



United States Copyright Office

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Re: Second Request for Reconsideration for Refusal to Register *Clothing with a Stylized C* (SR # 1-5860747051; Corr. ID 1-38NLKUR); *Button Top Clothing with a Stylized "C"* (SR # 1-5885676411; Corr. ID 1-38NFXA4)

Dear Mr. Stringham:

The Review Board of the United States Copyright Office ("Board") has considered Urbana Chappa's ("Chappa's") second request for reconsideration of the Registration Program's refusal to register a two-dimensional artwork claim in the works titled *Clothing with a Stylized "C"* and *Button Top Clothing with a Stylized "C"* (collectively, the "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.

I. DESCRIPTION OF THE WORKS

The Works are two-dimensional fabric designs incorporated into children's clothing. *Clothing with a Stylized "C"* is a yellow and black sleeveless romper with a "c" shape over the left leg. The front is yellow with a black "c," while the back is black with a yellow "c," as reproduced below.



Button Top Clothing with a Stylized “C” is an orange and black sleeveless romper with a “c” shape over the left torso. The front is orange with a black “c,” while the back is black with an orange “c,” as reproduced below:



II. ADMINISTRATIVE RECORD

On October 6, 2017, Chappa filed separate applications to register a copyright claim in the Works. A registration specialist refused registration for *Clothing with a Stylized “C”* on November 24, 2017, and *Button Top* on March 19, 2018, stating that they are useful articles that contain no copyrightable authorship. Letter from Coakley, Registration Specialist, to John C. Stringham (Nov. 24, 2017); Letter from Gillaspie, Registration Specialist, to John C. Stringham (Mar. 19, 2018).

In similar letters dated June 19, 2018, Chappa requested that the Office reconsider its initial refusal to register the Works. Letters from John C. Stringham to U.S. Copyright Office (June 19, 2018) (“First Requests”). 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 separable features of the Works consisted of basic elements whose “overall combination and arrangement do[es] not contain a sufficient amount of creativity to support a copyright claim.” Letters from Stephanie Mason, Attorney-Advisor, to John C. Stringham, at 3 (Oct. 18, 2018) (“Refusals of First Requests”).

In response, Chappa 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 John C. Stringham, to U.S. Copyright Office (Jan. 18, 2019) (“Second Request”). In these letters, Chappa argued that

the Works contain a sufficient amount of creative expression because “[t]he author of the subject Work[s] did more than simply make minor non-artistic modifications to a standard character or shape. Rather, the author developed design[s] which [are] reflective of the designer’s artistic depiction of a curve, horseshoe, or half-ring, and further offset [these] design[s] [by the intentional choice to use highly contrasting color combinations to drastically offset the shapes and the background.” *Id.* at 2. These requests have been consolidated.

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).

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 Works and applying the legal standards discussed above, the Board finds that they are useful articles that do not contain the requisite separable authorship necessary to sustain a claim to copyright.

As an initial matter, Chappa and the Copyright Office are in agreement that the color blocks and the “stylized C” shape in each Work “are separable elements applied to the surface of the garments. . . . with graphic qualities.” Refusals of First Requests at 3; *see also* Second Request at 1 (“The only requirement left in dispute is whether the subject Work is sufficiently creative . . .”). These individual elements—two contrasting colors and one “c” or curvilinear shape¹—are not copyrightable. *See Feist*, 499 U.S. at 363; *Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 498 (S.D.N.Y. 2005) (stating that “letters, mere variations of letters, and familiar symbols cannot be copyrighted”); 37 C.F.R. § 202.1(a) (prohibiting registration of “familiar symbols or designs; mere variations of typographic ornamentation, [and] lettering or coloring”); COMPENDIUM (THIRD) § 913.1 (stating that “[m]ere scripting or lettering, either with or without

¹ Chappa now claims that the “Stylized C” referenced in the titles is no longer a “c” but “rather the unique shape developed as the overlay, when placed in a particular arrangement, [that] causes the viewer to observe a curved shape[.]” Second Request at 3. Whether considered a letter “c” or abstract curve, the identified graphic is a simple element insufficiently creative for copyright protection on its own.

uncopyrightable ornamentation” does not satisfy the requirements for copyright registration). The question, then, is whether the combination of the Works’ elements is sufficiently creative.

While some combinations of common or standard design elements may contain sufficient creativity to support a copyright, not every combination will meet this threshold. *See Feist*, 499 U.S. at 358 and 363. The combination of elements in each of the Works fails to meet the threshold for protection. Each Work combines a black curvilinear shape with a bright color on the front of the garment, and then reverses the color combination for the back. This is a predictable combination of a few uncopyrightable elements and does not feature the necessary variety and composition of elements to qualify for registration. *See COMPENDIUM (THIRD)* § 309.3.

Chappa cites a number of cases to support the proposition that “a combination of geometric shapes, even if unprotectable individually, may merit copyright protection as a whole.” Second Request at 2. The works in the cases cited each share a quality of numerous geometric shapes or colors. *See Atari Games Corp. v. Oman*, 979 F.2d 242 (D.C. Cir. 1992) (finding a combination of shapes, color, and movement sufficiently creative); *Reader’s Digest Assoc. v. Conservative Digest*, 821 F.2d 800 (D.C. Cir. 1987) (finding a combination and arrangement of common forms created a unique graphic design); *Titlecraft, Inc. v. Nat’l Football League*, 2010 WL 5209293 (D. Minn. Dec. 20, 2010) (stating “at some level of abstraction, all objects are combinations of geometric shapes”); and *Glasscraft Door LLP v. Seybro Door & Weathership Co. Inc.*, 2009 WL 3460372 (S.D. Tex. Oct. 22, 2009) (involving doors containing multiple geometric shapes). Chappa then attempts to connect the Works with the cited cases by delineating three separate shapes within the work, stating when “the Black Shape and Half-Sphere are arranged by the artist on top of a contrasting color, the underlying contrasting color forms the curved shape.” Second Request at 3. While the Review Board agrees that combinations of geometric shapes may be sufficiently creative for copyright protection, it finds that reasonable observation does not support Chappa’s assertion that the Works are intricate combinations of multiple shapes. Here, a simple “c” or curvilinear shape is placed against a contrasting background. Without more, there is insufficient creative authorship to warrant copyright protection.

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

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