



Copyright Review Board
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000

September 22, 2023

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**Re: Second Request for Reconsideration for Refusal to Register Zephyr
(SR # 1-8524110767; Correspondence ID: 1-4NN7FLE)**

Dear Ms. Ross:

The Review Board of the United States Copyright Office (“Board”) has considered Artistic Tile, Inc.’s (“Artistic Tile”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork or sculptural claim in the work titled “Zephyr” (“Work”). After reviewing the application and deposit copy, along with the arguments in the second request for reconsideration and relevant correspondence, the Board affirms the Registration Program’s denial of registration for Zephyr.

I. DESCRIPTION OF THE WORK

The Work is a tile accented with a raised, curved brass line. The tile is an 8-inch by 16-inch rectangle, with the surface of the tile raised to a peak, cresting at $\frac{3}{8}$ inch, that is inset with a curved brass insert in a curve similar to half a lemniscate.¹ From the brass inset line the surface angles downwards, accented with incised lines. For its deposit material, Artistic Tile submitted a two-page brochure containing depictions of the Work as an individual tile and arrangements of multiple tiles.² An image of the Work is shown below, with the full deposit provided in the Appendix:

¹ See *Lemniscate*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/lemniscate> (“a figure-eight shaped curve”) (last visited Sept. 21, 2023). The lemniscate is also sometimes referred to as an infinity symbol. See *Infinity Symbol*, WIKIPEDIA, https://en.wikipedia.org/wiki/Infinity_symbol (“The infinity symbol ∞ is a mathematical symbol representing the concept of infinity. This symbol is also called a lemniscate, after the lemniscate curves of a similar shape studies in algebraic geometry”) (last visited Sept. 21, 2023).

² Applications for three-dimensional works such as “statues, carvings, [and] ceramics” must include identifying material as the deposit to the Office. 37 C.F.R. § 202.20(c)(xi)(A)(1). Identifying material consists of “two-dimensional reproductions or renderings of the work” that “show the entire copyrightable content in the ordinary case, but in no case [are] less than an adequate representation of such content.” *Id.* § 202.21(a), (b).



Cropped image of a single tile from the Work's deposit materials

II. ADMINISTRATIVE RECORD

On February 7, 2020, Artistic Tile filed an application to register a copyright claim in the Work, detailing the work as both two-dimensional artwork and sculpture. On May 28, 2020, a Copyright Office registration specialist refused to register the claim after determining that the Work is a useful article and “that it does not contain any non-useful design element that could be copyrighted and registered.” Initial Letter Refusing Registration from U.S. Copyright Office to Michele Ross at 1 (May 28, 2020).

On August 25, 2020, Artistic Tile requested that the Office reconsider its initial refusal to register the Work, arguing that the Work contained separable artistic elements, and that “[t]he exact shapes and depths chosen, the segmentation of each, and the positioning and manner in which they are embellished . . . as well as the varying angulations of the joints and cracks form a three-dimensional sculpture with distinct two-dimensional pictorial elements.” Letter from Michele Ross to U.S. Copyright Office at 5 (Aug. 25, 2020) (“First Request”). After reviewing the Work in light of the points raised in the First Request, the Office again concluded that the Work could not be registered. Refusal of First Request for Reconsideration from U.S. Copyright Office to Michele Ross (Feb. 3, 2021). The Office agreed that the Work had separable features, but found that the separable features of Zephyr, consisting of a “thin, curved brass band and incised straight lines” did not contain sufficient creativity to support a copyright registration “[b]ecause the separable features of this design are common and familiar shapes, and because the combination and arrangement of those shapes does not contain the requisite amount of creativity.” *Id.* at 3–4.

In a letter dated May 3, 2021, Artistic Tile 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 Michele Ross to U.S. Copyright Office (May 3, 2021) (“Second Request”). Artistic Tile asserted that “each underlying hand carved etching was purposefully arranged by the Applicant in a manner that varies in texture, dimension, color and scale.” *Id.* at 4. Artistic Tile further asserted

that the ability of the Work to “take on four distinct appearances, regardless of orientation or tile installation” is evidence of more than a modicum of creativity. *Id.* at 5. On July 31, 2023, Artistic Tile provided additional information about the Work, including renderings, in response to questions from the Board. Letter from Michele Ross to U.S. Copyright Office (July 31, 2023) (“Response to Board”).

III. DISCUSSION

After carefully examining the Work and considering the arguments made in the First and Second Requests, and the Response to Board, the Board concludes that the application and deposit do not adequately identify the claimed authorship in the Work and affirms the denial of registration for Zephyr on that basis.

The Board’s review is limited by the deposit provided by applicants,³ and the deposit for the Work here is ambiguous. Artistic Tile provided a deposit of identifying material, which must adequately represent the scope of the claimed content. *See* 37 C.F.R. § 202.21(b). The Board is unable to ascertain from the deposit, including subsequent correspondence, provided by Artistic Tile, whether the registration claim is for selection and arrangement of creative elements present in an individual dimensional field tile, as pictured in description of the work above, or for the installed composition of individual tiles. The deposit of the Work consists of a flyer including promotional language for Zephyr, specifications regarding application and installation, layout options, three images of a dimensional field tile, and a photo of the tile installed on a freestanding wall. In communications with the Board, Artistic Tile did not clarify the scope of the claim and instead made inconstant statements regarding the scope of the claim for copyright. For example, it stated “[t]he overall design is visible only when multiple tiles are completed and laid together, forming the design shown in the deposit sample.” Response to Board at 2. Similarly, the Artistic Tile’s Second Request mentions creativity both in the individual tiles, and in the installation options for the tile as evidence of originality. *Compare* Second Request at 4 (“[T]he culmination of ‘Zephyr’s[’]: texture, merging of materials (metal and stone), coloring, shading, dimensional elements, and carvings to form a sculptural wall-like feature, shows originality in a unremarkable form.”) *with id.* at 5 (“In further applying the applicable standard of originality, Applicant maintains that disassembled or assembled, ‘Zephyr’ can be applied in any orientation on any other surface.”).

To the extent that the claim is for creative authorship in an individual tile, the Board is unable to determine what two-dimensional and three-dimensional authorship is identified in the deposit copy. In the identifying material submitted with the registration application Artistic Tile did not specify the artistic features of the tile for which registration was sought.⁴ In its Second Request, Artistic Tile asserted that it “expressly designed” the Work with a “novel combination of elements, fluid features[,] and modern technique” and creative authorship is found via its “selecting, arranging the combined individual hand carved contours, sweeping asymmetrical lines” and other elements. *Id.* at 4.

³ *See* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 1704.2 (3d ed. 2021) (“COMPENDIUM (THIRD)”).

⁴ *See* Appendix. While not required, the Office encourages applicants seeking registrations related to useful articles to identify the artistic features that are being submitted for registration. COMPENDIUM (THIRD) § 924.6(B), (C).

The supplemental information provided by Artistic Tile did not resolve this question. Because hand-carved elements could result in each tile having different sculptural authorship, and thus constituting discrete works, the Board requested further information on the scope of the elements that Artistic Tile selected and arranged, particularly as to the sculptural elements present and identical in every tile, and the scope of elements that vary from tile to tile due to hand carving.⁵ Artistic Tile responded that the Work is based on an “outline [that] includes the v-shaped lines, centered upon the s-shaped vertical line, drawn to form the template” and a CNC machine⁶ is used to follow the hand drawings and create “a foundational sculpture of the design[] with varying depths,” but “[t]he v-shaped, texturized lines and the golden s-shaped inlay . . . are added thereafter, by an artisan, using hand application.” Response to Board at 2. As the Board interprets this description, each of the many tiles depicted in the deposit would have different three-dimensional elements as a result of the hand-carving process.⁷ Therefore, based the deposit copy, which included images of multiple tiles with potentially varied lines, we are unable to determine the defined and consistent elements selected and arranged to form any individual tile as a single identifiable work.

Even if the Board considered only the shared sculptural elements across the depictions of the Work in the deposit, it would conclude that the Registration Program was correct to refuse registration because the elements are not protectable. Putting aside the incised lines, the remaining separable elements consist of the single gold brass line, which is an unprotectable common shape,⁸ and the general three-dimensional S curve, which, by Artistic Tile’s own words, “does not include any artistic application.” *Id.* at 2. The arrangement of these two elements, with the S curve centered symmetrically along the tile’s axis, and the dimensionality of the tile following the shape dictated by the shape of the brass line, constitute a standard, garden-variety arrangement which does not demonstrate sufficient creative authorship to support a copyright registration. *See* COMPENDIUM (THIRD) § 905. Further, Artistic Tile repeatedly stated that the brass line and overall shape is a variation on the lemniscate. First Request at 4–5; Response to Board at 2. While the Office does not consider artistic intent when evaluating a work, it observes that a lemniscate, as a mathematical symbol, is an unprotectable familiar symbol and that representing half of that shape is unprotectable. 37 C.F.R. § 202.1(a) (“works not subject to copyright” include “familiar symbols or designs”); *see also* COMPENDIUM (THIRD) § 313.4(J) (examples of familiar symbols and designs include mathematical symbols).

Artistic Tile is welcome to submit a new application with a different deposit that better identifies the specific authorship it seeks to claim in the Work. As noted above, as a three-dimensional work, the Office’s regulations provide that the deposit should consist of “identifying

⁵ Email from the U.S. Copyright Office to Michele Ross (July 13, 2023).

⁶ *What is CNC? The Complete CNC Guide for 2023*, CNC SOURCED (Aug. 1, 2023), <https://www.cncsourced.com/guides/what-is-cnc-complete-cnc-guide/> (“CNC, or Computer Numerical Control, encompasses the manufacturing process where machines cut, carve and form parts based on computer codes that control the cutting tool’s speed and movement.”) (last visited Sept. 21, 2023).


⁷ Artistic Tile asserted that “[e]very piece follows the hand-drawn prototypes . . ., and therefore adheres to the same pattern. [T]he hand carved design follows the original hand drawn outlines and the contours of the dimensional stone . . . [t]he overall pattern will appear nearly identical, although with any hand carve technique, slight variations are to be expected.” Response to Board at 3. However, the Board observes that the quantity and spacing of the hand carved lines present in the Work appear to differ from the quantity and spacing of lines in the hand drawn outlines, or prototypes, submitted.

⁸ *See* COMPENDIUM (THIRD) § 313.4(J) (as familiar symbols and designs, letters are not copyrightable).

material,” defined as “two-dimensional reproductions or renderings of the work” that “show the entire copyrightable content” of the work or that at least provide “an adequate representation of such content.” 37 C.F.R. § 202.21(a)–(b); *id.* § 202.20(c)(2)(xi)(A)(2). In cases where the claimed authorship may be unclear, applicants are encouraged to “identify the specific artistic features that are being submitted for registration” and to “mark the deposit to identify the specific features being submitted for registration.” COMPENDIUM (THIRD) § 924.6(B), (C). The Board’s guidance to Artistic Tile with respect to any future application to register the Work is to provide deposit material that clearly identifies the claimed authorship, and resolves the questions presented in this letter.

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

Suzanne V. Wilson, General Counsel and

Associate Register of Copyrights

Maria Strong, Associate Register of Copyrights and

Director of Policy and International Affairs

Mark Gray, Assistant General Counsel

APPENDIX: IDENTIFYING MATERIAL

ZEPHYR *by* ALISON ROSE

Tailored To Waterjet Collection

Winner of Interior Design's 2019 Best of Year awards, Zephyr is the latest creation in Artistic Tile's collaboration with NY Designer Alison Rose. This sleek dimensional tile reflects Alison's intuitive approach to design, mixing natural materials with outstanding artisanal details. Inlaid brass lines curve gracefully through the summit of an intricate, handcarved ridge that flows across the surface and from one tile to the next. The artist's tooling is evident in the texture of each tile, the carvings revealing the richness of the stone base beneath. This is a sumptuous take on stone tile - a modern, mixed-material composition born from ancient traditions of stone-carving fused with modern sensibilities in style. Individual pieces may be installed in a straight or a broken joint layout, each creating a different undulation of pattern.



ARTISTIC TILE

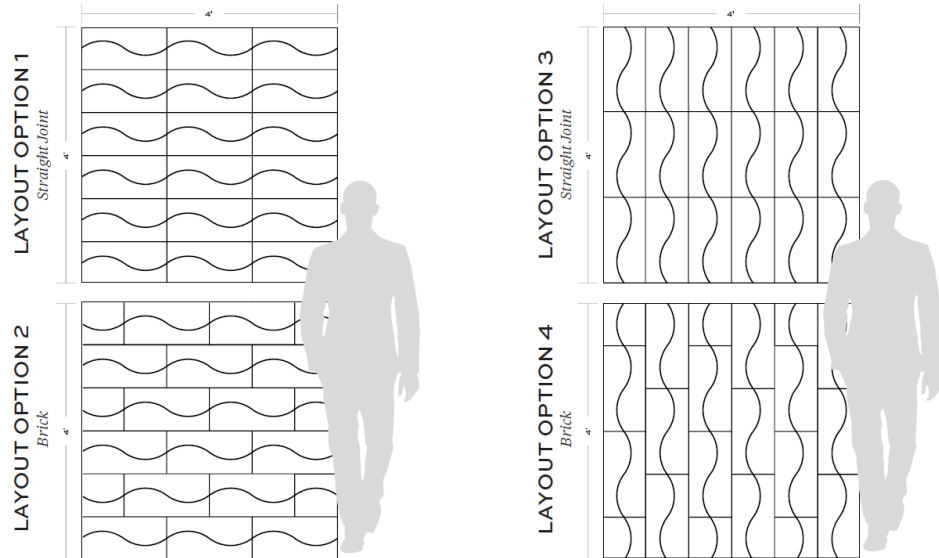
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ZEPHYR by ALISON ROSE

Tailored To Waterjet Collection



Dimensional Field Tile



APPLICATIONS								VARIATION			
INTERIOR FLOOR	INTERIOR WALL	SHOWER WALL	SHOWER FLOOR	EXTERIOR FLOOR	EXTERIOR WALL	POOL/ FOUNTAIN	COUNTER TOP	V1	V2	V3	V4
No	All, excluding showers	No	No	No	No	No	No				
INSTALLATION/MAINTENANCE										DIMENSIONAL FIELD TILE	
SETTING MATERIAL	GROUT	GROUT JOINT	MEMBRANE	CAULK	SEALER	CLEANER	INSTALLATION INSTRUCTIONS	LAYOUT	DRY LAYOUT	 ZEPHYR 8" x 16" x 3/8"	
Ardex X4 ¹	Ardex FG-C Microtec Unsanded ²	1/8" minimum	Ardex B+9	Ardex SX	AquaMix Sealer's Choice ³	AquaMix Concentrated Stone & Tile Cleaner	TCNA Handbook	Brick or Straight Joint	Partial ⁴		
NOTES											
¹ Alternate mortar - Mapei Ultraflex LFT ² Alternate grout - Mapei Ultracolor Plus FA or Mapei Keracolor Unsanded ³ Use Aquamix Grout Release prior to grouting and Aquamix Sealer's Choice after. ⁴ Layout for color and vein selection before installation. Tech Notes: Due to handmade nature of Zephyr, lines within pattern may not be continuous across tiles. Installer may adjust positioning to minimize variation. - Not suitable for use near heat such as fireplace or stove top. - Metal shine can be restored with a soft cloth.											

ARTISTIC TILE

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