



Copyright Review Board

United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000

July 21, 2021

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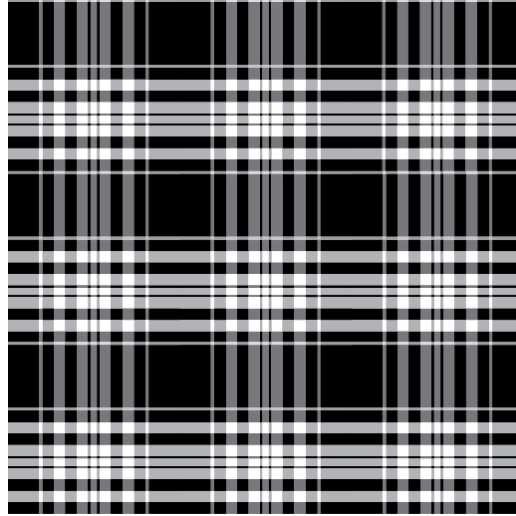
Re: Second Request for Reconsideration for Refusal to Register Pendry Plaid Pattern (Black and White) (Correspondence ID: 1-3ZD84RU; SR # 1-8337057171)

Dear Mr. Eulgen:

The Review Board of the United States Copyright Office (“Board”) has considered KT Intellectual Property Holding Company, LLC’s (“KT’s”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the work titled “Pendry Plaid Pattern (Black and White)” (“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 two-dimensional artwork that consists of a repeating pattern of nine sections (three horizontal and three vertical), with each section comprised of seven intersecting horizontal and vertical grey lines of three different widths set against a black background. The seven horizontal and vertical lines in each section are arranged into three groupings in a manner that creates a mirror image if the section is folded in half either horizontally or vertically. The groupings are as follows: (1) the first and seventh lines, both of which are thin, (2) the second and sixth lines, both of which are wide, and (3) the third, fourth, and fifth lines, where the third and fifth lines are wide and the fourth middle line is approximately half the width of the wide lines. Each grouping is separated by a black space approximately the width of a wide grey line. Wherever two grey lines intersect, the overlapping area is colored white to create accents of squares and rectangles along each line. Each section is separated from the other sections both horizontally and vertically by a black space that is approximately four times the width of a wide grey line. The Work is as follows:



II. ADMINISTRATIVE RECORD

On January 22, 2020, KT filed an application to register a copyright claim in the Work. In a March 23, 2020, letter, a Copyright Office registration specialist refused to register the claim, finding that it does not contain “a pictorial, graphic, or textual element that could justify a copyright and registration” as “none of the individual elements used in [][the] work, nor the combination of those elements could sustain a copyright.” Initial Letter Refusing Registration from U.S. Copyright Office to Lee J. Eugen (Mar. 23, 2020).

In a letter dated June 22, 2020, KT requested that the Office reconsider its initial refusal to register the Work. Letter from Lee J. Eugen to U.S. Copyright Office (June 22, 2020) (“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 “combination and arrangement of the component elements [were] insufficiently creative to support a claim in copyright” as “plaid is a standard, garden-variety fabric design configuration” and thus “as a whole, the Work does not meet the level of required creativity to warrant copyright protection.” Refusal of First Request for Reconsideration from U.S. Copyright Office to Lee J. Eugen at 1 (Oct. 8, 2020).

In a letter dated January 7, 2021, KT 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 Lee J. Eugen to U.S. Copyright Office (Jan. 7, 2021) (“Second Request”). In that letter, KT argues that the combined elements of the Work contain “at least a comparable level of creativity similar to works held protectable by U.S. Courts” as the Work “combines colors and lines of different thicknesses in different directions into an original and creative plaid design rendering it copyrightable.” *Id.* at 2. KT further argues that “[t]he repeated pattern of 4 different shades and colors suggest that the stripes are interlocking or overlapping, as if different strands of thread are combining in a fabric to create the different shades in the pattern.” *Id.* at 3.

III. DISCUSSION

A. *The Legal Framework*

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. *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 stereotypical elements in a glass sculpture of a jellyfish including clear glass, an oblong shroud, bright colors, vertical orientation, and the 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.” U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 906.1 (3d ed. 2021) (“COMPENDIUM (THIRD)”); *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 does not contain the requisite authorship necessary to sustain a claim to copyright.

The Copyright Office’s regulations bar registration of familiar designs (including common patterns), simple combinations of basic geometric shapes, and mere variations of coloration. *See* 37 C.F.R. §202(a); *see also* COMPENDIUM (THIRD) §§ 313.4(J) (identifying common patterns as uncopyrightable), 905 (“In all cases, a visual art work must contain a sufficient amount of creative expression. Merely bringing together only a few standard forms or shapes with minor linear or spatial variations does not satisfy this requirement.”), 906.1 (“The Copyright Act does not protect common geometric shapes” and the “Office will not register a work that merely consists of common geometric shapes unless [the work], as a whole, is sufficiently creative.”). Here, the Work’s individual elements consist of straight lines, which are common, familiar shapes, combined in a repeating pattern with predictable, repetitive spacing to form a standard, garden-variety plaid pattern, which is a basic fabric design configuration. As such, the Work falls squarely into the category of works lacking sufficient creativity to support a claim of copyright. The combination of black, white, and gray colors do not raise the design into copyrightability; they are *de minimis* and the minimum necessary shading to evoke a common plaid pattern.¹

KT argues that the use of shading creates stripes that are “interlocking as if they were different strands of thread in a fabric,” similar to the “basket weave” effect in *Covington Indus., v. Nichols*, Case No. 02 Civ. 8037, 2004 U.S. Dist. LEXIS 6210, at *7-11 (S.D.N.Y. Apr. 5, 2004). In contrast to the textile pattern in *Covington*, however, the Work is a two-dimensional artwork that consists of straight, solid overlapping horizontal and vertical lines in black, white, and gray. Conversely, the fabric design in *Covington* consists of lines in at least five different

¹ *See e.g., Patton Norwall KV27425 Plaid Wallpaper*, WALLPAPERSTOGO.COM, <https://www.wallpaperstogo.com/p-132274-plaid-wallpaper.aspx> (last visited June 21, 2021).

colors, including several that are arranged at 45 degree angles, which are themselves made up of small intersecting segments, creating a “basket weave.” Nor is the spacing between each segment of the design entirely uniform:



Thus, because the *Covington* fabric design incorporates different colors and utilizes varied spacing and a basket weave effect that is not expected in a common plaid design, it is distinct from the Work, which merely consists of seven overlapping horizontal and vertical lines, arranged in a mirror image configuration with a black, white, and grey color scheme. Nor does the Work rise to the same level of creativity as the other fabric designs cited by KT. See *Primcot Fabrics, Dep't of Prismatic Fabrics, Inc. v. Kleinfab Corp.*, 368 F. Supp. 482, 484–85 (S.D.N.Y. 1974) (protecting a fabric pattern that consisted of “eight squares, each square containing a distinctive design in a different color with a background of varying colors”); *MPD Accessories B.V. v. Urban Outfitters*, No. 12 Civ. 6501, 2014 U.S. Dist. LEXIS 74935, at *15 (S.D.N.Y. May 30, 2014) (protecting a fabric design that consisted of numerous unevenly spaced lines of varying widths and colors laid out in varying angles).

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

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Catherine Zaller Rowland, Associate Register of
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Education

Kimberley Isbell, Deputy Director of Policy and
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