



United States Copyright Office

Library of Congress · 101 Independence Avenue SE · Washington, DC 20559-6000 · www.copyright.gov

March 1, 2019

Aleen Tomassian, Esq.
Conkle, Kremer & Engel, PLC
3130 Wilshire Blvd.
Suite 500
Santa Monica, CA 90403-2351

Re: Second Request for Reconsideration for Refusal to Register No. 062044303097; Correspondence ID: 1-2RG04UN; SR #: 1-5523456891

Dear Ms. Tomassian:

The Review Board of the United States Copyright Office (“Board”) has considered Vladimir Zolotnik’s (“Zolotnik’s”) second request for reconsideration of the Registration Program’s refusal to register a sculptural claim in the work titled “No. 062044303097” (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 the lower portion of a clear plastic pedicure liner for a foot bath (or “spa”), without the outer liner walls. One end of the liner is shaped like a semi-circle, while the other end is shaped like a semi-square with rounded edges. The liner contains a left and right foot outlines, each filled with raised and evenly-spaced hemispheres. The space between the two foot outlines contains a raised divider. The Work is depicted in Appendix A.

II. ADMINISTRATIVE RECORD

On August 3, 2017, Zolotnik filed an application to register a copyright claim in the Work. In a November 16, 2017, letter, the Copyright Office’s Chief of the Visual Arts Division refused to register the claim, finding that it “is a useful article that does not contain any copyrightable authorship needed to sustain a claim to copyright.” Letter from John Ashley, Chief, Visual Arts Division, to Mark Kremer, Conkle, Kremer & Engel, PLC (Nov. 16, 2017).

In a letter dated February 15, 2018, Zolotnik requested that the Office reconsider its initial refusal to register the Work. Letter from Aleen Tomassian, Conkle, Kremer & Engel, PLC, to U.S. Copyright Office (Feb. 15, 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.” Letter from Stephanie Mason, Attorney-Advisor, to Mark Kremer, Conkle, Kremer &

Engel, PLC 1 (June 15, 2018) (“First Refusal”). The Office conducted a separability analysis, but, even after considering that the Work’s raised hemispheres and center divider could be separable, concluded that there were no features that would qualify as sufficiently creative for copyright registration. *Id.* at 3–4.

In a letter dated September 17, 2018, Zolotnik 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 Aleen Tomassian, Conkle, Kremer & Engel, PLC to U.S. Copyright Office (Sept. 17, 2018) (“Second Request”). In that letter, Zolotnik argued that elements in the Work were sufficiently creative and should thus be registered. First, he contended that the Work was not simply a common or familiar shape. *Id.* at 2–5. Specifically, Zolotnik tried to distinguish the Work from two cases of insufficient creativity cited by the Office in its First Refusal: the chinaware design pattern in *Homer Laughlin China Co. v. Oman*, No. CIV. A. 90-3160, 1991 WL 154540 (D.D.C. July 30, 1991), and the striped cloth and square pattern in *Jon Woods Fashions, Inc. v. Curran*, No. 85 CIV. 3203 (MJL), 1988 WL 38585 (S.D.N.Y. Apr. 19, 1988). Second, Zolotnik asserted that the Work’s combination of elements was more creative than the works in those cases, satisfied the creativity element, and that the Office did not sufficiently consider either the “raised tapered portion of the Work” or the arrangement of the raised hemispheres around that raised divider when considering whether the Work was sufficiently creative to register. *Id.* at 5.

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 “familiar symbols or designs”); *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 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 authorship necessary to sustain a claim to copyright.

The Board concludes that the Work lacks "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; *Star Athletica*, 137 S. Ct. at 1008. Zolotnik argued that both the "raised tapered portion of the Work" and the arrangement of the raised hemispheres around that raised tapered divider are design elements separately perceptible from the utilitarian article. Second Request at 5. But it is clear that these elements are inseparable parts of the useful article. The useful article is the liner for a foot bath. Its contours are designed to fit into vessels—namely the Belava Pedicure Tub, Trio Foot Spa, and Pro Foot Massager, *see App. B—*

to act as water and contaminant barriers.¹ Further, it is impossible to ignore that the divider in the foot bath separates a user's feet and keeps the liner securely in place, while the foot outlines and raised evenly-spaced hemispheres provide friction against a user's feet, so they will prevent slipping and create friction for any foot baths with massaging features.² These foot baths, and accompanying liners, are designed to accommodate a "man's size 13 [foot] comfortably," and their design is dictated by that utility.³ Every part of the Work has "an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." 17 U.S.C. § 101 (definition of "useful article"). And the Work's raised hemispheres around that raised tapered divider elements are not akin to "a carving on the back of a chair" or "a floral relief design on silver flatware" as contemplated by Congress as separable and protectable elements of a three-dimensional work. H.R. Rep. No. 94-1476, at 55 (1976), 1976 U.S.C.C.A.N. 5659, 5668. Instead, these design elements are comparable to the unprotectable chair or flatware itself; that is, inseparable.

Assuming, for the sake of argument, that the raised hemisphere and divider designs were separable from the useful article, the Board would still find that the Work does not meet the originality requirement necessary to sustain a claim to copyright.

The raised hemisphere designs consist of evenly-spaced hemispheres filling in the outlines of two feet. Foot outlines are not protected by copyright, as they are familiar symbols or designs. 37 C.F.R. § 202.1(a). The use of evenly-spaced hemispheres, or circles, is a classic example of a work using an unprotectable geometric design. COMPENDIUM (THIRD) § 906.1 (noting that the Office would not register a picture consisting merely of a purple background and evenly-spaced white circles). This principle applies to the Work here, which is the simplest abstraction of feet and thus not protected because it is a "common anatomical feature[], and natural poses are ideas that belong to the public domain." *Blehm v. Jacobs*, 702 F.3d 1193, 1204 (10th Cir. 2012). These designs also are dictated, not by creativity, but by the physiology of humans. *See Craig Frazier Design, Inc. v. Zimmerman Agency, LLC*, No. C10-1094 SBA, 2010 U.S. Dist. LEXIS 107170, at *17 (N.D. Cal. Sept. 27, 2010) (design elements that "flow from a duck's physiology" were not protected); *Satava*, 323 F.3d at 812 (design elements dictated by a jellyfish's physiology is not protectable); *Aliotti v. Dakin & Co.*, 831 F.2d 898, 901 (9th Cir. 1987) (in an infringement case concerning stuffed dinosaur toys, a court "prevent[ed] reliance upon any similarity in expression resulting from . . . the physiognomy of dinosaurs" because to do so would protect the idea of a dinosaur). To protect a foot outline in a foot bath would create

¹ *25 Disposable Pedicure Liners*, BELAVA (last visited Jan. 1, 2019), <https://www.belava.com/product/25-disposable-pedicure-liners> (describing the liners as a "simple deterrent to the spread of bacteria, fungus and infectious diseases associated with pedicures").


² *See id.* (stating that "[t]he liners are textured at the bottom to enhance the pedicure experience[,] and are "[s]haped to fit snugly in the pedicure tub"); *see also* Stephen Regenold, *High-Top "Water Shoes" Put To Test*, GEAR JUNKIE (Sept. 8, 2014), <https://gearjunkie.com/astral-rassler-water-shoe-review> (providing an example of "a simple dot-grid pattern for tread on the sole" of a shoe used to prevent slipping, also shown at App. C).

³ *Foot Spa "Trio" - in Black*, BELAVA, (last visited Jan. 1, 2019), <https://www.belava.com/product/foot-spa-trio-in-black>.

an inappropriate monopoly on foot baths that use the obvious design choice to put evenly-spaced circular foot treads on their bottom surface. These concerns equally apply to the raised divider design, as that design encompasses nothing more than filling the space between the foot designs. The Board thus finds that the Work is not sufficiently creative and unqualified for copyright protection.

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

Karyn A. Temple, Acting Register of Copyrights
and Director, U.S. Copyright Office

Regan A. Smith, General Counsel and
Associate Register of Copyrights

Catherine Zaller Rowland, Associate Register of
Copyrights and Director, Public Information and
Education

Appendix A



Appendix B



Image of the Belava “Trio” Foot Spa

Foot Spa “Trio” - in Black, BELAVA, (last visited Jan. 1, 2019), <https://www.belava.com/product/foot-spa-trio-in-black>.



Image of the Belava Pedicure Tub

Pedicure Kit, BELAVA (last visited, Jan. 1, 2019), <https://www.belava.com/product/pedicure-kit>.



Image of the Belava Pro Foot Massager

Pro Foot Massager in Snow White, BELAVA (last visited, Jan. 1, 2019), <https://www.belava.com/product/pro-foot-massager-in-snow-white-40-off>.

Appendix C



Image of the “Rassler” shoe’s treads made by Astral

Stephen Regenold, *High-Top “Water Shoes” Put To Test*, GEAR JUNKIE (Sept. 8, 2014), <https://gearjunkie.com/astral-rassler-water-shoe-review>.