



**United States Copyright Office**

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

March 26, 2019

Cortland C. Putbrese, Esq.  
Dunlap Bennett & Ludwig PLLC  
211 Church St., SE  
Leesburg, VA 20175  
cputbrese@dbllawyers.com

**Re: Second Request for Reconsideration for Refusal to Register Toy Block Tape Sculpture; Correspondence ID: 1-2ZHO1FU; SR 1-5105710482, 1-5105710968**

Dear Mr. Putbrese:

The Review Board of the United States Copyright Office (the “Board”) has considered Chrome Cherry Design Studio (Pty) Ltd’s (“Chrome’s”) second request for reconsideration of the Registration Program’s refusal to register sculpture claims in two toys both titled “Toy Block Tape Sculpture” (“Tape”) (the “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 three-dimensional rectangles of plastic “building tape.” These toys feature raised circular dots, made of the same material as the base, that allow various pieces of building tape to connect. Chrome submitted two registration applications,<sup>1</sup> each covering a distinct configuration of the building tape. The Works are set forth below:

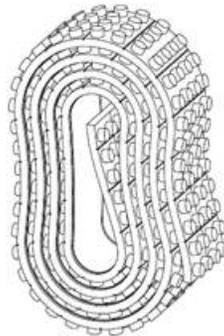
---

<sup>1</sup> Chrome initially submitted three registration applications. The Board thereafter learned that Chrome wished to withdraw SR 1-5105711016, and Chrome later submitted a request to withdraw pursuant to the instructions provided in *U.S. Copyright Office, Compendium of U.S. Copyright Office Practices* § 1708.4 (3d ed. 2017).

The “wave” configuration:



The “peanut” configuration:



## II. ADMINISTRATIVE RECORD

On May 11, 2017, Chrome filed applications to register copyright claims in the Works. In a June 5, 2017, letter, a Copyright Office registration specialist refused to register the claims, finding that the Works lacked originality. Letter from Rhoda Holliman, Registration Specialist, to Benjamin Imhoff, Andrus Intellectual Property Law, LLP at 1 (June 5, 2017). In a letter dated July 31, 2017, Chrome requested that the Office reconsider its initial refusal to register the Works. Chrome argued that the Works meet the originality threshold because, for each sculpture, “the author designed and selected the materials for the sculpture and arranged the sculpture in an original manner, making selections as to the relative position of the sculptures in relation to itself (fold, rolling, or twisting of the material forming the sculptures) and the

relations of components of the sculpture to one another (e.g. the ‘ends’ of the sculptures to one another).” Letter from Benjamin R. Imhoff to Register of Copyrights, at 5–6 (July 31, 2017) (“First Request”). After reviewing the Works in light of the points raised in the Chrome First Request, the Office re-evaluated the claims and denied Chrome’s first request for reconsideration. The Office concluded that “[e]ach sculpture merely consists of a standard geometric shape or at best a merely trivial variation on such shapes. . . . Simply put, each sculpture is extremely basic and rudimentary in nature, and exhibits no creativity beyond what would be expected in a shape made with rolled or folded tape.” Letter from Jaylen S. Johnson to Benjamin Imhoff, at 4–5 (Apr. 17, 2018). And, considering the claimant’s argument that “the sculptures are the author’s own interpretation and conceptualization of such shapes and symbols,” the Office observed that it “does not consider the author’s creative intent but focuses solely on the appearance of the work submitted for registration.” *Id.* at 5. Lastly, the Office stated that it does not consider “the material used to create the sculptures and . . . [the] selections as to the relative position of the sculpture” in registration determinations. *Id.*

In a letter dated August 6, 2018, Chrome 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 Cortland C. Putbrese to Copyright Office (Aug. 6, 2018) (“Second Request”). Chrome argues that “[a]lthough the Works are constructed out of common shapes such as lines, circles, and squares, these shapes are combined in a unique way, resulting in a creative sculptural work.” *Id.* at 5. Claimant also contends that it “made creative decisions regarding the combinations and arrangements of each individual element, including creative decisions regarding the size and shape of the studs, the design of the indentations, the placement of the adhesive backing, the content, size, contour, and layout of the shapes, and the overall composition. . . .” *Id.* at 10. Additionally, Chrome argues that “[t]o the extent the Copyright Office does not find th[e] combination of elements depicted in the Works [to be] registrable, [Chrome] respectfully requests that the Copyright Office apply the ‘Rule of Doubt’ to grant registration.” *Id.* at 15.

### **III. DISCUSSION**

#### ***A. The Legal Framework***

##### ***1. 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.” U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 906.1 (3d ed. 2017) (“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.

## ***2. Registration Under the Rule of Doubt***

Registration under the Rule of Doubt is a Copyright Office practice by which the Office may register a claim to copyright “even though the Office has reasonable doubt as to whether the material submitted for registration constitutes copyrightable subject matter or whether the other legal and formal requirements of the statute have been met.” *Id.* § 607. The Office may register a claim under the Rule of Doubt when the Office is unable to examine the deposits in order to ascertain whether the work is copyrightable. *Id.* For example, when registrations for computer programs are issued under the Rule of Doubt, it is usually because they are written in object code, and not in a human-readable format. *See, e.g., Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 253 F. Supp. 2d 943, 949 (E.D. Ky. 2003) (“[T]he Copyright Office cannot determine copyrightability due to the deposit being in human-unreadable object code.”); *Compaq Comput. Corp. v. Procom Tech., Inc.*, 908 F. Supp. 1409, 1417–18 (S.D. Tex. 1995) (“[T]he Copyright Office was unable to verify that the data was copyrightable because it is not in a format that is understandable to humans.”).

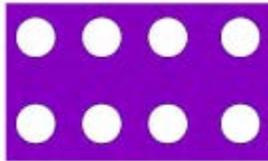
### ***B. Analysis of the Work***

After carefully examining the Works and applying the legal standards discussed above, the Board finds that the Works do not contain the requisite authorship necessary to sustain a claim to copyright.

The individual elements of the building tape are not copyrightable, because they fall under the Copyright Office’s regulations concerning registration of common geometric shapes.

The individual elements of the building tape – the rectangular shape, circular nodules, and ovular “peanut” shape or undulating line into which the tape is arranged – are not registrable. *See* 37 C.F.R. § 202.1(a) (stating that “familiar symbols or designs” are not registrable); COMPENDIUM (THIRD) § 906.1 (including curved lines, circles, spheres, and ovals in the list of non-protectable common geometric shapes).

Considering each Work as whole, they are still not registrable, because the combination of the shapes of which each Work consists does not exhibit sufficient creativity. The combination of the elements—layered geometric shapes to create the tape and the arrangement of the tape into an additional geometric shape—does not give rise to creative authorship. *See Feist*, 499 U.S. at 358–59; *United States v. Hamilton*, 583 F.2d 448, 451 (9th Cir. 1978) (“Trivial elements of compilation and arrangement, of course, are not copyrightable since they fall below the threshold of originality.”). Indeed, the *Compendium (Third)* recognizes that a work that consists of “a purple background and evenly spaced white circles” is not registrable, as depicted below:



Rather, “the combination of the purple rectangle and the standard symmetrical arrangement of the white circles does not contain a sufficient amount of creative expression.” COMPENDIUM (THIRD) § 906.1.

Here, the building tape consists of circular nodules on a monochrome background, creating a three-dimensional rendering of the example provided in the *Compendium (Third)*, albeit in a single color. While claimant argues that the circular nodules are not always regularly spaced, any irregularities are not evident, and the illustrations deposited with the Office demonstrate a clear pattern to which the nodules adhere. Moreover, the shape into which the building tape is formed merely layers one common geometric shape onto another. Accordingly, the combination of elements does not produce a work that contains the necessary creativity according to *Feist*.

Moreover, the Board finds that the Rule of Doubt does not apply to the Works. The Office applies the Rule of Doubt where the registration specialist is unable to examine the deposit copy to determine if the work contains copyrightable authorship, or in other “exceptional

cases.” COMPENDIUM (THIRD) § 607. Here, the illustrations deposited with the Office plainly depict the Works at issue, and thus the Office declines to apply the Rule of Doubt.

After analyzing both the individual elements of the Works and the combinations of those elements, the Office concludes that the building tape does not meet the standard for originality under *Feist*, and hence fails to demonstrate registrability.

#### IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the copyright claims in the Works. 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