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

March 18, 2011

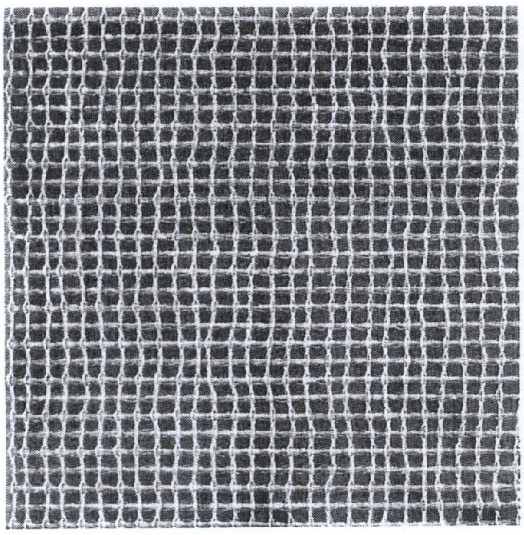
Gottlieb Rackman and Reisman, PC
Attn: George Gottlieb, Esq.
270 Madison Avenue
New York, NY 10016

RE: WOVEN LATTICE
Control No. 61-422-0891(G)

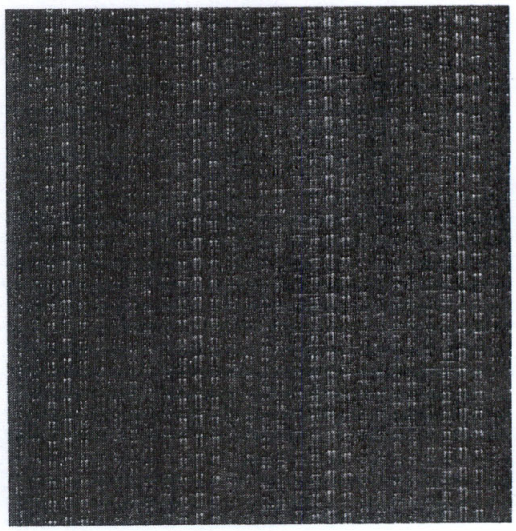
Dear Mr. Gottlieb:

I am writing on behalf of the Copyright Review Board ("Board") in response to your letter of November 20, 2007, in which you, on behalf of your client, Chilewich LLC, requested a second reconsideration of the Copyright Office's ("Office") refusal to register the work entitled "WOVEN LATTICE." After careful review of the record relating to this design, the Copyright Office Review Board affirms the denial of registration on the basis that the design does not contain a sufficient amount of original and creative human authorship to support a copyright registration.

I. DESCRIPTION OF THE WORK



WOVEN LATTICE



RIBBON WEAVE

The WOVEN LATTICE work consists of an irregular lattice weave of two different types of yarn. In one sample, shown above, the vertical strands contain different colored threads, covered in a transparent plastic material applied in a manner to create irregularly spaced bumps on the yarn's surface. The horizontal yarn is also a vinyl yarn but of a single color and consistency. These

materials are combined in a loose lattice weave which produces a random pattern of irregularly shaped rectangles. For purposes of this letter and the discussion herein, I have also included an example of a previously registered work of the claimant, RIBBON WEAVE.

II. ADMINISTRATIVE RECORD

A. Initial submission and refusal to register

On December 11, 2006, Ms. Camille Howe of Chilewich LLC filed applications for registration of WOVEN LATTICE, along with another copyright claim entitled RIBBON WEAVE, claiming authorship in 2-dimensional artwork. In a letter dated February 2, 2007, Visual Arts Section Examiner Rebecca Barker, wrote a letter to Ms. Howe refusing registration of both works due to insufficient authorship supporting a claim of copyright. Ms. Barker stated that copyright does not protect familiar symbols, familiar designs, or basic geometric shapes. She also stated that neither the aesthetic appeal nor commercial value of a work, nor the amount of time and effort expended to create a work are factors that are considered under the copyright law.

B. First request for reconsideration and Office reply

On April 30, 2007, you submitted a letter on behalf of Chilewith LLC requesting reconsideration of the refusal to register WOVEN LATTICE and RIBBON WEAVE. You stated that WOVEN LATTICE design was an original, sculptural work of art fixed in a tangible medium of expression. You asserted that it was neither a "familiar design," nor a "basic geometric shape," and that it was independently created by the author and designed to project a number of creative impressions. *Letter for Gottlieb to Copyright R&P Division of 4/30/2007* at 1.

You characterized WOVEN LATTICE as "an irregular weave of colored plastic materials: a metallic taupe (horizontal) braid combined with a blue-green (vertical) twist covered in a translucent, 'bubbled' overlay." You also state that the choice of colors make the plastic appear as natural fibers, and that "light reflecting off the plastic covering makes the lattice appear, in one sense, to be covered in water droplets, and from another angle, to be riddled with specks of silver." In conclusion, you claim that "the combination of the water droplet look, the vertical transparent elements, crossed by the wavy horizontal elements, result in a work of copyrightable authorship created by artistic decision." *Id.* at 1-2.

C. Examining Division's response to first request for reconsideration

In response to your first request for reconsideration, Attorney-Advisor Virginia Giroux-Rollow notified you that the Office was still unable to register a copyright claim in this work because it did not contain a sufficient amount of original and creative artistic authorship to support a copyright registration. *Letter from Virginia Giroux-Rollow to George Gottlieb*, of 8/24/07, at 2, hereinafter "*Giroux-Rollow" letter*. However, Ms. Giroux-Rollow concluded that a second work, RIBBON WEAVE, did contain sufficient creative authorship "in the treatment and arrangement of the linear elements on its surface" to support a copyright registration and, accordingly, RIBBON WEAVE was registered.

In analyzing these works, Ms. Giroux-Rollow began by stating that copyrightability could not rest on the material of which a work is made or with which it is adorned. *Giroux-Rollow letter* at 1. Ms. Giroux-Rollow then, citing *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), stated that for a work to be regarded as copyrightable, it must not only be independently created by the author, but it must also "possess more than a de minimis quantum of creativity." She stated that the Office did not dispute the fact that the two designs were original with and independently created by the author. She also noted that originality, as interpreted by the courts, meant that the authorship must constitute more than a trivial variation of public domain elements, citing *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951). *Id.* at 1. She stated that in applying that standard, "the Copyright Office does not make aesthetic judgments, [or consider] the attractiveness of a design, its uniqueness, its visual effect or impression, its symbolism, the time and effort it took to create, or its commercial success in the marketplace...." *Id.* at 2.

Applying these principles, she concluded that RIBBON WEAVE could be registered, while WOVEN LATTICE did not contain a sufficient amount of original and creative artistic authorship upon which to support a copyright registration. *Id.* She stated that WOVEN LATTICE consisted of a lattice pattern composed of irregular square shapes which was common and familiar, and therefore not copyrightable. She asserted further that even the coloring used, coupled with the lattice design, is de minimis, composed of minor variations of a common and familiar shape, citing *Compendium of Copyright Office Practices, Compendium II, § 503.02(a)*(1984).

Ms. Giroux stated that the above principles were confirmed by several judicial decisions, including *John Muller & Co. v. New York Arrows Soccer Team, Inc.*, 802 F.2d 989 (8th Cir. 1986)(a logo consisting of four angled lines forming an arrow, with the word "arrows" in cursive script below lacked the minimal required creativity to support registration); *Forstmann Woolen Co. v J. W. Mays, Inc.*, 89 F. Supp. 964 (E.D.N.Y. 1950) (label with words "Forstmann 100% Virgin Wool" interwoven with three fleur-de-lis held not copyrightable); *Homer Laughlin China Co. v. Oman,* 22 U.S.P.Q.2d 1074 (D.D.C. 1991) (upholding refusal to register "gothic" pattern composed of simple variations and combinations of geometric designs due to insufficient creative authorship to merit copyright protection); *Jon Woods Fashions, Inc. v. Curran*, 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988)(upholding refusal to register a design consisting of two inch stripes, with small grid squares superimposed upon the stripes); and *Tompkins Graphics, Inc. v. Zipatone, Inc.*, 222 U.S.P.Q. 49 (E.D. Pa. 1983) (upholding a refusal to register a collection of various geometric shapes). *Id.* at 2.

Ms. Giroux conceded that it is true that even a slight amount of creativity will suffice to obtain copyright protection. However, she went on to cite *Nimmer on Copyright* § 2.01(B) (2002), which states that "there remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright." *Id.* at 2. She concluded the lattice design fell within this narrow area. In explaining this conclusion, she stated that the Copyright Office believed even the low requisite level of creativity required by *Feist* was not met by the lattice design.

Ms. Giroux also discussed the case of *Folio Impressions v. Byer California*, 937 F.2d 759 (2rd Cir. 1991) which you cited in your request for reconsideration. She noted that the court found that the arrangement of "clip art" roses placed in horizontal rows and positioned so that the roses faced in different directions against an ornate background was clearly copyrightable. That work consisted of a design that was more than a trivial variation of a theme by arranging the roses in a

creative manner on a ornate background. She concluded that such a work was distinguishable from WOVEN LATTICE. *Id.* at 3.

D. Second request for reconsideration

In your second request for reconsideration you assert that WOVEN LATTICE is an original, visual work of art fixed in a tangible medium of expression. *Letter from Gottlieb to Copyright R&P Division* of 11/20/2007 at 1. You assert that it is neither a "familiar design" nor a "basic geometric shape." Instead, you claim that the design was independently created by the author and the work embodies the author's unique arrangement and treatment of quasi-linear elements to form a copyrightable visual design.

You contend that the author intended a variable arrangement of the irregular shapes which were created from a concept sketch created by the author. A portion of the deposit submission reveals the concept sketch by the artist along with a reproduction of the actual woven fabric. The irregular shapes in the concept drawing correspond with the irregular shapes in the fabric. You criticize Ms. Giroux's conclusion that the work "consists of a lattice pattern composed of irregular square shapes." You assert that there are hundreds of rectangular-like shapes, each having its own individual rectanguloid shape. *Id.* at 2.

The primary case cited in support of registration is *Folio Impressions v. Byer California*, 937 F.2d 759 (2nd Cir. 1991). You assert the arrangement of horizontal, braided waves crossing the vertical, twisted strands in WOVEN LATTICE is equally creative as the arrangement of clip art roses in horizontal rows and positioned so that the roses faced in different directions against an ornate background.

E. Supplemental Information

On July 28, 2009, the Office requested additional information in order to fully evaluate the claim for registration. *Letter from Tanya Sandros, Deputy General Counsel, to George Gottlieb*, of 7/28/09. Specifically, the Office posed three questions:

- How the author created the design;
- Whether (and if so how) each of the irregularities in line weight, shape and color, was individually created and positioned by a human author, rather than as a result of some process or chance; and
- Whether any two pieces of the fabric incorporating the design that are manufactured by the claimant are identical to each other. If so, please reconcile the fact that with your statement that "no negative space is identical to any other."

In your reply, *Letter from Gottlieb to Sandros* of 9/10/09, you explained four steps the author undertook in the creation of the design: (1) supervision of the manufacture of an original fiber that would be comprised of a colored yarn encased by a clear, thick plastic outer coating (bubble fiber); (2) combination of the bubble fiber with other metallic vinyl yarns; (3) choice of a loom to weave these fibers that allows manipulation of the horizontal fibers ("warp" metallic yarns); and (4) weaving "the warp yarns in a tight braid over and around the bubble yarn, resulting in

changeable, horizontal waves as the warp yarns were positioned between the irregular bubbles in the weft yarns."

In answering the question whether the irregularities were created and positioned by a human author, you state that "it is the author's creation of the bubble yarn and positioning of the composite materials of the Woven Lattice design that create the irregularities and copyrightable expression in this work." You also acknowledge that no two pieces of the fabric manufactured by the claimant are identical to each other because no two bubbles are identical nor are the inner, coiled threads the same. "Since the waft bubble yarns are irregularly cylindrical and the warp metallic yarns are flat, the tight weaving process chosen by the author forces the warp yarns into a wavy pattern as they cross over and around the irregular bubbles. Thus, because the texture of the bubble yarn varies on each fiber strand, the horizontal waves in the design will also vary between the different pieces of the Woven Lattice fabric."

III. ANALYSIS

After reviewing the application, the deposit, and your arguments, the Review Board upholds the Examining Division's refusal to register WOVEN LATTICE. The irregular rectangular shapes and the random wavy nature of the threads which comprise this design are the result of a weaving process that produces a work without a set discernable pattern and, therefore, not copyrightable.

Copyright protection is available only for "original works of authorship fixed in [a] tangible medium of expression." 17 U.S.C. § 102. In *Feist*, the Supreme Court stated that originality consists of two elements, "independent creation plus a modicum of creativity." *Feist Publications, Inc. v. Rural Tel. Service Co*, 499 U.S. 340, 346 (1991). *See also Alfred Bell & Co. v. Catalda Fine Arts,* 191 F.2d 99, 102 (1951) ("'Original' in reference to a copyrighted work means that the particular work 'owes its origin' to the 'author.' No large measure of novelty is necessary."); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (The court defined "author" to mean the originator or original maker and described copyright as being limited to the creative or "intellectual conceptions of the author."). Congress, however, did not extent copyright protection concepts underlying the production of a work or to the process used to create the work, *see* 17 U.S.C. § 102(b),[1] but rather only to the actual expression of that concept.

Consistent with those precedents, the Copyright Office examines works and their applications to ensure that the works satisfy the requirements for both independent creation and a minimum level of creativity. While the Office recognizes that the author was closely involved in the development of the bubble yarn and choose the type of loom to weave the bubble fiber with the horizontal metallic yarns, those choices are not part of the consideration before the Board. The Board considers only the work at issue and evaluates whether the work is the product of human authorship and, if so, whether the work contains sufficient originality to merit protection.

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[1] "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in a work." 17 U.S.C. § 102(b).

In this case, the Board has determined that the work does not have sufficient human authorship to be copyrightable. Therefore, the Office need not reach the originality analysis to determine whether the work contains sufficient creativity to support a copyright registration.

In answer to the Board's supplemental questions, it has become clear that the creative process centered on choosing materials and designing a weaving process to produce a certain effect; namely, "a 'visual dialogue' between the positive and the negative space throughout the design," using the colors, weight and shape of the threads. The author did not decide where each hourglass-shaped rectangle or wave was to appear, or the spatial relationship between the negative and positive spaces throughout the sample. These combinations were a result of the interaction between the materials as they came in contact with one another during the weaving process.

Thus, there was no notable human authorship at this point in the creation of the work even though the author understood that the materials would segregate in a pattern of irregular, randomly distributed rectangles which, in some instances, would create what is identified as "wave" patterns throughout the work. However, the author could not predict where or how those relationships would be expressed in the final product, relying instead on the process to create the expression that we see in the work. Because the actual design as exhibited in the work was a result of the mechanical process rather than choices made by the author, human authorship was lacking at the point of creation and the work is not entitled to copyright protection.

The Office has long recognized that works which are not the result of human authorship will not be registered. "In order to be entitled to copyright registration, a work must be the product of human authorship. Works produced by mechanical processes or random selection without any contribution by a human author are not registrable. Thus, a linoleum floor covering featuring a multicolored pebble design which was produced by a mechanical process in *unrepeatable, random patterns, is not registrable*. Similarly, a work owing its form to the forces of nature and lacking human authorship is not registrable; thus, for example, apiece of driftwood even if polished and mounted is not registrable." *See Compendium of Copyright Office Practices, Compendium II,* §202.02(a) (1984). (emphasis added).

Weave designs, however, need not depend upon the process to create the design. More often, the process merely fixes a design whose color, materials, and repetition choices were made by a human who then used the process and machinery to fix that design into the product. In the case of the Applicant's other work, RIBBON WEAVE, the claimant did receive a registration for the design embodied in the work because the author created a clear and discernable pattern. The RIBBON WEAVE design includes five distinct "yarns" which, in each case, appear to be composed of two different colored threads arranged in a particular order. These five yarns are then arranged in a repetitive fashion from which emerges a particular identifiable pattern embodied in the product. This pattern, which was repeated many times within the work, was found to contain sufficient creativity to support a copyright registration upon reconsideration at the first review stage. *See* Giroux-Rollow letter of 8/24/07.

We also note that if the Office were to issue a certificate of registration notwithstanding our inability to detect any copyrightable authorship, your client would derive little benefit from such a registration. Such a certificate of registration could not recognize a copyright in any and all lattice

weaves produced by your client using the same materials and processes described in your letters of November 20, 2007 and September 10, 2009. As your letter of September 10, 2009 relates, "no two pieces of Woven Lattice fabric are identical to each other, because no two 'bubbles' on the bubble yarn fabric are identical, and no two sections of the inner, coiled thread are identical." You acknowledge that "because the texture of the bubble yarn varies on each fiber strand, the horizontal waves in the design will also vary between different pieces of the Woven Lattice fabric, the same is true of the color variation throughout the design."

While we can discern no copyrightable authorship in Woven Lattice, the strongest case we can see for copyrightability would lie in the particular irregularities that depart from standard geometric forms (*e.g.*, each of the squares in the pattern is not a geometrically perfect square, and each is different from the others). But none of those irregularities is a result of copyrightable authorship; rather, they are a function of the physical properties of bubble yarn as it is woven by a machine. As noted above, there can be no copyright that extends to all works created by a particular process using particular materials, and we cannot issue a certificate of registration which would recognize what it appears that your client is seeking: a blanket copyright in all the end products of that process. The only other alternative would be to issue a certificate of registration recognizing a copyright in the particular variations that appear in the deposit that was submitted with the application. However, as noted above, those variations are not the result of human authorship. Moreover, a certificate of registration recognizing a copyright in that particular sample would not serve to register any putative copyright in any other piece of Woven Lattice fabric, since no two pieces are identical and the only conceivable copyrightable authorship (assuming that it was a product of human authorship) would be in those variations.

CONCLUSION

For the reasons stated above, the Review Board concludes that WOVEN LATTICE cannot be registered for copyright protection. This decision constitutes final agency action.

Sincerely,

/s/ Tanya M. Sandros

Tanya M. Sandros,
Deputy General Counsel
for the Review Board
United States Copyright Office