



United States Copyright Office

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June 22, 2020

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**Re: Second Request for Reconsideration for Refusal to Register Hex Chest;
Correspondence ID: 1-3HGMZ1W; SR # 1-6886106851**

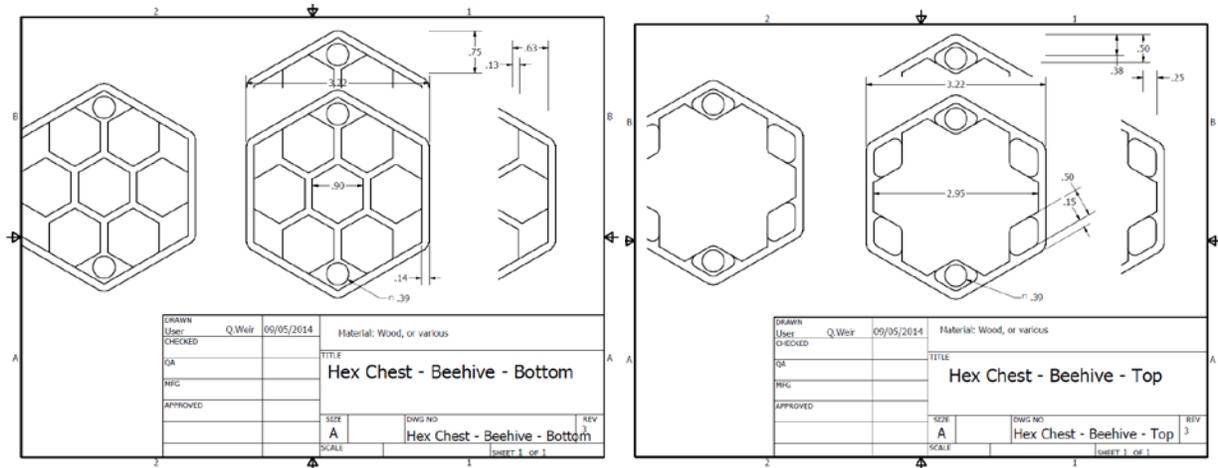
Dear Mr. McArthur:

The Review Board of the United States Copyright Office (“Board”) has considered Three Frog LLC’s (“Three Frog”) second request for reconsideration of the Registration Program’s refusal to register a sculptural claim in the work titled “Hex Chest” (“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 small wooden chest used to store dice. The overall shape is a hexagon, and there is a top and a bottom piece. The bottom has spaces to hold six dice. The six spaces are each hexagon shapes, described as a “beehive” arrangement in the deposit. Three Frog describes the negative space on the bottom as “diamond shapes with pointed edges.” The top piece fits onto the bottom piece. The underside of the lid has what Three Frog describes as a “blunted 6-pointed star design.” The negative space on the underside of the lid is described as “diamond shapes with rounded corners.” Three Frog does not seek registration of the wood patterns, type of wood used, or the carved script. The Work is as follows:





II. ADMINISTRATIVE RECORD

On August 23, 2018, Three Frog filed an application to register a copyright claim in the Work. In an October 24, 2018, letter, a Copyright Office registration specialist refused to register the claim, finding that the Work “is a useful article that does not contain any copyrightable authorship needed to sustain a claim to copyright.” Initial Letter Refusing Registration from U.S. Copyright Office to Stephen McArthur (Oct. 24, 2018).

In a letter dated November 19, 2018, Three Frog requested that the Office reconsider its initial refusal to register the Work. Letter from Stephen Charles McArthur to U.S. Copyright Office (Nov. 19, 2018) (“First Request”). After reviewing the Work in light of the points raised in the First Request, the Office re-evaluated the claims and again concluded that the Work “is a useful article that does not contain any separable copyrightable features.” Refusal of First Request for Reconsideration from U.S. Copyright Office to Stephen McArthur, at 1 (Apr. 9, 2019). The Office determined that while some of the Work’s features were separable, they did not satisfy the originality test because they “consist of diamonds, hexagons, and a star ... [all] common and familiar shape[s].” *Id.* at 4.

In a letter dated August 14, 2019, Three Frog 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 Stephen Charles McArthur to U.S. Copyright Office (Aug. 14, 2019) (“Second Request”). In that letter, Three Frog argued that the Work’s external hexagonal shape, six rounded-corner diamond shapes on the inside of the lid, six pointed-edged diamond shapes on the base, the beehive arrangement of hexagonal cutouts on the base, and the blunted six-pointed star design on the inside of the lid are all separable and copyrightable elements. *Id.* at 1. It asserted that “numerous artistic decisions” were made, specifically the “number of features, size of features, [and] their arrangement.” *Id.* 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; *see also* 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.”); *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 claim for 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 copyright 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* COMPENDIUM (THIRD) § 310.2. The attractiveness of a design, the espoused intentions of the author, the design’s visual effect or 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 is a useful article that does not contain the requisite separable original authorship necessary to sustain a claim to copyright.

As Three Frog acknowledges, the Work, a box that holds seven dice, is a useful article. *See* First Request at 2.¹ Thus, to be copyrightable, the Work must be able to “be perceived as a two- or three-dimensional work of art separate from the useful article” that “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.” *Star Athletica*, 137 S. Ct. at 1007. Three Frog asserts that the following five elements are separable: “(1) the hexagonal shape of the Work; (2) the six diamond shapes with rounded comers [sic] on this [sic] inside of the lid of the Work; (3) the six matching diamond shapes with pointed edges on the base of the Work; (4) the beehive arrangement of hexagonal cutouts as they exist in the bottom of the Work; and (5) the blunted 6-point star design inside the inside of the lid of the Work.” Second Request at 1.

Under the first part of the *Star Athletica* test, the Board finds that there are separable two-dimensional design features—the diamond shapes on the lid and on the base, the hexagonal cutouts on the base, and the 6-pointed star on the lid—that can be identified as “two- or three-dimensional element[s] that appear[] to have pictorial, graphic, or sculptural qualities.” *Star Athletica*, 137 S. Ct. at 1010.

In contrast, the Board does not find that the external hexagonal shape of the Work is separable. The hexagonal shape does not have “the capacity to exist apart from the utilitarian aspects” of the box and stand “on its own.” *Id.* at 1010. A feature “cannot itself be a useful article,” and in this case, the shape of the box and the box are one in the same. Once a feature is imaginatively removed, “some aspects of the original useful article [must be] left behind” even if it is not a “fully functioning useful article.” *Id.* at 1013–14 (internal quotation marks omitted). In this case, removing the external hexagonal shape from the Work would not leave any part of the box behind. Three Frog argues that “[t]he specific decorative shape of the box has no utilitarian function” and the hexagon was chosen for “aesthetic and artistic” reasons. Second

¹ Three Frog does not contend, nor does it appear, that the Work is a primarily decorative object whose form may be copyrightable apart from its mechanical and utilitarian aspects. *See* 17 U.S.C. § 101 (definition of “Pictorial, graphic, and sculptural works”); *see also* COMPENDIUM (THIRD) § 906.8.

Request at 2–3. The creator’s “design methods, purposes, and reasons” are irrelevant to the separability analysis. *Star Athletica*, 137 S. Ct. at 1015. The Board’s inquiry “is limited to how the article and feature are perceived, not how or why they were designed.” *Id.*

Next, 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 the Work’s separable individual elements nor the combination of those elements meet this threshold. Three Frog concedes that the individual elements—twelve diamonds, seven hexagons, and a 6-pointed star—are not copyrightable. *See* Second Request at 9. Viewed as a whole, the Board finds that the selection, coordination, and arrangement of these shapes are insufficient to render the Work sufficiently creative and original. The Office cannot register a work consisting of a simple combination of a few familiar symbols or designs with minor linear or spatial variation. COMPENDIUM (THIRD) § 313.4(J). Here, the arrangement of hexagon, diamond, and star elements are evenly spaced and symmetrical. The hexagons and diamonds are all the same size. Similarly, the arrangement of the hexagons is a standard beehive configuration while the blunted six-pointed star is only a minor variation on the standard hexagram, and is a predictable configuration.² Such familiar designs and common patterns, are uncopyrightable. *See id.* (listing as uncopyrightable subject matter “[c]ommon patterns, such as standard chevron, polka dot, checkerboard, or houndstooth designs”); *cf. Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678–79 (1st Cir.1967) (copyright protection should not be extended when “by copyrighting a mere handful of forms, [a party] could exhaust all possibilities of future use of the substance [of the idea]”).

Finally, Three Frog argues that several creative decisions qualify the Work for copyright protection. It notes that hexagons “are a repeated element in the gaming community”; their use in the Work creates a “visual pun” of a curse; the six sides of a hexagon “invites a comparison between an iconic element in gaming”—a twenty-sided die profile; hexagons “mirror[] the highly angulated and faceted designs” of polyhedral dice; and the specific use of seven hexagons “has special significance in roleplaying games.”³ Second Request at 9–10. The Board focuses

² The Board notes that these features arguably follow from the utilitarian aspects of the Work and not from original creative expression. For example, as noted by Three Frog in their Second Request, the hexagonal cutouts largely follow the outline of twelve- and twenty-sided dice, which, as demonstrated by the deposit photograph, are typically among the types of dice the Work is intended to store. Similarly, the inside of the chest contains cutouts for seven dice, which is the standard number of dice used to play *Dungeons & Dragons*. *See Dungeons & Dragons Dice—Build Your DND Dice Horde*, AWESOME DICE, <https://www.awesomedice.com/collections/dungeons-dragons-dice> (“*Dungeons and Dragons* uses any standard 7-dice set. In fact, the 7-dice set *is the gaming standard* because of D&D.”) (emphasis added). Once Three Frog elected to create seven cutouts to hold a standard number of seven dice within a hexagonal shaped box, the resulting beehive arrangement and the resulting negative space in the shape of six diamonds on the base result from one of the most space-efficient arrangements of those elements. *See The Miraculous Space Efficiency of Honeycomb: Hexagons and the Science of Packing*, SLATE: SCIENCE (July 22, 2015, 11:37 AM), <https://slate.com/technology/2015/07/hexagons-are-the-most-scientifically-efficient-packing-shape-as-bee-honeycomb-proves.html>. Similarly, since dice are thicker than the height of the cutouts on the base, Three Frog had only a handful of options to make them fit into the box with the lid on: create individual hexagonal lid cutouts to correspond to the shape of the base cut outs, cut out the entire lid, or cut out the area corresponding to the outline of the six outer base cutouts, which necessarily results in the some version of a six-pointed star on the lid.

³ To the extent that these arguments are true, they constitute yet more grounds for rejecting a copyright claim that could limit other parties’ use of these elements, since expressive elements of a work are not entitled to protection if they are standard, stock, or common to a particular topic, if they necessarily follow from a common theme or setting, or if they are “dictated by external factors such as particular business practices.” *See, e.g., Computer Mgmt.*

on the actual appearance of the fixed Work and does not consider any meaning or significance that the Work may evoke. The fact that creative thought may take place in the mind of the person who encounters a work has no bearing on originality. *See* COMPENDIUM (THIRD) § 310.3. Similarly, the Office will not consider the author’s inspiration, creative intent, or intended meaning when examining a work. *Id.* § 310.5. Three Frog also argues that the design “underwent numerous alternatives and required substantial amounts of time devoted to drafting, adjusting, and creative planning.” Second Request at 10. The Board focuses on the Work’s appearance and will not consider the amount of time, effort, expense, or design alternatives required to create the work. COMPENDIUM (THIRD) § 310.7–310.8.

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
Regan A. Smith, General Counsel and
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Catherine Zaller Rowland, Associate Register of
Copyrights and Director, Public Information and
Education
Kimberley Isbell, Deputy Director of Policy and
International Affairs

Assistance Co. v. Robert F. DeCastro, Inc., 220 F.3d 396, 401 (5th Cir. 2000); 4 NIMMER ON COPYRIGHT § 13.03[B][4] (2018); GOLDSTEIN ON COPYRIGHT § 2.3.2.2 (2015).