle the low bar of copyrightable originality.” Gold Wood Second Request at 3 (quoting *Mannington Mills*, 784 F.3d at 1410). TWN argued that, like the wood grain design in *Mannington Mills*, Gold Wood is sufficiently creative to be subject to copyright registration. *Id.* at 5. Further, TWN claimed that it “had to make specific choices from endless alternatives of shapes, backgrounds and colors, and decide how to arrange the components,” and the resulting combination of elements is “sufficiently original and creative to merit copyright protection.” *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.

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 Works

After carefully examining the Works and applying the legal standards discussed above, the Board finds that Staggered Carbon is registrable, but Gold Wood does not contain the requisite originality necessary to sustain a claim to copyright.

1. Staggered Carbon

The Board finds that the combination of elements in Staggered Carbon—namely the different textures on the bands, as well as their arrangement—exhibits copyrightable authorship and thus may be registered. The Board’s finding is based on the “minimal degree of creativity” required by the U.S. Supreme Court in *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). The Office cautions, however, that registration covers only the original and creative features displayed in the Work, and not standard designs or other unoriginal elements. *See, e.g., Satava*, 323 F.3d at 812. Thus, the registration covers the specific combination of textures that TWN’s designers created, but not, for example, woven patterns or carbon fiber appearance generally.

2. Gold Wood

The Board accepts that Gold Wood satisfies the first prong of the originality requirement, independent creation. Gold Wood, however, lacks sufficient creativity to satisfy the second prong. Considering the elements of Gold Wood individually or as a whole, it consists of simple, minor variations on common shapes arranged in an obvious and uniform manner. *See, e.g., Homer Laughlin China Co. v. Oman*, No. 90 Civ. 3160, 1991 WL 154540 (D.D.C. 1991) (upholding refusal to register chinaware design pattern composed of simple variations of geometric designs due to insufficient creative authorship to support copyright registration).

In making its determination, the Board adheres to the standard set forth in *Feist*, where the Supreme Court held that only a modicum of creativity is necessary to support a copyright. *Feist*, 499 U.S. at 345. The Board agrees that public domain elements and/or commonly known shapes can be combined to create copyrightable works as long as such use constitutes more than a trivial variation of such elements, *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 102–103 (2d Cir. 1951), and the combination meets the minimal standard of creativity. This standard is met by Staggered Carbon, but not by Gold Wood.

Gold Wood is not protectable because it is made up of only a very few elements (monochromatic lines in a few shades of gold) arranged in an unoriginal manner (densely and with only minor and repeating variations throughout the pattern). The Board therefore has

determined that the elements in *Gold Wood* are minor variations on common shapes, and the few elements present in it have been arranged in a way that reflects only a *de minimis* level of creativity and is therefore insufficient to be copyrightable. *Cf.* COMPENDIUM (THIRD) § 313.4(J) (“a work consisting of a simple combination of a few familiar symbols or designs with minor linear or spatial variations” is not copyrightable).

TWN cited *Mannington Mills* to argue that *Gold Wood* is protectable, likening it to the work at issue in that case—a design that is intended to look like real wood grain. But the *Mannington* wood grain consisted of a detailed expression of deeply stained maple wood, with variable striations and portions of lighter and darker stain. The creativity required of *Mannington* in determining the “location and character of the marks it added to the boards” far exceeded any creativity necessary to densely arrange gold-colored lines in a pattern with little variation. *Mannington Mills*, 784 F.3d at 1410. The designs are fundamentally different in that sense; *Mannington*’s design in that case could not be characterized as consisting of common shapes arranged in the same orientation on a colored background, which, despite the nature of the process TWN used to create it, is an accurate characterization of *Gold Wood*. *Gold Wood* First Request at 1.

TWN argues that it “had to make specific choices from endless alternatives of shapes, backgrounds and colors, and decide how to arrange the components, which further demonstrates that [the Works are] registrable.” *Staggered Carbon* Second Request at 4; *Gold Wood* Second Request at 5. But it is not the possibility of choices that determines copyrightability, but whether the resulting expression contains copyrightable authorship. *See* COMPENDIUM (THIRD) § 310.8. The Board finds that *Gold Wood*, upon examination of its elements individually and as a whole, does not contain a sufficient amount of original and creative authorship to sustain a copyright claim. That an author had many choices available does not necessarily mean that the one the author selected meets even the modest creativity requirement of the copyright law.

Overall, the Board finds that *Gold Wood* is not copyrightable. The level of creative authorship involved in its configuration of elements is, at best, *de minimis*, and too trivial to enable copyright registration. *See* COMPENDIUM (THIRD) § 313.4(B).

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office reverses the refusal to register the copyright claim in *Staggered Carbon*; the Board’s decision will be referred to the Office’s Registration Program so that the application for *Staggered Carbon* can be registered. But the Board affirms the refusal to register the copyright claim in *Gold Wood*. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action in this matter.

BY:



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Copyright Office Review Board