



**United States Copyright Office**

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January 31, 2018

Shanna K. Sanders  
Heslin Rothenberg Farley & Mesiti P.C.  
5 Columbia Circle  
Albany, NY 12203

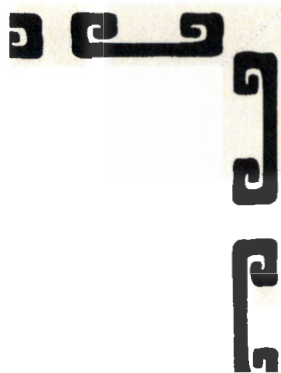
**Re: Second Request for Reconsideration for Refusal to Register WONKY KEY,  
Correspondence ID: 1-1Q0TJQ8, SR# 1-2938254551**

Dear Ms. Sanders:

The Review Board of the United States Copyright Office (“Board”) has considered Linherr Hollingsworth, LLC’s (“Linherr Hollingsworth”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the work titled “Wonky Key” (“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 for the Work.

**I. DESCRIPTION OF THE WORK**

The Work is a repeating pattern of alternating black line designs resembling Greek keys, on an off-white background. The key-like design is made up of a straight line, with the edges curled into rectangular swirls. The designs are created to appear primitive or rough, with irregular edges. It appears that the designs make up a trim that can be applied to rectangular-shaped objects, like carpets or picture frames. The open side of the designs alternate in facing the interior and outer edges of the shape to which it is applied. A reproduction of the deposit is below:



## II. ADMINISTRATIVE RECORD

On February 26, 2016, Linherr Hollingsworth filed an application to register a copyright claim in the Work as a two-dimensional artwork. In a June 24, 2016 letter, a Copyright Office registration specialist refused to register the claim, finding that the Work “will not support a claim to copyright” because “a work of the visual arts must contain a minimum amount of creative pictorial, graphic or sculptural authorship,” and the Work does not. Letter from Larisa Pastuchiv, Registration Specialist, to Shanna Sanders, Heslin Rothenberg Farley & Mesiti P.C. (June 24, 2016).

In April 2017, Linherr Hollingsworth requested that the Office reconsider its initial refusal to register the Work. Letter from Shanna Sanders, Heslin Rothenberg Farley & Mesiti P.C. to U.S. Copyright Office (April 7, 2017) (“First Request”). Linherr Hollingsworth argued that “because Wonky Key is the product of the authors’ independent efforts, there is no question that the works reflect a sufficient amount of original authorship to support a copyright registration. *Id.* at 2. It further stated that it “created a unique swirl design” that “is irregular,” and that has “various thicknesses, widths, angles and curves, all of which demonstrate creativity.” *Id.* at 3. Linherr Hollingsworth claimed that “the Copyright Office has failed to appreciate the numerous creative aspects of Applicant’s unique design.” *Id.* Moreover, it argued that even if the design were “merely a geometric shape or familiar pattern,” courts have held that “combinations and patterns of standard shapes are capable of possessing the requisite creativity necessary for copyright protection.” *Id.* at 4. Linherr Hollingsworth thus claimed the Work should be registered.

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 “does not contain a sufficient amount of original and creative artistic or graphic authorship to support a copyright registration.” Letter from Stephanie Mason, Attorney-Advisor, to Shanna Sanders, Heslin Rothenberg Farley & Mesiti P.C. (June 22, 2017). The Office stated that the Work is a “repeating pattern of ‘Caneel’ petroglyphs arranged in an alternating configuration,” the “‘Caneel’ petroglyph . . . is a common and familiar shape,” and such shapes, “or minor variation[s] thereof, are not copyrightable.” *Id.* at 2. While recognizing that “some combinations of unprotectable elements may exhibit sufficient creativity with respect to how the elements are combined or arranged to support a copyright,” the Office found “that the glyph is not arranged in any way that differentiates it from its basic shape, and so does not rise to the level of creativity necessary for copyright registration.” *Id.* at 3. The Office stated that the arrangement of the alternating petroglyphs “in a single row” is a “very simple arrangement” that is insufficiently creative for copyright protection. *Id.*

In September 2017, Linherr Hollingsworth 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 Shanna Sanders, Heslin Rothenberg Farley & Mesiti P.C. to U.S. Copyright Office (Sept. 21, 2017) (“Second Request”). In this letter, Linherr Hollingsworth claimed that there are “numerous, significant differences between the Applicant’s design and the ‘Caneel’ petroglyphs,” *id.* at 2, 5, and at any rate, those petroglyphs are not common or familiar. *Id.* at 4.

Further, it argued that the Work “is a trim design that is a creative work of authorship,” and that it contains “a unique swirl design” created with “unfettered artistic license and choices.” *Id.* at 3-4. Linherr Hollingsworth also stated that, even if the Work were a repeating pattern of “Caneel” petroglyphs, “combinations and patterns of standard shapes re capable of possessing the requisite creativity necessary for copyright protection.” *Id.* at 6.

### 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 (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 Works**

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

The Board accepts that the Work satisfies the first prong of the originality requirement, independent creation. The Work, however, lacks sufficient creativity to satisfy the second prong. Considering the elements of the Work individually or as a whole, the Work is a simple, minor variation on common shapes or symbols 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).

The Works’ constituent elements—the key-like line design that repeats in alternating directions—are not individually subject to copyright protection.<sup>1</sup> 37 C.F.R. § 202.1(a) (prohibiting registration of “familiar symbols or designs; . . . lettering or coloring”); *see also* COMPENDIUM (THIRD) § 313.4(J) (“Well-known and commonly used symbols that contain a *de*

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<sup>1</sup>The Board notes that the Office previously deemed this shape to be that of a “Caneel” petroglyph. The designs that repeat in the Work are similar to “Caneel” petroglyphs, but that resemblance is not determinative of the Board’s decision. Such a simple, generally symmetrical line drawing is not copyrightable on its own regardless of its possible ancient antecedents. COMPENDIUM (THIRD) § 906.1.

*minimis* amount of expression” are not copyrightable.), § 906.1 (noting that simple shapes, such as “straight or curved lines,” are not copyrightable). The question then is whether the combination of those designs is protectable when viewed as a whole. The Board finds that, viewed as a whole, the Work simply is not sufficiently creative from a copyright perspective. *See Feist*, 499 U.S. at 359. Here, the combination of those designs does not rise to the level of creativity necessary for copyright protection. It is common and unoriginal amongst repeating patterns and designs to alternate the orientation of a simple shape. There is simply not enough creative authorship in the design of the Work to warrant copyright protection. The fact that the line designs are not entirely symmetrical does not render the Work copyrightable either. The line designs are designed to appear rough, primitive, or hand-drawn. But the design’s roughness is a trivial variation on a basic design.

The Office finds that the Work thus does not evince enough creativity for protection under the Copyright Act and that the selection and placement of the Work’s elements are the product of only *de minimis* creative choices. *Cf.* COMPENDIUM (THIRD) § 313.4(J) (“a work consisting of a simple combination of a few familiar symbols or designs with minor linear or spatial variations” is not copyrightable).

In support of its arguments, Linherr Hollingsworth cited three cases, none of which is persuasive in terms of registering the Work. The Board does not compare works before it to works that were granted registration in the past; the Board examines works individually, applying uniform standards of copyrightability throughout the examination process. Differences between any two works thus can lead to different results. *See* COMPENDIUM (THIRD) 602.4(C) (“When examining a claim to copyright, the U.S. Copyright Office generally does not compare deposit[s] to determine whether the work for which registration is sought is substantially similar to another work.”); *see also Homer Laughlin China Co. v. Oman*, No. 90 Civ. 3160, 1991 WL 154540, at \*2 (D.D.C. July 30, 1991) (stating that court was not aware of “any authority which provides that the Register must compare works when determining whether a submission is copyrightable”); *accord Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 499 (indicating the Office “does not compare works that have gone through the registration process”). And, as discussed above, the Board applies the copyrightability standard articulated in *Feist* through its expert administration of the nation’s copyright registration system.

Nevertheless, each of the works at issue is distinguishable from the Work as well. In *Roulo v. Russ Berrie & Co., Inc.*, 886 F.2d 931 (7th Cir. 1989), the work at issue was a line of greeting cards that contained both graphic and textual elements. Thus it was the combination of many elements, including the text, font, size of the cards, color of the paper, ink, and border designs, stripes, ellipses, and a single-sided format, that the jury there found protectable by copyright (though many of the elements are themselves unprotected). *Id.* at 939. There are far fewer elements in Linherr Hollingsworth’s Work, and the elements were not stylized or combined in any expressive manner.

At issue in *Runstadler Studios, Inc. v. MCM Ltd. P’ship*, 768 F. Supp. 1292 (N.D. Ill. 1991) was a three-dimensional sculpture. The sculpture there was composed of 39 clear glass rectangles, overlying each other to form a spiral with approximately 405 degrees of arc. In

*Runstadler Studios*, the court was applying a presumption of validity because the Office had registered a copyright registration for the work. *Id.* at 1295. Additionally, the court held that the sculpture possessed sufficient creativity due to the “choice of location, orientation and dimensions of the glass panes, and the degree of arc of the spiral,” which were evidence of “more than a trivial amount of intellectual labor and artistic expression.” *Id.* at 1295–96. In other words, the arrangement of the geometric elements in *Runstadler Studios* was original and creative based on elements, such as three-dimensional arrangement and degree of arc, not present in the Work.

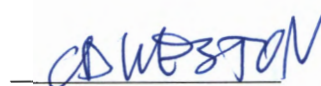
Finally, *Atari Games Corp. v. Oman*, 979 F.2d 242 (D.C. Cir. 1992) concerned a video game, which self-evidently involves far more elements and creative choices than those present in the Work.

Overall, the Board finds that the Work is not copyrightable. The level of creative authorship involved in its 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 Work. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action in this matter.

BY:



Chris Weston

Copyright Office Review Board