



**United States Copyright Office**

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October 25, 2017

Charles R. Hoffmann P.C.  
Attn: Charles Hoffmann  
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Woodbury, NY 11797

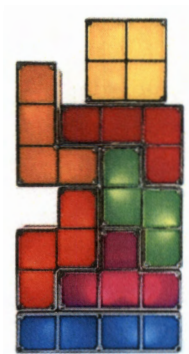
**Re: Second Request for Reconsideration of Refusal to Register “Stackable Multi-Color Lamp Game”; Service Request #: 1-3074715611; Correspondence ID: 1-200FPPJ**

Dear Mr. Hoffmann:

The Review Board of the United States Copyright Office (“Board”) has considered Sharper Innovations Limited’s (“Sharper”) second request for reconsideration of the Registration Program’s refusal to register a three-dimensional sculpture claim in the work titled “Stackable Multi-Color Lamp Game” (“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.

**I. DESCRIPTION OF THE WORK**

The Work consists of seven three-dimensional, stackable shapes, each in a different solid color illuminated by a LED light, and each composed of four squares. Two shapes are standard geometric figures: a yellow square and a blue rectangle. The five remaining figures somewhat resemble letters of the English alphabet: a purple “T”; an orange “L”; a red “J”; a green “S”; and a red “Z”. The deposit image reproduced below depicts the seven arrangeable pieces of the Work.



## II. ADMINISTRATIVE RECORD

On January 26, 2016, Sharper filed an application to register a copyright claim in the Work as a “3-Dimensional Sculpture.” The application does not contain any information in the “Limitation of Claim” or “New Material Included” fields. In a May 5, 2016 letter, a Copyright Office registration specialist refused to register the Work, finding that it “lack[ed] the authorship necessary to support a copyright claim” and noting that copyright only protects works “independently created by the author” and possessing “at least a minimal degree of creativity.” Letter from Robin Jones, Registration Specialist, to Charles R. Hoffmann (May 5, 2016).

In a letter dated July 15, 2016, Sharper requested that the Office reconsider its initial refusal to register the Work. Letter from Charles R. Hoffmann to U.S. Copyright Office (July 15, 2016) (“First Request”). First, Sharper acknowledged that “[t]o merit protection . . . a work need not be particularly novel or unusual[,]” but must “have been ‘independently created’ by the author and possess ‘some minimal degree of creativity.’” First Request at 1. Sharper’s letter stated that “there is no suggestion that the [W]ork was not ‘independently created.’” *Id.* at 2. Thus, the remainder of Sharper’s letter sought to establish that the collection of stackable pieces with so-called “decorative borders” was sufficiently creative. *Id.* at 2-3. After reviewing the Work in light of the points raised in the First Request, the Office re-evaluated the claim and concluded it was “still unable to register a copyright claim in this [W]ork because it does not contain a sufficient amount of original and creative authorship.” Letter from Stephanie Mason, Attorney-Advisor, to Charles R. Hoffmann (Jan. 31, 2017) (“Second Refusal”).

On April 25, 2017, Sharper requested that the Office reconsider for a second time its refusal to register the Work. Letter from Charles R. Hoffmann to U.S. Copyright Office (Apr. 25, 2017) (“Second Request”). Sharper restated that “there is no suggestion that the [W]ork was not ‘independently authored.’” Second Request at 2. Sharper then acknowledged “that the individual components of the [Work] might not be copyrightable,” but stated that it “does not seek to register the[] components by themselves—but rather seeks to register the creative arrangement of all such components.” Second Request at 2-3. Sharper asserted that “the creative features embodied in the [W]ork more than satisf[ied] the ‘minimal degree of creativity’ described by the Supreme Court in *Feist*.” Second Request at 6. To support this conclusion, Sharper equated the geometric designs in the Work to those found copyrightable in *Glasscraft Door I, L.P. et al v. Seybro Door & Weathership Co., Inc.*, 2009 WL 3460372 (S.D. Tex. 2009)).

## III. DISCUSSION

### A. *The Legal Framework*

#### 1) *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, for the Office to register a work that consists merely of geometric shapes, 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.

## 2) *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 (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.”).

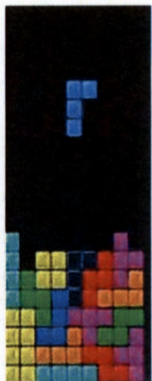
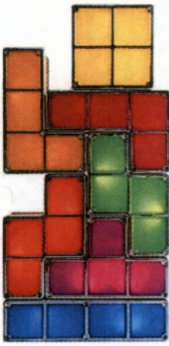
In the case of derivative works, the “new authorship that the author contributed to the derivative work may be registered, provided that it contains a sufficient amount of original expression, meaning that the derivative work must be independently created and it must possess more than a modicum of creativity.” COMPENDIUM (THIRD) § 311.1 (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). 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 Work**

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

A threshold requirement for claiming copyright is that the work must be independently created by the author, that is, not copied from another work. *See Feist*, 499 U.S. at 345. While the Office “generally does not compare” works, it will “take administrative notice of facts or matters . . . known by the Office or the general public . . . to question an application that appears to contain or be based upon inaccurate or erroneous information.” COMPENDIUM (THIRD) §§ 602.4(C)-(D). In this case, the Work appears to incorporate significant portions of a preexisting, and widely published, copyrighted work. As shown in the chart below, the seven game pieces that make up the Work are essentially copies of the iconic game pieces of the video game *Tetris*, which uses “seven distinctive geometric playing pieces, each made up of four squares.” *Tetris, About Us*, TETRIS.COM, <https://tetris.com/about-us> (last visited Oct. 20, 2017).

Tetris <sup>1</sup>	Work (Stackable Multi-Color Lamp Game)
	

The *Tetris* videogame is protected by copyright, including its “visual expression”: the seven “bright[ly] color[ed]” pieces “composed of individually delineated bricks, each brick [having] an interior border to suggest texture, and shading and gradation of color . . . to suggest light is being cast onto the pieces.” *Tetris Holding, LLC v. Xio Interactive, Inc.*, 863 F. Supp. 2d 394, 410-11 (D.N.J. 2012) (holding similarly designed game pieces infringed *Tetris*’s copyright, noting that “the pieces are composed of individually delineated bricks, each brick is given an interior border to suggest texture, and shading and gradation of color are used in substantially similar ways to suggest light is being cast onto the pieces”). According to the Office’s registration records, Tetris Holding, LLC is the copyright owner of the *Tetris* videogame, as well as subsequent copyrights associated with *Tetris*, and the Tetris online store sells a number of three-dimensional puzzles and other merchandise.<sup>2</sup>

There can be no doubt that the Work was created with *Tetris* in mind; in fact, sharperimage.com markets the Work as a “Tetris Light,” stating “If you like Tetris (and who

<sup>1</sup> Image reproduced from *Tetris Holding, LLC v. Xio Interactive, Inc.*, 863 F. Supp. 2d 394, 410 (D.N.J. 2012).

<sup>2</sup> TX0002600074; PA0000412170. This registration and subsequent copyrights associated with *Tetris* are now owned by Tetris Holding, LLC. *See, e.g., Tetris Shop, Tetris MasterPieces Brainteaser Cube 3D Puzzle, 16-Piece*, TETRIS.COM, <https://shop.tetris.com/collections/games/products/tetris-masterpieces-brainteaser-cube-3d-puzzle-16-piece> (last visited, Oct. 20, 2017).

doesn't?) you'll love the Tetris Light! Inspired by the classic video game, it features seven blocks that you stack and arrange into any combination you like."<sup>3</sup> Just like *Tetris*, the Work here is comprised of seven pieces that resemble: (1) a yellow square; (2) a blue rectangle; (3) a purple "T"; (4) an orange "L"; (5) a green "S"; and (6) a red "Z"; each composed of four illuminated and individually delineated squares.<sup>4</sup> According to the application, the Work was created in 2012, decades after *Tetris* was registered in the U.S. Accordingly, the Board finds that these common elements of the Work were not "independently authored" by Sharper, and are therefore ineligible for copyright.<sup>5</sup> See *Feist*, 499 U.S. at 345.

Next, the Board evaluates the extent to which the Work contains independent and sufficiently creative authorship for copyright protection. Applying the legal standards discussed above, the Board finds that the discernable features added by the Work lack the necessary modicum of creativity required for independent copyright protection.<sup>6</sup> As noted, a derivative work must contain a non-trivial amount of original authorship distinguishable from the preexisting work. *Schrock*, 586 F.3d at 521. Here, the copyright in the *Tetris* video game encompasses "the right to reproduce the work in or on any kind of article, whether useful or otherwise," including in three-dimensional format, *i.e.*, a lamp. 17 U.S.C. § 113(a). Moreover, "merely changing the size of the preexisting work" or "recasting a work from one medium to another . . . does not support a claim in derivative authorship." COMPENDIUM (THIRD) § 311.2; see also *L. Batlin & Son*, 536 F.2d at 491. In recreating the iconic *Tetris* pieces as illuminated three-dimensional pieces, the Work "reproduce[s], albeit in a different form, [*Tetris*]' 'original work of authorship.'" *Penguin Random House LLC v. Colting*, No. 17-CV-386 (JSR), 2017 WL 3977000, at \*12 (S.D.N.Y. Sept. 7, 2017).

The minor design differences between the borders used in the Work and the preexisting *Tetris* pieces are *de minimis*. The *Tetris* pieces have a "border to suggest texture, and shading and gradation of color . . . to suggest light is being cast onto the pieces." *Tetris Holding*, 863 F. Supp. 2d at 410-11. The Work seemingly attempts to recreate the dark border in *Tetris* by applying a silver metal border with grommets that individually delineate each of the four squares in the illuminated game pieces. The Board finds that any minor resulting variations in the border, coloration, or texture to be trivial and non-copyrightable. See *Feist*, 499 U.S. at 345, 359; *Boyd*s, 360 F. Supp. 2d at 661. See also 37 C.F.R. § 202.1 (mere coloration and common shapes not subject to copyright); COMPENDIUM (THIRD) § 906.1; 3 (same).

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<sup>3</sup> <https://www.sharperimage.com/si/view/product/Tetris+Light/203158> (last visited, Oct. 24, 2017).

<sup>4</sup> The seventh piece in the Work is a magenta "J" compared to the dark blue "J" depicted in the game above; magenta is apparently the color of the "J" featured in the Microsoft version of *Tetris*, and multiple Tetris.com products also feature a magenta "J". See *Tetris*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Tetris> (last visited, Oct. 24, 2017); *Tetris Shop*, TETRIS.COM, <https://shop.tetris.com/> (last visited, Oct. 24, 2017).

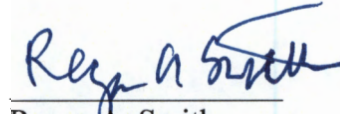
<sup>5</sup> Although in the Second Refusal a Copyright Office registration specialist stated that the independent authorship component was "not at issue," the Review Board disagrees, insofar as the Work incorporates copyrightable elements of the *Tetris* game. Second Refusal at 1. Both the decision made by the registration specialist and the decision to uphold the refusal to register following the applicant's first request for reconsideration are subject to *de novo* review by the Board. COMPENDIUM (THIRD) § 1704.2.

<sup>6</sup> The Board assumes, *arguendo*, that no preexisting material was incorporated unlawfully into the Work, *i.e.*, that any copyrightable elements from preexisting *Tetris* material were incorporated into the Work with adequate license. See 17 U.S.C. § 103(a).

**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:**



Regan A. Smith  
Copyright Office Review Board