



**United States Copyright Office**

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January 2, 2020

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**Re: Second Request for Reconsideration for Refusal to Register Tilted Kilt Server Uniform Applied Artwork (SR 1-4798347915) and Tartan Fabric Design (1-4798347471); Correspondence IDs: 1-2TVWFAG, 1-3B324D9**

Dear Mr. Garrison:

The Review Board of the United States Copyright Office (the “Board”) has considered Tilted Kilt Franchise Operating, LLC’s (“TKFO’s”) second request for reconsideration of the Registration Program’s refusal to register two-dimensional artwork claims in the works titled “Tilted Kilt Server Uniform Applied Artwork” (“Server Uniform”) and “Tartan Fabric Design” (“Fabric Design” and, collectively with Server Uniform, “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 denials of registration.

**I. DESCRIPTION OF THE WORKS**

The Works are graphic designs submitted for registration in two separate applications. First, Fabric Design is a two-dimensional design set in five colors—red, blue, yellow, white, and black. The pattern consists of overlapping squares, rectangles, and lines in a basic plaid configuration.

Second, Server Uniform is a two-piece uniform that consists of a top that ties into a knot in the front and a skort. The top is primarily white with the Fabric Design on the front of the shirt as well as on the piping around the sleeves. The top also includes a yellow, green, white, and black shield patch with the words “Tilted Kilt Pub and Eatery” and an animal image. The skort has five fabric panels and a waistband and uses the Fabric Design. Reproductions of the Works are depicted below:



*Server Uniform*



*Fabric Design*

## II. ADMINISTRATIVE RECORD

In April 2017, TKFO filed two separate applications to register copyright claims in the Works. For Server Uniform, TKFO claimed “2-D artwork, Applied 2-D artwork consisting of the combination and arrangement of Tartan fabric design, Tartan plaid piping, shield shaped patch with black unicorn on green and yellow background and text elements” and excluded “2-D artwork, Pre-existing published material includes fabric design and logo on sleeve as existing independently in other tangible media.” For Fabric Design, TKFO claimed “2-D artwork.” In a January 2, 2018, letter, a Copyright Office registration specialist refused to register the claim in Server Uniform, finding it to be “a useful article that does not contain any copyrightable authorship needed to sustain a claim to copyright.” Letter from B. Garner, Examiner, to Sean Garrison, Bacal & Garrison Law Group at 1 (Jan. 2, 2018). In a separate March 22, 2018, letter, a Copyright Office registration specialist refused to register the claim in Fabric Design, finding that it “lack[ed] the authorship necessary to support a copyright claim.” Letter from Guy Messier, Registration Specialist, to Sean Garrison (Mar. 22, 2018).

In letters dated April 9, 2018, and June 22, 2018, TKFO requested that the Office reconsider its initial refusals to register the Works. TKFO argued that “the surface decorations on TKFO’s server uniform (original tartan fabric design on the skirt and top, with the matching tartan piping encircling each sleeve arching over the top of the shield patch) have pictorial and graphic qualities.” Letter from Sean Garrison to Copyright Office at 1 (Apr. 9, 2018) (citing *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1012 (2017)). TKFO also claimed that the “tartan fabric design . . . constitutes an original design that has been registered in the Scottish Register of Tartans.” Letter from Sean Garrison to Copyright Office at 2 (June 22, 2018). After reviewing the Works in light of the points raised by TKFO, the Office re-evaluated the claims and again concluded that the Works do not contain a sufficient amount of original and creative graphic or artistic authorship to support a copyright registration. Letter from Stephanie Mason, Attorney-Advisor, to Sean Garrison at 1 (Dec. 6, 2018); Letter from Stephanie Mason, Attorney-Advisor, to Sean Garrison, at 4 (Aug. 24, 2018).

In letters dated November 21, 2018, and March 6, 2019, TKFO requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Works. TKFO contested the Office’s conclusion that each of the individual elements appearing on the uniform lacks sufficient originality. Letter from Sean Garrison to Copyright Office at 1 (Nov. 21, 2018) (“Server Uniform Second Request”). TKFO argued that the tartan fabric, depiction of the shield, and design and appearance of the tartan piping and center tie closure each individually represent creative, artistic choices entitled to copyright registration. *Id.* at 2. TKFO further argued that the presentation of these elements on the uniform constitutes an original and creative design as a whole. *Id.* Additionally, TKFO contended that Fabric Design’s “number, colors and arrangement of the striping, and the selection and arrangement of the graphical elements . . . are original designs entitled to copyright protection.” Letter from Sean Garrison to Copyright Office at 3 (Mar. 6, 2019) (“Fabric Design Second Request”).

### 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 “[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 the Works lack the requisite authorship necessary to sustain a claim to copyright.

First, Fabric Design does not demonstrate the necessary originality for copyright protection. The design falls squarely into the Copyright Office’s regulations barring registration of familiar designs (including common patterns) and simple combinations of basic geometric shapes and mere variations of coloration. *See* 37 C.F.R. § 202.1(a); COMPENDIUM (THIRD) §§ 313.4(J) (identifying common patterns as uncopyrightable), 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.”). Composed of squares, rectangles, and lines, Fabric Design is a common plaid pattern, similar in composition to the well-known Royal Stewart tartan. The red, blue, yellow, white, and black colors do not raise the design into copyrightability; they are *de minimis* and the minimum required to evoke Royal Stewart tartan.<sup>1</sup>

TKFO cites two cases for the proposition that plaid fabric designs may be copyrightable. Fabric Design Second Request at 2–3 (citing *Covington Indus. Inc. v. Nichols*, 2004 U.S. Dist. LEXIS 6210 (S.D.N.Y. 2004), and *Sunham Home Fashions v. Pem-America, Inc.*, 2002 U.S. Dist. LEXIS 24185 (S.D.N.Y. Dec. 17, 2002)). While the Office does not compare works, COMPENDIUM (THIRD) § 309.3, each of the works in the cited cases exhibits more creativity than Fabric Design. In *Covington Industries*, the court cautioned that “vertical and horizontal stripes are so basic an element and shape that on their own they cannot be copyrighted;” and “[n]either are individual colors copyrightable.” *Covington Indus.*, 2004 U.S. Dist. LEXIS at \*5. While it did find that particular design to be protectable, the court noted the particular “use and arrangement” of stripes, colors, and basket weave (in particular the basket weave effect, which the court observed “has not previously been incorporated into a plaid”) along with an unusual 17-inch repeat and specific “choices as to the width and spacing of the various stripes as well as the manner in which to incorporate color.” *Id.* at \*9–11. This is quite different than Fabric Design, which is obvious upon a review of the *Covington* deposit held in Copyright Office records, which is as follows:

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<sup>1</sup> *See, e.g., Royal Stewart tartan*, WIKIPEDIA.ORG, [https://en.wikipedia.org/wiki/Royal\\_Stewart\\_tartan](https://en.wikipedia.org/wiki/Royal_Stewart_tartan) (last visited Aug. 30, 2019).



Unlike in *Covington*, Fabric Design is a mere configuration of stripes and incorporation of five colors (red, blue, yellow, white, and black), which are expected and “typical.” *Covington Indus.* at \*10. Fabric Design is a basic interpretation of a Royal Stewart tartan fabric design.

The Board is likewise not persuaded by TKFO’s citation to *Sunham Home Fashions*, where the court found plaid and floral quilts copyrightable due to the “careful thought [that] went into the colors used, the size of the shapes in the designs and the spacing of the designs’ patterns.” 2002 U.S. Dist. LEXIS 24185, at \*19. The work at issue in *Sunham Home Fashions*, with its plaid *and* floral graphic elements, clearly exhibits more creativity than the Fabric Design.

Second, Server Uniform also does not cross the threshold of creativity required by the Copyright Act. Server Uniform, which consists of a top and skort, is undeniably a useful article, and thus there must be separable creative authorship for the Office to register it. While there are some elements that “can be perceived as a two- . . . dimensional work of art separate from the useful article,” *Star Athletica*, 137 S. Ct. at 1007, those specific elements are not sufficiently creative in this context and their overall combination, along with the white color and piping, are not protectable.<sup>2</sup> See *Feist*, 499 U.S. at 359. The uniform’s design elements are instead dictated by non-creative and utilitarian considerations such that a claim in the overall arrangement is akin to claiming the entire uniform itself, which is a useful article.

TKFO cites a number of cases to support the proposition that “graphical elements appearing on . . . clothing, including uniforms, has been upheld as being entitled to copyright protection and registration.” Server Uniform Second Request at 3 (citing *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1004 (2d Cir. 1995); *Silvertop Assocs. v. Kangaroo Mfg.*, No. 1:17-cv-7919, 2018 U.S. Dist. LEXIS 89532, \*16 (D.N.J. May 29, 2018); *MPD Accessories B. V. v. Urban Outfitters*, 111 U.S.P.Q. 2d 1211, 1217 (S.D.N.Y. 2014); *In Design v. Lynch Knitting Mills, Inc.*, 689 F. Supp. 176, 178–79 (S.D.N.Y. 1998), *aff’d*, 863 F.2d 45 (2d Cir. 1988)). As noted above, the Office does not compare works. See COMPENDIUM (THIRD) § 309.3. The

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<sup>2</sup> TKFO excluded the shield patch as pre-existing and previously published, thus the Board focuses its review on TKFO’s copyright claim in the Fabric Design and the arrangement of that design along with the shield design and other elements.

Review Board notes, however, that the works in each of the cases cited contain more graphic authorship than the uniform. Indeed, the works in *Knitwaves*, *MPD Accessories*, and *In Design* each combine a larger variety of geometric shapes or colors than in the uniform. See *Atari Games Corp. v. Oman*, 979 F.2d 242 (D.C. Cir. 1992) (finding a combination of shapes, color, and movement sufficiently creative). Here, Server Uniform merely arranges the fabric pieces into a uniform, which, as a useful article, is not entitled to copyright protection.

Accordingly, the Board upholds, in light of the appropriate legal standards, the initial decisions to refuse registration of the Works.

#### 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 Works. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action in this matter.



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**U.S. Copyright Office Review Board**

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