



**United States Copyright Office**

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227 West Monroe Street  
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**Re: Second Request for Reconsideration for Refusal to Register Oval Sculpture – Large and Oval Sculpture – Small; SR Nos. 1-1845294757 and 1-1842812121; Correspondence ID 1-14Z7U8L**

Dear Messrs. Rand and Chu:

The Review Board of the United States Copyright Office (the “Board”) has examined WesPac International’s (“Wespac’s”) second request for reconsideration of the Registration Program’s refusals to register copyright claims in the works titled “Oval Sculpture – Large” and “Oval Sculpture – Small.” After reviewing the applications, deposit copies, 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 WORKS**

“Oval Sculpture – Large” and “Oval Sculpture – Small” (collectively, the “Works”) are three-dimensional sculptural designs. They each contain four concentric ovals, with an opaque white plastic oval forming a border around three more ovals formed from a single piece of translucent plastic and increasing in height toward the center. A rectangular-shaped aperture is positioned at one of the two points furthest from the center of the opaque white plastic band. The Works are identical in all respects except that “Oval Sculpture – Small” is

not as long as "Oval Sculpture – Large." The Works are depicted below:

*Oval Sculpture – Large*



*Oval Sculpture – Small*



## II. ADMINISTRATIVE RECORD

On October 22, 2014, WesPac filed applications to register copyright claims in the Works. In an October 28, 2014 letter, a Copyright Office registration specialist refused to register the Works, finding that they “appear to be ‘useful articles’ which do not contain any separable authorship needed to sustain a claim to copyright.” See Letter from Rebecca Barker, Registration Specialist, to Justin Rand, McDermott Will & Emery LLP 1 (Oct. 28, 2014). WesPac’s counsel then engaged in email correspondence with the Office, disputing that the Works are useful articles and instead claiming that they “are sculptures designed to be hung on a wall” and that “these are not containers and cannot hold or protect anything.” Email from Justin Rand to Copyright Office (Nov. 18, 2014). The Office responded by noting that “these two works would have been refused even as sculptures to be hung on a wall. They do not contain enough artistic sculptural authorship to support a claim to copyright.” Email from Carol Frenkel, Supervisory Registration Specialist, to Justin Rand (Nov. 18, 2014). The Office followed up the email exchange with a formal refusal of the Works because they “lack the authorship necessary to support copyright claims.” Letter from C. Frenkel, Supervisory Registration Specialist, to J. Rand (Nov. 18, 2014).

On February 12, 2015, WesPac submitted its first request for reconsideration of the Office’s refusal to register the Works. See Letter from Justin Rand, McDermott Will & Emery LLP, to U.S. Copyright Office (Feb. 12, 2015) (“First Request”). The First Request noted that the Office refused to register the Works on lack of creativity, not on useful article grounds per WesPac’s communications with the Office.<sup>1</sup> WesPac claimed that the Works “meet the minimum level of creativity,” and “are a unique and artistic combination of color, size, texture, and shape that [WesPac] has arranged and displayed in a creative manner.” *Id.* at 5. After reviewing the Works in light of the points raised in the First Request, the Office reevaluated the claims and concluded that the Works “do not contain a sufficient amount of original and creative sculptural authorship to support copyright registrations.” Letter from Stephanie Mason, Attorney-Advisor, to Justin Rand, McDermott Will & Emery LLP 1 (June 17, 2015).

On September 14, 2015, WesPac requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Works. Letter from Justin B. Rand and Michael P. Chu, McDermott Will & Emery LLP, to U.S. Copyright Office (Sept. 14, 2015) (“Second Request”). WesPac disagreed with the Office’s conclusion that

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<sup>1</sup> The administrative record demonstrates that the official refusals are based on lack of creative authorship, not on the basis that the Works are useful articles, in accordance with the representations made by Wespac that the works are sculptures and not useful articles. We take those representations at face value, presuming the applicant and its attorneys are aware of the penalties for making false representations to the Copyright Office. See 17 U.S.C. § 506(e) (imposing penalties for knowingly making a false representation of a material fact in the application for copyright registration); 18 U.S.C. § 1001 (imposing criminal penalties from knowingly and willfully making materially false statements in any matter in the government’s jurisdiction). The Board thus addresses only the arguments regarding originality and need not remark on the propriety of refusing registration of the Works as useful articles.

the Works, as a whole, do not include the minimum amount of creativity required to support registration under the Copyright Act. Specifically, WesPac argued that, although the Works consist of geometric shapes, “the shapes and lines combine to form an unobvious design with unique and creative expression.” *Id.* at 3. In support of its claim, WesPac noted that the Works “meet all three of the[] criteria” for geometric shapes to be copyrightable. *Id.* at 2. WesPac also claimed that “these Works rise above familiar designs and are sufficiently creative.” *Id.* at 3.

### 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) (emphasis in original).

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. They are not influenced by the attractiveness of a design, the espoused intentions of the author, the design’s visual effect or appearance, its symbolism, the time and effort it took to create, or its commercial success in the marketplace. *See* 17 U.S.C. § 102(b); *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903). The fact that a work consists of a unique or distinctive shape or style for purposes of aesthetic appeal does not necessarily mean that the work, as a whole, constitutes a copyrightable work of art.

### ***B. Analysis of the Works***

After careful examination, the Board finds that the Works fail to satisfy the requirement of creative authorship and thus are not copyrightable.

In evaluating whether the Works are sufficiently creative, the Copyright Office follows the principle that works should be judged in their entirety and not based solely on the protectability of individual elements within the work. *See Atari Games Corp. v. Oman*, 979 F.2d 242 (D.C. Cir. 1992). Works composed of public domain elements (such as simple shapes like ovals) may be copyrightable, but only if the selection, coordination, and/or arrangement of those elements reflect authorial discretion that is not so obvious or minor that the “creative spark is utterly lacking or so trivial as to be virtually nonexistent.” *Feist*, 499 U.S. at 359.

The Board finds that, viewed as a whole, the Works are not sufficiently original. The Work consists of little more than a series of concentric ovals. A concentric arrangement of single shapes is entirely predictable. The position and shape of each next innermost ring is entirely determined by the position and shape of the previous ring. *See M & D Int'l Corp. v. Chan*, 901 F. Supp. 1502, 1507, 1516 (D. Haw. 1995) (finding that a sculpture of a rose, comprised of a series of three concentric rings of stock petal pieces, including an outer ring of six petal-shaped crystals, a middle ring of three such pieces, and an inner ring of three teardrop-shaped pieces, contained “an insufficient degree of creativity in [its] arrangement, as well as selection, to qualify for copyright protection”). Furthermore, the choice of colors is not sufficiently creative: although works including borders certainly could qualify for copyright protection, this particular work consists of translucent ovals surrounded by a single opaque white border. Finally, the tiering effect achieved by placing each subsequent, inner oval higher than the previous one is not original. Viewed from the side, the Works appear to comprise three ovals, and a simple stack of three layers is not sufficiently creative to merit copyright registration. Overall, the Works simply do not rise to the level of originality to warrant copyright protection.

In sum, the use of common geometric shapes and the simple color scheme that makes up the work, as a whole, lack the requisite amount of creativity in their selection, combination, and arrangement to warrant copyright protection. *See Feist*, 499 U.S. at 359. Thus, the level of creative authorship involved in this configuration of unprotectable elements is, at best, *de minimis*, and too trivial to merit copyright registration.

#### 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.

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