



United States Copyright Office

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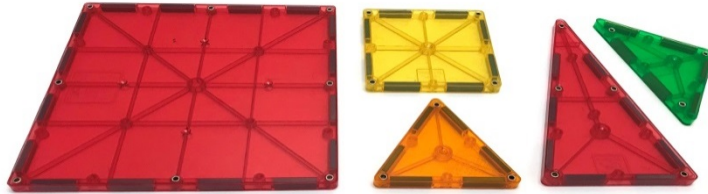
**Re: Second Request for Reconsideration for Refusal to Register Toy Tile Designs;
Correspondence ID: 1-31AGGZ2; SR 1-6016135561**

Dear Mr. Arnold:

The Review Board of the United States Copyright Office (“Board”) has considered People Co., Ltd.’s (“People’s”) second request for reconsideration of the Registration Program’s refusal to register a unit of publication claim in the sculptural work titled “Toy Tile Designs” (“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, as claimed by People is “toy parts,” specifically five three-dimensional tiles that include three triangles of different sizes and two squares of different sizes. These toy parts are made of translucent plastic and each tile is solid red, yellow, orange, or green. The tiles feature raised straight lines made of plastic that intersect to create geometric shapes within the tile. The Work is depicted as follows:



II. ADMINISTRATIVE RECORD

On November 22, 2017, People filed an application to register a copyright claim in the Work. In a November 28, 2017 letter, a Copyright Office registration specialist refused to register the claim, finding that it “lack[ed] the authorship necessary to support a copyright claim.” Letter from Ivan Proctor, Registration Specialist, to Patrick Arnold Jr., at 1 (Nov. 28, 2017).

In a letter dated January 8, 2018, People requested that the Office reconsider its initial refusal to register the Work. Letter from Patrick Arnold Jr. and Bryce Persichetti to U.S. Copyright Office, at 1 (Jan. 8, 2018) (“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 Work “fail[ed] to meet the threshold for copyrightable authorship.” Letter from Stephanie Mason, Attorney-Advisor, to Patrick Arnold Jr., at 3 (May 22, 2018) (“Refusal of First Request”). The Office reasoned that the elements of the Work are uncopyrightable “triangles, squares, and straight lines” featuring “mere coloration,” which is similarly not registrable. *Id.* at 2. The Office concluded that “each of the tiles is a simple geometric shape accented with other geometric shapes,” which is a “garden variety configuration that does not exhibit the creativity necessary to support a claim in copyright.” *Id.* at 3.

In a letter dated July 3, 2018, People 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 Patrick Arnold Jr. and Bryce Persichetti to U.S. Copyright Office (July 3, 2018) (“Second Request”). In that letter, People asserted that the Office’s previous decision “did not address the combination of the large shape of the Toy Tiles, the interior shapes that give a matrix-like appearance, *and* the vibrant translucent colors.” *Id.* at 2. People argued that this “combination of the overall Toy Tile shapes, the translucent colors, and the interior matrix-like designs gives the Toy Tile

Designs a distinct and creative stained glass-like appearance,” *id.* at 1, sufficiently creative for copyright protection.

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).

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.

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. The attractiveness of a design, the espoused intentions of the author, the design’s visual effect or its symbolism, the time and effort it took to create, or the design’s commercial success in the marketplace are not factors in determining whether a design is copyrightable. *See, e.g., Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

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, either in the elements of the tiles individually or the tiles together as a whole.

Under the Copyright Office’s regulations concerning registration of common geometric shapes and mere coloration, the individual elements of the tiles are not copyrightable. None of the individual elements of the tiles—triangles and squares into which the tiles are shaped; interior straight lines; smaller interior shapes created by the intersecting straight lines; and solid colors—are registrable. *See* 37 C.F.R. § 202.1(a) (stating that “familiar symbols or designs” and “coloring” are not registrable); COMPENDIUM (THIRD) § 906.1 (including triangles, squares, and straight lines in the list of non-protectable common geometric shapes). The interior shapes do not demonstrate the necessary creativity, as they are not distinctive or imaginative; rather, the straight lines merely intersect to create variations on squares and triangles. *See* COMPENDIUM(THIRD) § 906.1. Similarly, the coloration of the tiles does not result in a creative work. *See* 37 C.R.F. § 202.1(a). This type of solid coloring is akin to adding color to typography, *i.e.*, combining coloration with an unprotectable work, which does not produce a registrable work. *See* COMPENDIUM (THIRD) § 313.4(K).

Considering the tiles together as whole, they are still not registrable, because the combination of the shapes and colors does not exhibit sufficient creativity.¹ Copyright protection is afforded to compilations, which are works formed when the collection and assembling of preexisting material are selected, coordinated, and arranged in such a way that the resulting work as a whole constitutes an original work of authorship. 17 U.S.C. § 101. A compilation is not copyrightable *per se*, and “some ways of selecting, coordinating, and arranging [elements] are not sufficiently original to trigger copyright protection. *Feist*, 499 U.S. at 341; *see also 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.”).

Here, the combination of five layered shapes in a group of standard primary and secondary solid colors does not give rise to creative authorship. Indeed, the *Compendium* recognizes that a Work that contains layered geometric shapes in a pattern without sufficient variation in size and color of those elements is not registrable. COMPENDIUM (THIRD) § 906.1 (explaining that registration would be denied to “a picture with a purple background and evenly spaced white circles” given, in part, the “standard symmetrical arrangement of the white circles”). Here, the Work consists of interior geometric shapes within two squares and three triangles, standard geometric shapes. The interior shapes are the products of the grid-like subdivisions of the larger shapes and are created by intersecting straight lines arranged to

¹ In responding to the First Request, the Office stated that “*Toy Tile Designs* is a set of five tiles which are sold as a unit of publication.” Refusal of First Request at 2. A unit of publication, for purposes of registration, are separate copyrightable works first published together in a single unit on the same date, with the same copyright claimant. *See* COMPENDIUM (THIRD) § 1107.2 (citing 37 C.F.R. § 202.3(b)(4)(i)(A)). For purposes of this decision, the Office will leave aside questions of registration accommodations and focus on People’s contention that the selection, coordination, and arrangement of the five tiles constitutes sufficient creative authorship.

connect the corners and sides of the larger shapes at even intervals. Accordingly, the combination of the shapes does not produce a Work that contains the necessary creativity according to *Feist*.

Moreover, the solid coloration does not add adequate expressive content. People argues that *Boisson v. Banian, Ltd*, 273 F.3d 262 (2d Cir. 2001), supports a conclusion that the Work’s “combination of the translucent colors with the exterior and interior shapes and lines” is sufficiently creative to warrant registration. Second Request at 1. This argument, however, is not availing because, in *Boisson*, the Court held that the choice of colors in two quilts was an element protectable by copyright. 273 F.3d at 271. The Court’s holding, however, was based on the assortment of colors in the quilts, “combined with [Plaintiff’s] other creative choices” in designing and making the quilts. *Id.* In contrast, the current Work is solidly colored and, as described above, the additional elements of the Work are unprotectable.

People’s other cases cited in support of its argument that the combination of elements in the Work “exceeds the mere ‘modicum’ of creativity necessary to support a copyright registration” are also not persuasive. Second Request at 2. Those cases are inapposite; in finding protectable expression, they rely upon color variations or distinctive combinations of shapes in the works at issue, and such elements are not present in the current Work. For example, in *MPD Accessories B.V. v. Urban Outfitters*, 2014 WL 2440683, at *6 (S.D.N.Y. May 30, 2014), the court stated that one protectable scarf design featured “stripes of different widths and lengths, in different directions, in different colors and with irregular spacing” and another featured “different sized stars placed at irregular intervals throughout the design on one side of the scarf and, on the other side of the scarf, a repetitive stylized floral pattern.” Those scarves thus featured a variety of shapes, patterns, and colors not found in the Work’s layered geometric shapes. Similarly, in *Prince Group, Inc. v. MTS Products*, 967 F. Supp. 121, 125 (S.D.N.Y. 1997), the district court held that a polka dot design was protectable where the dots were irregularly shaped, featured shading, consisted of many colors, and “place[d] . . . in imperfect and conflicting diagonal lines at varying distances from each other giving the appearance of randomness” The present Work features only geometric shapes featuring evenly placed straight lines in solid colors. In contrast to the cases cited by People, the combination of elements in the Work does not achieve the requisite “modicum” of creativity.

The Office will consider only the resulting appearance of a work in determining registrability. COMPENDIUM (THIRD) § 310.8. People asserts that there were a number of design choices available in creating the Work. First Request at 1; *see also* Second Request at 2. The number of available aesthetic choices or design alternatives available to a creator, however, is not relevant to the Office’s inquiry. COMPENDIUM (THIRD) § 310.8. People also argues that the Work evokes stained glass—an argument that may speak to a viewer’s impression or the creator’s intent. Second Request at 1–2. On this point, the Office does not consider the

impression that a work may have on a viewer, COMPENDIUM (THIRD) § 310.3, or the creative intent behind certain design choices, COMPENDIUM (THIRD) § 310.5, and the Office does not engage in aesthetic evaluations of works, COMPENDIUM (THIRD) § 310.2. Thus, People's contentions regarding the artistry and aesthetics of the Work are not persuasive.

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

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
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