



United States Copyright Office

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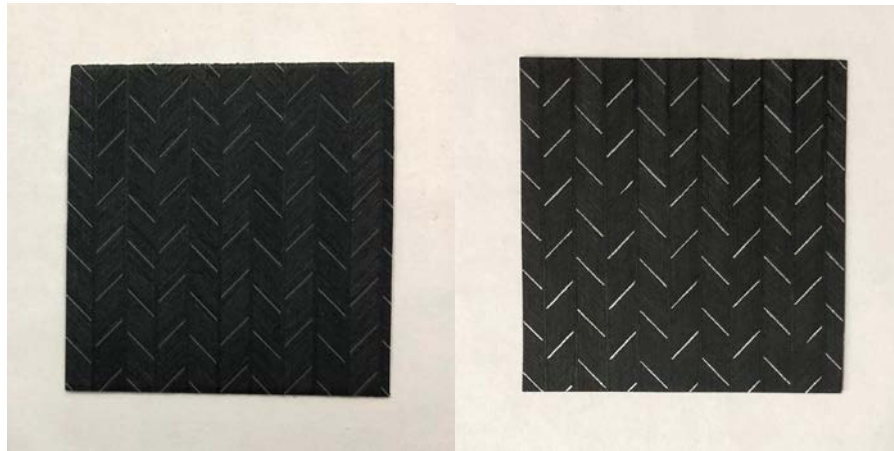
Re: Second Request for Reconsideration for Refusal to Register DESIGN 00058, SR# 1-2960430111; DESIGN 00062, SR# 1-2960510257; DESIGN 00074, SR# 1-2960510356; DESIGN 000100, SR# 1-2963362772; Correspondence ID: 1-2JGZCU5.

Dear Mr. McDonald:

The Review Board of the United States Copyright Office (“Board”) has considered Novem Car Interior Design GmbH’s (“Novem”) second request for reconsideration of the Registration Program’s refusal to register two-dimensional artwork claims in the works titled “Design 00058,” “Design 00062,” “Design 00074,” and “Design 000100” (“Works”). After reviewing the applications, deposit copies, and relevant correspondence, along with the arguments in the second request for reconsideration, the Board affirms the Registration Program’s denial of registration for the Works.

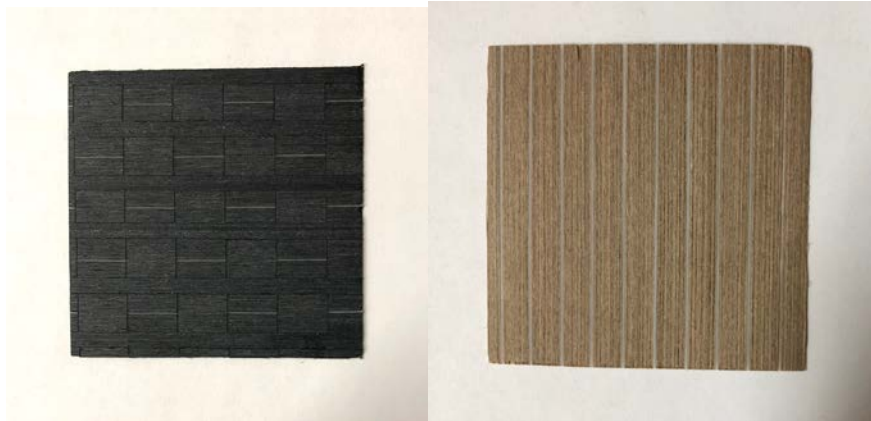
I. DESCRIPTION OF THE WORKS

The Works are swatches of materials to be used for interiors of luxury cars. They seem to be made up of compressed wood fibers. Design 00058 and Design 00062 are nearly identical; both are a repeating pattern of silver lines arranged on a background of textured black fibers, arranged in rows. The silver lines in Design 00058 are a lighter silver than those in Design 00062. The diagonal direction of the silver lines alternates with each row of fibers, such that the pattern looks similar to a herringbone pattern. Design 00074 is a repeating pattern of black rectangles, where every other rectangle in the pattern is divided by a silver line. Design 000100 is a brown, uniformly textured wood tone, with thin translucent stripes. Reproductions of the deposits are below:



Design #00058

Design #00062



Design #00074

Design #000100

II. ADMINISTRATIVE RECORD

On December 15, 2015, Novem filed applications to register copyright claims in Design 00058 and Design 00062 as two-dimensional artworks, and on December 16, 2015, Novem filed applications to register copyright claims in Design 00074 and Design 000100 as two-dimensional artworks. In an April 7, 2016 letter, a Copyright Office registration specialist refused to register these claims, along with fifteen others, finding that the Works “will not support claims to copyright” because “a work of the visual arts must contain a minimum amount of creative pictorial, graphic or sculptural authorship,” and the Works do not. Letter from Ivan Proctor, Registration Specialist, to Bruce McDonald, Smith, Gambrell & Russell, LLP (April 7, 2016).

After the Office granted Novem an extension of time to file a request for reconsideration, in January 2017, Novem requested that the Office reconsider its initial refusal to register the Work. Letter from Bruce A. McDonald, Smith, Gambrell & Russell, LLP to U.S. Copyright Office (Jan. 30, 2017) (“First Request”). Novem described the process used to create the Works, and explained that the Works’ originality “results from the selection, coordination and arrangement of the constituent materials and the innovative method by which they are synthesized.” *Id.* at 3. Novem also argued that the Works are useful articles, but that “the pictorial, graphic and sculptural features of the designs in this case are

separable from the utilitarian article in which they are embodied; and in light of the selection, coordination and arrangement of elements contributing to the manufacture of these articles, the degree of originality and creativity necessary for copyright protection is fully established.” *Id.* at 8. Furthermore, Novem argued that the Works are sufficiently original because it made “numerous independent decisions concerning the number and location of coordinates used to depict various shapes.” *Id.* at 8–9. It argued that the Works’ originality “is apparent in the[ir] appearance, texture and translucence.” *Id.* at 10.

After reviewing the Works in light of the points raised in the First Request, the Office re-evaluated the claims and again concluded that the Works “do not contain a sufficient amount of original and creative artistic or graphic authorship to support a copyright registration.” Letter from U.S. Copyright Office to Bruce A. McDonald, Smith, Gambrell & Russell, LLP (June 30, 2017). The Office stated that “standard designs, figures, and geometric shapes are not sufficiently creative to sustain a copyright claim,” and that the bands, squares, and straight-edged lines in the Works “are all common and familiar shapes.” *Id.* at 2. The Office also explained that “[t]he very simple combination of common and familiar elements exhibited in all of the designs does not demonstrate sufficient creativity to support a claim of copyright.” *Id.* at 3. The Office noted that the process and materials used to create the Works are not “considered by the Office in its determination of whether a work contains sufficient original and creative authorship to support a claim in copyright.” *Id.* Rather, the Office focuses “only on the actual appearance of the work.” *Id.* The Office also explained that “[i]t is not the possibility of choices that determines copyrightability but rather whether the particular resulting expression contains copyrightable authorship.” *Id.*

In October 2017, Novem requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Works. Letter from Bruce A. McDonald, Smith, Gambrell & Russell, LLP to U.S. Copyright Office (Oct. 2, 2017) (“Second Request”). In this letter, Novem claimed that its “process of creating the Works should be considered as part of the Copyright Office’s originality analysis.” *Id.* at 2. Citing *Home Legend, LLC v. Mannington Mills, Inc.*, 784 F.3d 1404 (11th Cir. 2015) and several other cases, Novem argued that courts have permitted parties to “offer[] evidence of the process for creating” works, and that the “process [is] relevant to the originality analysis.” *Id.* at 3. Novem also argued that the “texture of the Works also supports their copyrightability.” *Id.*

III. DISCUSSION

A. The Legal Framework

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.” 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 market places 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 Works

After carefully examining the Works and applying the legal standards discussed above, the Board finds that they do not contain the requisite originality necessary to sustain claims to copyright.

The Board accepts that the Works satisfy the first prong of the originality requirement, independent creation. The Works, however, lack sufficient creativity to satisfy the second prong. Considering the elements of the Works individually or as a whole, the Works are simple, minor variations on common shapes consisting of a few simple geometric designs arranged in an obvious manner. *See, e.g., Homer Laughlin China Co. v. Oman*, No. 90 Civ. 3160, 1991 WL 154540 (D.D.C. 1991) (upholding refusal to register chinaware design pattern composed of simple variations of geometric designs due to insufficient creative authorship to support copyright registration).¹

The Works' constituent elements—the lines, stripes, and squares—are not individually subject to copyright protection. 37 C.F.R. § 202.1(a) (prohibiting registration of “familiar symbols or designs; . . . lettering or coloring”); *see also* COMPENDIUM (THIRD) § 313.4(J) (3d ed. 2017) (“Well-known and commonly used symbols that contain a *de minimis* amount of expression” are not copyrightable.); *id.* § 906.1 (noting that simple shapes, such as “straight or curved lines,” are not copyrightable). The question then is whether the combination of those lines and shapes is protectable when viewed as a whole. The Board finds that, viewed as a whole, the Works simply are not sufficiently creative from a copyright perspective. *See Feist*, 499 U.S. at 359.

Design 00058 and Design 00062 appear to be simple herringbone patterns made up of short lines arranged in a diagonal way common to all herringbone. Design 00074 combines rows of rectangles, every other one having a thin stripe across it. Between the rows, there is a plain stripe. All of the elements in this design are the same color, except for the thin stripe adorning half of the rectangles. Design 000100 is made up merely of simple, plain stripes (albeit wood-toned ones). These Works all involve few elements, all of which are basic shapes, arranged in a basic manner. The combination of those lines and shapes does not rise to the level of creativity necessary for copyright protection. There is simply not enough creative authorship in the design of the Works to warrant copyright protection. This determination is contrasted with a pattern that is copyrightable, included in the *Compendium*. COMPENDIUM (THIRD) § 906.1. It is reproduced below:



¹ As an initial matter, Design 00058 and Design 00062 are identical except for their shading. The Office will not register two versions of the same work that differ only in coloration. COMPENDIUM (THIRD) § 906.3 (“Merely adding or changing one or relatively few colors in a work, or combining expected or familiar pairs or sets of colors is not copyrightable, regardless of whether the changes are made by hand, computer, or some other process.”). As such, even if these works were sufficiently original to merit copyright protection, only one could be registered.

There, the design is made up of many stars, many circles, and many triangles, all in different colors, sizes, and orientations. In total, there are eight different colors used in that design. By contrast, the Works have far fewer elements: at most, only three different shapes in total. And the Works' color schemes are simple: either black and silver, or wood-tone and a gray or translucent tone. The Office finds that the Works thus do not evince enough creativity for protection under the Copyright Act and that the selection and placement of the Works' elements are the product of only *de minimis* creative choices. Cf. COMPENDIUM (THIRD) § 313.4(J) (explaining that “a work consisting of a simple combination of a few familiar symbols or designs with minor linear or spatial variations” is not copyrightable).

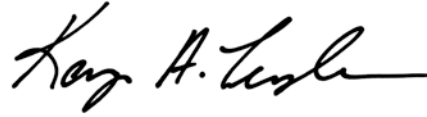
Novem argues that the process used to create the Works should support the Works' originality. In support of this argument, Novem cited four cases, none of which is persuasive in terms of registering the Work. Indeed, the cited cases confirm that the processes used to create works are not protectable themselves, and are not assessed when determining the originality of a work. In *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 684 F.2d 821 (11th Cir. 1982), which concerned soft-sculpture dolls, the court confirmed that the process of soft sculpture is not copyrightable, *id.* at 825 n.5, and found the work to be original based only on differences between the dolls at issue. *Id.* at 825. The court in *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99 (2d Cir. 1951) discussed the process used to create engravings, but clarified that copyrightable originality of engravings results from “the management of light and shade . . . produced by different lines and dots,” which the engraver decides upon. *Id.* at 104 n.22 (quoting COPINGER, THE LAW OF COPYRIGHTS 40–44 (7th ed. 1936)). The court also referenced the process used to create a screen print design in *Key West Hand Print Fabrics, Inc. v. Serbin, Inc.*, 269 F. Supp. 605 (S.D. Fla. 1966), but found the design “sufficiently original in creation and arrangement for copyright protection” in reference to the work's final appearance. *Id.* at 609. Finally, in *Home Legend, LLC v. Mannington Mills, Inc.*, 784 F.3d 1404 (11th Cir. 2015), which concerned the copyrightability of wood grain designs used on laminate flooring, the court held that the process used to create the laminate flooring at issue was not eligible for copyright. *Id.* at 1414. Instead, the court referenced the creation process solely to make clear that the creators did in fact make creative decisions when making the designs, rather than faithfully reproducing photographs of naturally occurring wood. As such, the designs were creative expression: “the product of creativity, not a slavish copy of nature.” *Id.* at 1410. These cases do not state that the process of creating a work may be considered when assessing a work's originality.

Novem also argues that the textures of the Works—which Novem claimed as two-dimensional artworks—are relevant when considering their originality. Novem cited three cases in support of this argument, which are unpersuasive. Two of the cases did not involve two-dimensional artwork claims whatsoever, but rather three-dimensional objects. *Kay Berry, Inc. v. Taylor Gifts, Inc.*, 421 F.3d 199, 207 (3d Cir. 2005) (holding copyrightable stone sculptures in the shapes of rocks, with engraved poems on them); *Kamar Int'l, Inc. v. Russ Berrie & Co.*, 657 F.2d 1059, 1062 (9th Cir. 1981) (stuffed animals). In the third, the court made merely a passing reference to texture, when discussing generally how one party may infringe the copyright of another in oriental rugs. *Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 134 (2d Cir. 2003). In short, none of the cited cases stand for the proposition that, when assessing copyrightability of two-dimensional artworks specifically, texture may be taken into account.

Overall, the Board finds that the Works are not copyrightable. The level of creative authorship involved in their configuration of elements is, at best, *de minimis*, and too trivial to support copyright registration. See COMPENDIUM (THIRD) § 313.4(B).

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 Works. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action in this matter.



U.S. Copyright Office Review Board

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