



United States Copyright Office

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Re: Second Request for Reconsideration for Refusal to Register Bear Rug Claraloo Variation 6, SR 1-4642238991; Fox Rug Claraloo Variation 2, SR 1-4715136927; Bear Wall Mount Claraloo Variation 1, SR 1-4674277221; Bear Rug Claraloo Variation 16, SR 1-4699580604; and Bear Basket Claraloo Variation 1, SR 1-4646029181; Correspondence ID: 1-2XJS9XJ.

Dear Mr. Earle:

The Review Board of the United States Copyright Office (“Board”) has considered Daniela Jean Robbins’s (“Robbins”) second requests for reconsideration of the Registration Program’s refusal to register sculptural design claims in the works titled “Bear Rug Claraloo Variation 6,” “Fox Rug Claraloo Variation 2,” “Bear Wall Mount Claraloo Variation 1,” “Bear Rug Claraloo Variation 16,” and “Bear Basket Claraloo Variation 1” (“Works”). After reviewing the applications, deposit copies, and relevant correspondence, along with the arguments in the second requests for reconsideration, the Board reverses the decision of the Registration Program to deny registration to “Bear Rug Claraloo Variation 6,” “Fox Rug Claraloo Variation 2,” and “Bear Wall Mount Claraloo Variation 1.” The Board finds that these three works exhibit copyrightable authorship and thus may be registered. The Board, however, affirms the Registration Program’s decision to refuse registration for “Bear Rug Claraloo Variation 16” and “Bear Basket Claraloo Variation 1” because these works do not contain a sufficient amount of creative authorship to support copyright claims.

I. DESCRIPTION OF THE WORKS

The five Works are three-dimensional sculptural works. Bear Rug Claraloo Variation 6, Bear Rug Claraloo Variation 16, and Fox Rug Claraloo Variation 2 are faux fur rugs in the shape of a splayed animal body. Robbins only seeks to register the heads of these works; therefore, the Board will review only the heads and not the bodies. Bear Rug Claraloo Variation 6 and Bear Rug Claraloo Variation 16 have white crochet ears surrounded by shaggy fur, round protruding white crochet snouts, and black triangular noses. Bear Rug Claraloo Variation 6 is made of a long, white faux fur, while Bear Rug Claraloo Variation 16 is made of a softer, grey faux fur. “Fox Rug Claraloo Variation 2” has two white crochet ears that are covered in more shaggy burnt orange fur. The nose and mouth area is also white crochet. It wraps around the front of the

face, is rectangular, and is topped with a triangular black nose. “Bear Wall Mount Claraloo Variation 1” is a plush animal bear head on a wall mount. It has shaggy brown fur, two white crochet ears covered in more shaggy brown fur, and then a protruding white crochet snout topped with a black triangular nose. “Bear Basket Claraloo Variation 1” is a woven crochet basket made of brown yarn. The front has two solid-colored, half-circle ears on top with a round, protruding white snout topped with a black triangular nose. None of the Works have eyes or mouths. The Works are as follows:



Bear Rug Claraloo Variation 6



Bear Rug Claraloo Variation 16



Fox Rug Claraloo Variation 2



Bear Basket Claraloo Variation 1



Bear Wall Mount Claraloo Variation 1

Full reproductions of the Works are included as Appendix A.

II. ADMINISTRATIVE RECORD

Robbins filed applications on March 17, 18, 21, 24, and 26, 2017, to register five copyright claims in the Works. In four separate letters, sent on May 25 and 26, 2017, a copyright registration specialist refused to register the claims finding that they “lack the authorship necessary to support copyright claims.” Letters from R. Barker, Registration Specialist, to Daniela Robbins (May 25 and 26, 2017).

In five separate letters dated August 21, 2017, Robbins requested that the Office reconsider its initial refusal to register the Works. Letters from Daniel T. Earle, Shlesinger, Arkwright & Garvey LLP, to U.S. Copyright Office (Aug. 21, 2017) (“First Requests”). After reviewing the Works in light of the points raised in the First Requests, the Office re-evaluated the claims and again concluded that the Works “do not contain a sufficient amount of original and creative sculptural or artistic authorship to support copyright registrations.” Letter from Stephanie Mason, Attorney-Advisor, to Daniel T. Earle, Shlesinger, Arkwright & Garvey LLP, at 2 (Mar. 14, 2018). Addressing Bear Basket Claraloo Variation 1, the Office found that the Work is a useful article with elements that are separable, but that nonetheless “do not exhibit the necessary creative and original sculptural or artistic authorship” to support a copyright claim. *Id.* at 5-6. Addressing the other four Works, the Office found that they consisted of features common to a stuffed animal, arranged in expected and inevitable configurations. *Id.* at 4.

In five letters dated June 6, 2018, Robbins requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Works. Letters from Daniel T. Earle, Shlesinger, Arkwright & Garvey LLP, to U.S. Copyright Office (June 6, 2018) (“Second Requests”). In those letters, Robbins addressed each Work separately but asserted similar arguments, essentially that the animal heads consist of “a combination of elements that were creatively selected and compiled through countless artistic decisions concerning the precise size, shape, texture, arrangement, and juxtaposition of features.” Bear Rug Claraloo Variation 6 Second Request at 1. Further, Robbins admits that Bear Rug Variation 16 and Bear Wall Mount Variation 1 are derivative works of Bear Rug Variation 6, but argues that the Works introduce new materials which “transform[] the preexisting work through artistic decisions concerning the texture and juxtaposition of elements.” Bear Rug Claraloo Variation 16 Second Request at 1. As such, Robbins asserts that the Works are original and creative, entitling them to registration. Bear Rug Claraloo Variation 6 Second Request at 6-7.

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. 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.

3) Derivative Works

The Copyright Office will register a claim in a derivative work where the deposit material contains new authorship with a sufficient amount of original expression. 17 U.S.C. § 103(a) (“The subject matter of copyright . . . includes . . . derivative works, but protection for a work

employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.”); *see also* COMPENDIUM (THIRD) § 311.1 (3d ed. 2017) (citing H.R. REP. NO. 94-1476, at 57 (1976)). The registration for a derivative work, however, “does not cover any previously published material, previously registered material, or public domain material that appears in the derivative work. Nor does it cover any material that is not owned by the copyright claimant.” *Id.*; *see also* 17 U.S.C. § 103(b) (Copyright in a derivative work is “independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.”).

In the case of derivative works, the “new authorship that the author contributed to the derivative work may be registered, provided that it contains a sufficient amount of original expression, meaning that the derivative work must be independently created and it must possess more than a modicum of creativity.” COMPENDIUM (THIRD) § 311.2 (citing *Waldman Publishing Corp. v. Landoll, Inc.*, 43 F.3d 775, 782 (2d Cir. 1994)). The amount of creativity required for a derivative work is the same as that required for a copyright in any other work: “[a]ll that is needed to satisfy both the Constitution and the statute is that the ‘author’ contributed something more than a ‘merely trivial’ variation, something recognizably ‘his own.’” *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102-03 (2d Cir. 1951) (citing *Chamberlin v. Uris Sales Corp.*, 150 F.2d 512, 513 (2d. Cir. 1945)). Thus, “the key inquiry is whether there is sufficient nontrivial expressive variation in the derivative work to make it distinguishable from the [preexisting] work in some meaningful way.” *Schrock v. Learning Curve International, Inc.*, 586 F.3d 513, 521 (7th Cir. 2009).

Although the amount of originality required is low, courts have recognized that derivative works “[l]acking even a modest degree of originality. . . are not copyrightable.” *L. Batlin & Son*, 536 F.2d at 490; *Durham Industries, Inc. v. Tomy Corp.*, 630 F.2d 905, 911 (2d Cir. 1980). Indeed, “[s]pecial caution is appropriate when analyzing originality in derivative works, ‘since too low a threshold will give the first derivative work creator a considerable power to interfere with the creation of subsequent derivative works from the same underlying work.’” *We Shall Overcome Found. v. The Richmond Org., Inc.*, 16-cv-2725, 2017 WL 3981311, at *13 (S.D.N.Y. Sept. 8, 2017). Very minor variations do not satisfy this requirement, such as merely changing the size of the preexisting work or recasting a work from one medium to another. *See L. Batlin & Son*, 536 F.2d at 491. Further, a claim to register a derivative work that adds only non-copyrightable elements to a prior product is not entitled to copyright registration. *Boyd’s Collection, Ltd. v. Bearington Collection, Inc.*, 360 F. Supp. 2d 655, 661 (M.D. Pa. 2005). Ultimately, whatever the addition is, it must be independently protectable in order for the derivative work to be registered.

B. Analysis of the Works

1. Bear Rug Claraloo Variation 6, Fox Rug Claraloo Variation 2, and Bear Wall Mount Claraloo Variation 1

After carefully examining the Works, specifically only looking at the heads, and applying the legal standards discussed above, the Board finds that Bear Rug Claraloo Variation 6, Fox Rug Claraloo Variation 2, and Bear Wall Mount Claraloo Variation 1 satisfy the requirement of

creative authorship necessary to sustain claims to copyright. The Board finds that each of these works contains a sufficient amount of original three-dimensional artwork authorship. Our decision to register these works is based on the low standard for copyrightability articulated in *Feist*, 499 U.S. at 346. Courts evaluating the copyrightability of plush toys have looked to whether the toys' features are lifelike representations or generic designs—subject to narrow or no copyright protection—or whether they contain features that manifest “imaginative artistic expression.” *Wildlife Express Corp. v. Carol Wright Sales, Inc.*, 18 F.3d 502, 510 (7th Cir. 1994); *see also Coquico, Inc. v. Rodriguez-Miranda*, 562 F.3d 62, 65, 68-69 (1st Cir. 2009). When making the determination, courts have acknowledged that the creation of a plush toy involves “countless artistic decisions” from the “size, shape, posture, color, juxtaposition of features” to the “stitching, and adornment” of the toy. *Coquico, Inc.*, 562 F.3d at 69 (finding the plush toys' at issue “distinctive stitching pattern,” “idiosyncratic color combination,” and pose protectable); *see also Boyds Collection v. Bearington Collection, Inc.*, 360 F. Supp. 2d 655, 660 (M.D. Pa. 2005) (finding that stuffed bears' unique fur, facial expressions, and arm and leg style supported a finding of originality) (Appendix B of this letter includes a representative selection of images of the works at issue in *Boyds Collection*.) Using these guiding principles, the Board finds that the three Works exhibit copyrightable authorship.

The Works' features, though they may be uncopyrightable common and familiar shapes in isolation, *see* 37 C.F.R. § 202.1, are arranged in a creative manner when viewed as a whole:

- In Bear Rug Claraloo Variation 6, the Board agrees with Robbins that the long exaggerated faux fur; the size, depth, and placement of the ears, the selection and use of contrasting textured materials for the ears, face, snout, and nose—specifically the crochet, faux fur, and felt nose; and the decision to exclude eyes, a mouth, and teeth are sufficient to render the Work copyrightable.
- In Fox Rug Claraloo 2, the Board also agrees with Robbins that the long exaggerated faux fur; the size, depth, and placement of the ears, the selection and use of contrasting textured materials for the ears, face, snout, and nose—specifically the crochet, faux fur, and felt nose; the widely elongated muzzle; and the decision to exclude eyes, a mouth, and teeth, are sufficient to render the Work copyrightable.
- Bear Wall Mount Claraloo Variation 1 is a derivative work of Bear Rug Claraloo Variation 6, *see* Bear Wall Mount Claraloo Variation 1 Second Request at 1, but there are several changes, which combined, are beyond de minimis: the use of a short faux fur; the different posture of the head; and the differing size, shape, and position of the snout.

The combinations of these features in the Works are more than “necessary [uncopyrightable] byproducts of the stuffed-animal artistic medium.” *Coquico, Inc.*, 562 F.3d at 68. Further, the depictions are clearly not “inevitable concomitants of an effort to produce an anatomically correct portrayal” of a bear or fox. *Id.* at 69. The Works fall within the middle ground between generic designs and lifelike depictions. The Office cautions, however, that registration covers only the original and creative features displayed in the Works, and not standard designs or other unoriginal elements. *See, e.g., Satava*, 323 F.2d at 812.

2. *Bear Rug Claraloo Variation 16*

After carefully examining the Work, specifically only looking at the head—the only portion of the rug Robbins seeks to register—and applying the legal standards discussed above, the Board finds that Bear Rug Claraloo Variation 16 does not contain the requisite authorship necessary to sustain a claim to copyright. The Work is a derivative of Bear Rug Claraloo Variation 6. *See* Bear Rug Claraloo Variation 16 Second Request at 1. Because the Work incorporates elements from a preexisting work, the new authorship may be registered if it contains a sufficient amount of original expression, meaning the derivative work must be independently created, and it must possess more than a modicum of creativity. *See Waldman Publishing Corp. v. Landoll, Inc.*, 43 F.3d 775, 782 (2d Cir. 1994). The Board does not question that the Work was independently created. Reviewing the Work for originality, the single change from Variation 6 to Variation 16 is the use of a grey “plush minky fur” as opposed to the white “long exaggerated faux fur” in the preexisting work. Bear Rug Claraloo Variation 16 Second Request at 3. The Board is unconvinced that the change in faux fur color and texture is enough to render the Work a copyrightable derivative work. Also, merely changing one color is not a copyrightable alternation. *See* 37 C.F.R. § 202.1(a); COMPENDIUM (THIRD) § 906.3. Thus, the Work does not contain new material sufficient to constitute registration, and the Board upholds, in light of the appropriate legal standards, the initial decision to refuse registration of the Work.

3. *Bear Basket Claraloo Variation 1*

After carefully examining the Work and applying the legal standards discussed above, the Board finds that Bear Basket Claraloo Variation 1 does not contain the requisite separable authorship necessary to sustain claims to copyright.

As Robbins acknowledges, the Work, a basket with a protruding bear snout and ears, is a useful article. *See* Bear Basket Claraloo Variation 1 Second Request at 4. Thus, for there to be any consideration of the Work’s design features, these features must be separable from the basket’s utilitarian function as a container. As discussed above, the U.S. Supreme Court laid out a two part separability test in its *Star Athletica* decision. Under the first part of the test, the Board finds that there are identifiable and separable three-dimensional design features—the ellipsoid-shaped snout and two semi-circular ears—that can easily be identified as “two- or three-dimensional element[s] that appear[] to have pictorial, graphic, or sculptural qualities.” *Star Athletica*, 137 S. Ct. at 1010. Under the second part of the test, one can “imaginatively separate[]” the snout and the two ears from the basket. *Id.* at 1014. Because the snout and ears are the only separable design elements, the Board is only evaluating those elements and not the brown basket itself, a nonprotectable useful article.

Next, for a work to be eligible for copyright protection, it must “possess more than a *de minimis* quantum of creativity,” *Feist*, 499 U.S. 340, 363. Neither the Work’s separable elements nor the compilation of those elements meet this low threshold. The individual elements—a cream crochet ellipsoid snout with a black triangular nose and two brown crochet semi-circular ears—are all variations of common and familiar uncopyrightable shapes. The Copyright Act does not protect common geometric shapes either in two or three-dimensional

form, such as the circles, ovals, spheres, and triangles that are represented in the Work. *See* 37 C.F.R. 202.1(a); COMPENDIUM (THIRD) § 906.1.

The Board recognizes that although the individual components of a given work may not be copyrightable, the components may be protectable if selected or combined “in a distinctive manner indicating some ingenuity.” *Atari Games Corp.*, 888 F.2d at 883. Here, though, the Board finds that the selection, combination, and arrangement of the Work’s design elements, is not sufficient to render the Work original. Once removed from the basket, we are left only with a cream snout and two ears. The Board finds that these features are “necessary byproducts of the stuffed-animal artistic medium” and are therefore not subject to copyright protection when they are the only features being considered. *Coquico, Inc.*, 562 F.3d at 68. Courts have found that snouts and ears are “generic features of a teddy bear,” and the Work exemplifies extremely basic versions of a stuffed animal snout and ears. *N. Am. Bear Co v. Carson Pirie Scott & Co.*, No. 91 C 4550, 1991 U.S. Dist. LEXIS 17350, at *11 (N.D. Ill. Nov. 26, 1991). These few and unprotectable elements are combined in an entirely standard and commonplace manner, creating the most generic depiction of stuff animal facial elements: the muzzle is one color and one texture, aside from the black triangular nose, and the ears are also one color and one texture. *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.”). Accordingly, the Board upholds, in light of the appropriate legal standards, the initial decision to refuse registration of the Works.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office reverses the refusals to register copyright claims in Bear Rug Claraloo Variation 6, Fox Rug Claraloo Variation 2, and Bear Wall Mount Claraloo Variation 1. The Board now refers those works to the Registration Policy and Practice division for registration of these works, provided that all other application requirements are satisfied.

The Board affirms the refusal to register the copyright claims in Bear Rug Claraloo Variation 16 and Bear Basket Claraloo Variation 1. 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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Appendix A