



**United States Copyright Office**

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**Re: Second Request for Reconsideration for Refusal to Register Overlay for Glove;  
Correspondence ID: 1-2V1EUOL; SR 1-4260743051**

Dear Ms. Jung:

The Review Board of the United States Copyright Office (“Board”) has considered PT Sport Glove Indonesia’s (“PT Sport Glove’s”) second request for reconsideration of the Registration Program’s refusal to register a three-dimensional sculptural claim in the work titled “Overlay for Glove” (“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 three-dimensional sculptural work consisting of black molded pieces that are an overlay on the top of work gloves. The claim is in the overlay, not the overall glove, or other parts of the glove. Specifically, the Work consists of six individual black pieces that are applied to the back of the glove digits and the back of the glove hand. The five finger pieces are rectangular, with rounded edges that correspond with joints and fingertips, and have horizontal indentations running the length of each piece. The hand piece is trapezoidal, with four rectangular protrusions pointing towards the four fingers. The hand piece also has one horizontal and four vertical indentations.<sup>1</sup> Reproductions of the Work are as follows:

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<sup>1</sup> The work glove also includes a logo, but that design element is not included in the claim for this Work.



## II. ADMINISTRATIVE RECORD

On December 19, 2016, PT Sport Glove filed an application to register a copyright claim in the "Work." In a December 20, 2016, letter, a Copyright Office registration specialist refused to register the claim, finding that it "is a 'useful article' which does not contain any separable

features that are copyrightable.” Letter from Kathryn Sukites, Registration Specialist, to Isabelle Jung (Dec. 20, 2016).

In a letter dated March 13, 2017, PT Sport Glove requested that the Office reconsider its initial refusal to register the Work. Letter from Isabelle Jung to U.S. Copyright Office (Mar. 13, 2017) (“First Request”). In a letter dated April 4, 2017, the Office gave PT Sport Glove the opportunity to submit additional arguments in light of the U.S. Supreme Court’s decision in *Star Athletica, L.L.C. v. Varsity Brands, Inc., et al.* because of the decision’s relevance to copyrightability of useful articles. Letter from Stephanie Mason, Attorney-Advisor, to Isabelle Jung (Apr. 4, 2017). On May 4, 2017, PT Sport Glove responded and asserted that the Work is entitled to copyright protection under the *Star Athletica* decision. Letter from Isabelle Jung to U.S. Copyright Office (May 4, 2017) (“Additional Arguments”). After reviewing the Work in light of the points raised in the First Request and Additional Arguments, the Office re-evaluated the claim and again concluded that the Work “is considered a useful article for purposes of registration, because it has an ‘intrinsic utilitarian purpose’ and because . . . [it is] ‘normally a part of a useful article.’” Letter from Stephanie Mason, Attorney-Advisor, to Isabelle Jung, at 4 (Jan. 25, 2018) (internal citations omitted). The Office continued that neither the overall shape of the overlay nor the horizontal and diagonal cuts were separable, concluding that the Work “does not contain any separable, copyrightable features.” *Id.* at 4-6.

In a letter dated March 21, 2018, PT Sport Glove 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 Isabelle Jung, to U.S. Copyright Office (Mar. 21, 2018) (“Second Request”).<sup>2</sup> PT Sport Glove argued that the Work is not a useful article and should be protected by copyright. *Id.* at 1. First, PT Sport Glove claimed that, “while the [Work] may provide incidental benefits when used as part of the [glove], the design does not have an intrinsically useful function.” *Id.* at 2. Second, PT Sport Glove argued that the Work is merely decorative and not an “article that is normally part of a useful article.” *Id.* at 2. PT Sport Glove claimed that the Office had misapplied the separability test, and that, when properly applied, the separability test supported registration because the Work “can be imaginatively separated from the useful article of which it is a feature – the glove.”

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<sup>2</sup> PT Sport Glove incorporated its arguments from the First Request and Additional Arguments into its Second Request by reference. Second Request at 2.

### 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. “An article that is normally a part of a useful article is considered a useful article.” *Id.* 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).

Finally, 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 Work***

After carefully examining the Work and applying the legal standards discussed above, the Board finds that the Work is a useful article that does not contain the requisite separable authorship necessary to sustain a claim to copyright.

Here, the Work, a protective overlay for a glove, is a feature incorporated into the design of a useful article, the glove. It is undisputed that the glove is a useful article, and PT Sport Glove does not seek to register the glove itself. *See* Second Request at 1; *see also* First Request at 5 (admitting that “the overlay is intended primarily for use on a glove.”). To be copyrightable, then, the Work must be able to “be perceived as a two- or three-dimensional work of art separate from the useful article” that “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.” *Star Athletica*, 137 S. Ct. at 1007.

Under the first step of the *Star Athletica* test, the Work does contain elements that meet the “separate identification” requirement, one that the Court has noted is “not onerous” but simply requires spotting “some two- or three-dimensional element that appears to have pictorial, graphic, or sculptural qualities.” *Id.* at 1010. The Board first examines the overall shape of the overlay panels as well as the horizontal and diagonal cuts in the overlay (that is, both the two- and three-dimensional qualities of the Work). The overall shape of the design, which consists of five panels proportionally placed on the five glove digits and one panel placed on the back of the

hand can easily be separately identified from the glove. The Board can also consider whether the three-dimensional qualities of the horizontal and diagonal cuts in the overlay's rubber contain copyrightable aspects.

Turning to the second step, however, the Board concludes that these identified features lack “the capacity to exist apart from the utilitarian aspects of the article.” *Id.* Instead, the asserted features represent “an article that is normally a part of a useful article,” and are unprotectable by copyright. In other words, the overlay itself serves an intrinsic utilitarian function. PT Sport Glove admits that “when an impact-resistant material is used,” the Work provides “a functional benefit (impact protection).” First Request at 5. Although PT Sport Glove argues that the functional benefits of the overlay stem solely from the (unclaimed, rubber) material used, *see* Second Request at 2, the asserted design aspects also inextricably serve the cut-resistance, impact protection, and mobility functions of the overlay. As explained below, analysis of the Work (and its asserted design features) show it is not “a pictorial, graphic, or sculptural feature of that article [*i.e.*, the glove], but rather one of its utilitarian aspects.” *Star Athletica*, 137 S. Ct. at 1007.

Beginning with the overall shapes of the six overlay panels, (*e.g.*, the two-dimensional elements), the Work was designed to cover and protect the hand, almost completely covering the fingers and the back of the hand. In fact, PT Sport Glove markets the overlay as “extend[ing] all the way to the fingertips for impact protection” and “along the back of the fingers, hand and wrist to prevent knocks, bumps, crushing, and pinch point injuries.”<sup>3</sup> Regardless of the material used, extension of the overlay all the way to the fingertips is a design choice made to protect the wearer's digits (indeed, the design is “specifically engineered” for impact resistance to meet ANSI cut-level standards).<sup>4</sup> This shape does not “exist apart from the utilitarian aspects” of the overlay to stand “on its own.” *Star Athletica*, 137 S. Ct. at 1010. Even when viewed separate from the glove, the shape of the overlay is dictated and constrained by its functional purpose; it is not possible to remove the shape of the overlay panels and leave any part of the overlay behind. *See id.* at 1013-14.

Looking next at the horizontal and diagonal cuts in the overlay's rubber (*i.e.*, the three-dimensional elements), the Board also finds that these design elements are not separable. The grooves and cuts in the design are used for the functional purpose of allowing finger and hand movement, while being “specifically engineered” to provide “cut resistance and impact

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<sup>3</sup> *See* SUPERIORGLOVE, *Endura*®, <https://www.superiorglove.com/en/endura-oilbloc-goatskin-kevlar-lined-driver-gloves-with-anti-impact-d3o-backing>; *see also* SUPERIORGLOVE, *Impact-Resistant Gloves – Eliminate Metacarpal Injuries*, <https://www.superiorglove.com/en/work-gloves/impact-resistant-gloves>.

<sup>4</sup> *See* [https://www.superiorglove.com/en/work-gloves/impact-resistant-gloves/cut-resistant-anti-impact-gloves?impact\\_resistant=2567](https://www.superiorglove.com/en/work-gloves/impact-resistant-gloves/cut-resistant-anti-impact-gloves?impact_resistant=2567).

protection.”<sup>5</sup> While a feature “cannot lose . . . [copyright] protection simply because it was first created as a feature of the design of a useful article, even if it makes that article more useful,” that is not the case here. *Id.* at 1014. Based on the information available to the Board, these cuts are not merely artistic features of the overlay that incidentally contribute to its usefulness but rather represent a design that was apparently deliberately engineered and repeatedly tested to qualify with ANSI cut-level standards while allowing finger and hand movement.<sup>6</sup> Thus, the overlay cuts also fail the separability test.

For these reasons the Board concludes that the Work is inseparable from its intrinsic utilitarian function(s), similar to automobile wire-spoked wheel covers that have been deemed useful articles because they are designed to provide protection to cars. *See, e.g., Norris Indus. v. Int’l Tel. & Tel. Corp.*, 696 F.2d 918, 922 (11th Cir. 1983) (holding that “the district court was correct in deciding that the wire-spoked wheel covers are useful within the meaning of the copyright law”).

Alternatively, the Board also concludes that the two- and three-dimensional features of the Work, even if deemed separable from the utilitarian aspects of the glove or its overlay, lack sufficient creativity for protection as pictorial, graphic, or sculptural works. Of course, for a work to be eligible for copyright protection, it must “possess more than a *de minimis* quantum of creativity.” *Feist*, 499 U.S. at 363. Neither the Work’s constituent elements nor the combination of those elements meet this low threshold. The individual elements—five long, rectangular digit panels and one trapezoidal hand panel with four rectangular protrusions—are all variations of common and familiar uncopyrightable shapes; moreover the specific variations and arrangement are dictated by the unprotectable shape of the human hand. The Copyright Act does not protect common geometric shapes, such as rectangles and trapezoids. *See* 37 C.F.R. 202.1(a); COMPENDIUM (THIRD) § 906.1. Here, the selection, combination, and arrangement of these few and unprotectable elements are combined in an entirely standard and commonplace manner, dictated by the shape of a hand. *See* COMPENDIUM (THIRD) § 313.4(J) (“[T]he Office cannot register a work consisting of a simple combination of a few familiar symbols or designs with minor linear or spatial variations.”). The design elements are arranged in the most predictable manner, following the shape of five fingers, the back of a hand, and four knuckles without any unique variation and creative elements.

Finally, PT Sport Glove argues that the Work is copyrightable because it has “unique visual qualities” that are “completely different” from other impact resistant gloves. First Request

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<sup>5</sup> *See* [https://www.superiorglove.com/en/work-gloves/impact-resistant-gloves/cut-resistant-anti-impact-gloves?impact\\_resistant=2567](https://www.superiorglove.com/en/work-gloves/impact-resistant-gloves/cut-resistant-anti-impact-gloves?impact_resistant=2567).

<sup>6</sup> *See id.*; *see also* [https://www.superiorglove.com/en/work-gloves-101/guide-to-ansi-en388-cut-levels?gclid=CjwKCAiA767jBRBqEiwAGdAOr4dkxsnpwSPCqob9pyzQDqiCpODbFY9t7RynIYVcfyU4EJOk9op6WRoCnVsQAvD\\_BwE](https://www.superiorglove.com/en/work-gloves-101/guide-to-ansi-en388-cut-levels?gclid=CjwKCAiA767jBRBqEiwAGdAOr4dkxsnpwSPCqob9pyzQDqiCpODbFY9t7RynIYVcfyU4EJOk9op6WRoCnVsQAvD_BwE).



at 7. This contention is unavailing. As noted above, the Work's visual features are inseparable from its intended utilitarian function. In any case, a work's novelty or uniqueness does not necessarily argue for its originality, as a work may be one-of-a-kind and yet fail to contain a sufficient amount of creative expression. *See* COMPENDIUM (THIRD) § 310.1.

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

#### 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.



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

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