



United States Copyright Office

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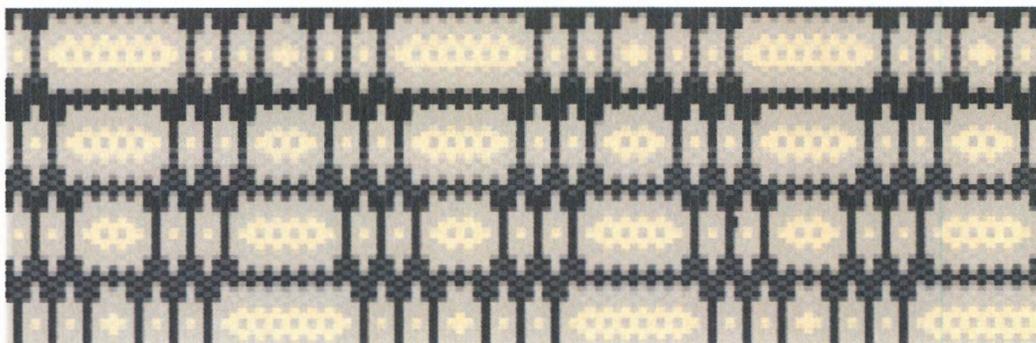
Re: Second Request for Reconsideration for Refusal to Register ZX2 Yampa/Light Beam, Correspondence ID 1-25KFE2N, SR 1-3815608161; and Updraft Ecotread X2/Yellow Beams, Correspondence ID 1-25KFE2N, SR 1-3775632401

Dear Mr. Myers:

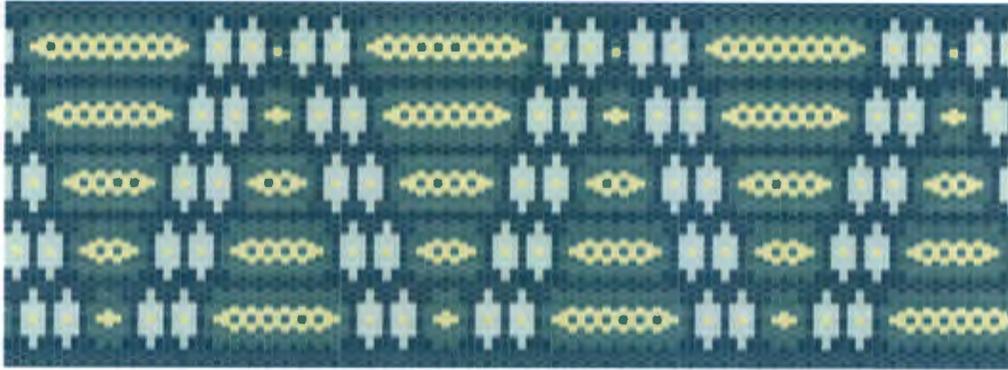
The Review Board of the United States Copyright Office (“Board”) has considered Wolverine World Wide, Inc.’s (“Wolverine”) second requests for reconsideration of the Registration Program’s refusals to register a two-dimensional artwork claim in the work titled “ZX2 Yampa/Light Beam” (“Yampa”), and a derivative claim in the “re-coloration and extension of design” of Yampa for the work titled “Updraft Ecotread X2/Yellow Beams” (“Updraft”) (collectively, the “Works”). The Works are described as follows:

I. DESCRIPTION OF THE WORKS

Yampa, depicted below, is a textile design comprised of horizontal stitches that vary in length, forming alternating right-side-up and upside-down pyramids. Each pyramid is separated by two diagonal columns of what Wolverine describes as “geometric flowers.” Yampa’s color scheme is light yellow, and dark and light grey.



Updraft, which is described by its application as a “re-coloration and extension” of Yampa, is the same design as Yampa, except the color scheme is yellow, green and grey, and Updraft includes one additional row:



II. ADMINISTRATIVE RECORD

On August 19, 2016, Wolverine filed separate applications to register copyright claims in “Updraft Ecotread X2/Yellow Beams,” and in “ZX2 Yampa/Light beam.” The applications respectively state that Yampa was completed in 2012, while Updraft was completed in 2013. The Updraft application lists “Textile Design entitled ZX2 Yampa/Light Beam” as material excluded from its claim, and describes the new material included in its claim as “Re-coloration and extension of design.” In an August 22, 2016 letter, a Copyright Office registration specialist refused to register the claims in the Works because they each “lack[ed] the authorship necessary to support copyright claims.” Letter from Sandra Ware, Registration Specialist, to Joseph V. Myers, III (Aug. 22, 2016).

In a letter dated November 21, 2016, Wolverine requested that the Office reconsider its initial refusals to register the Works. Letter from Joseph V. Myers, III, to U.S. Copyright Office (Nov. 21, 2016) (“First Request”). In the letter, Wolverine argued that the “original pattern of rectangular shapes with tooth-like edges containing differing numbers of chain links of ovals” are original and “sufficiently creative to warrant copyright registration.” First Request at 3. After reviewing the Works in light of the points raised in the First Request, the Office reevaluated the claims and, on March 23, 2017, again concluded that the Works “do not contain a sufficient amount of artistic and graphic authorship to support a copyright registration,” stating that the Works were a “basic arrangement of common shapes in a simple configuration.” Letter from Stephanie Mason, Attorney-Advisor, to Joseph V. Myers, III (Mar. 23, 2017).

In a letter dated June 22, 2017, Wolverine requested that, pursuant to 37 C.F.R. 202.5(c), the Office reconsider for a second time its refusals to register the Works. Letters from Joseph V. Myers, III, to U.S. Copyright Office (June 22, 2017).

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).

2. *Derivative Works*

The Copyright Office will register a claim in a derivative work where the deposit material contains new authorship with a sufficient amount of original expression. 17 U.S.C. § 103(a) (“The subject matter of copyright . . . includes . . . derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.”); *see also* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 311.1 (3d ed. 2017) (“COMPENDIUM (THIRD)”) (citing H.R. REP. NO. 94-1476, at 57 (1976)). The registration for a derivative work, however, “does not cover any previously published material, previously registered material, or public domain material that appears in the derivative work. Nor does it cover any material that is not owned by the copyright claimant.” *Id.*; *see also* 17 U.S.C. § 103(b) (Copyright in a derivative work is “independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.”).

In the case of derivative works, the “new authorship that the author contributed to the derivative work may be registered, provided that it contains a sufficient amount of original expression, meaning that the derivative work must be independently created and it must possess more than a modicum of creativity.” COMPENDIUM (THIRD) § 311.1 (citing *Waldman Publishing Corp. v. Landoll, Inc.*, 43 F.3d 775, 782 (2d Cir. 1994)). The amount of creativity required for a derivative work is the same as that required for a copyright in any other work: “[a]ll that is needed to satisfy both the Constitution and the statute is that the ‘author’ contributed something more than a ‘merely trivial’ variation, something recognizably ‘his own.’” *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102-03 (2d Cir. 1951) (citing *Chamberlin v. Uris Sales Corp.*, 150 F.2d 512, 513 (2d Cir. 1945)). Thus, “the key inquiry is whether there is sufficient nontrivial expressive variation in the derivative work to make it distinguishable from the [preexisting] work in some meaningful way.” *Schrock v. Learning Curve International, Inc.*, 586 F.3d 513, 521 (7th Cir. 2009).

Although the amount of originality required is low, courts have recognized that derivative works “[l]acking even a modest degree of originality. . . are not copyrightable.” *L. Batlin & Son*, 536 F.2d at 490; *Durham Industries, Inc. v. Tomy Corp.*, 630 F.2d 905, 911 (2d Cir. 1980). Indeed, “[s]pecial caution is appropriate when analyzing originality in derivative works, ‘since too low a threshold will give the first derivative work creator a considerable power to interfere with the creation of subsequent derivative works from the same underlying work.’” *We Shall Overcome Found. v. The Richmond Org., Inc.*, 16-cv-2725, 2017 WL 3981311, at *13 (S.D.N.Y. Sept. 8, 2017). Very minor variations do not satisfy this requirement, such as merely changing the size of the preexisting work or recasting a work from one medium to another. *See L. Batlin & Son*, 536 F.2d at 491. Further, a claim to register a derivative work that adds only non-copyrightable elements to a prior product is not entitled to copyright registration. *Boyd’s Collection, Ltd. v. Bearington Collection, Inc.*, 360 F. Supp. 2d 655, 661 (M.D. Pa. 2005). Ultimately, whatever the addition is, it must be independently protectable in order for the derivative work to be registered.

B. Analysis of the Work

After reviewing the applications, deposit copies, and relevant correspondence, along with the arguments in the second request for reconsideration, the Board finds that Yampa exhibits a modicum of copyrightable authorship, but that Updraft is an insufficiently original derivative work.

The Board finds that Yampa satisfies the requirement of creative authorship necessary to sustain a claim to copyright because it contains a sufficient amount of original and creative two-dimensional authorship, namely the overall configuration of the pyramid structures and diagonal columns of flowers. Although pyramids are common and familiar geometric shapes not themselves copyrightable, *see* 37 C.F.R. § 202.1, Yampa's specific combination of elements, including its spacing variations and interior stitching, demonstrates the "minimal degree of creativity" required by the Supreme Court in *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). *See also* *L.A. Printex Industries, Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 850 (9th Cir. 2012) (concluding that the plaintiff's selection, coordination and arrangement of a "repeating pattern of bouquets of flowers and three-leaf branches" was "original.>").

Updraft's combination of elements, however, are derivative of and highly similar to Yampa. Although Wolverine argues in its Second Request that "fresh additions [are] present in the Updraft Design but not present in the Yampa Design," Second Request at 6, the Board fails to see any copyrightable differences between the two designs. To be sure, Updraft has a yellow and green color scheme, while Yampa has a grey and light yellow color scheme. Mere coloration, however, is not copyrightable. *See* 37 C.F.R. § 202.1(a) (prohibiting registration of "coloring"); *see also* COMPENDIUM (THIRD) § 313.4(K) (stating that "the Office cannot register mere variations in coloring;" giving as an example of a prohibited registration the creation of "a new version of a fabric design where the colors red and blue are substituted for the colors yellow and green.>"). Similarly, while Updraft includes an additional row of design, that row is a rote continuation of the same pyramidal pattern claimed by Yampa. *See* COMPENDIUM (THIRD) § 313.4(B) ("Works that contain . . . only a *de minimis* amount of original expression are not copyrightable and cannot be registered with the U.S. Copyright Office.>").

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office reverses the refusal to register the copyright claim in Yampa and affirms the refusal to register the copyright claim in Updraft. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action with respect to the Updraft claim. The Board now refers the Yampa copyright claim to the Registration Policy and Practice division for registration of the Works, provided that all other application requirements are satisfied.

No response to this letter is needed.

BY:



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Copyright Office Review Board