



Copyright Review Board
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000

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Re: Second Request for Reconsideration of Refusal to Register Moynihan Train Hall Clock (SR # 1-10097199351; Correspondence ID: 1-52KE7DP)

Dear Ms. Winston:

The Review Board of the United States Copyright Office (“Board”) has considered Peter Pennoyer’s (“Pennoyer”) second request for reconsideration of the Registration Program’s refusal to register a sculptural claim in the work titled “Moynihan Train Hall Clock” (“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 is a clock encased in a three-dimensional sculpture consisting of multiple clock faces set in a case comprised of a series of rectangles separated, except for at the corners, by recessed isosceles trapezoids that are arranged in rectangular tiers. The central tier has a circular band surrounding the clock face. The top of the Work has two rectangular, terraced tiers and the bottom has three. Each tier is arranged concentrically, and evenly, with the tiers becoming smaller as they increase in distance from the clock face. All sides visible in the deposit images appear to be identical.

The Work is as follows:



II. ADMINISTRATIVE RECORD

On January 31, 2021, Pennoyer filed an application to register a copyright claim in the Work. In a May 5, 2021 letter, a Copyright Office registration specialist refused to register the claim, determining that it did “not contain any separable design element that contains sufficient copyrightable authorship to support a registration.” Initial Letter Refusing Registration from U.S. Copyright Office to Laura Winston at 1 (May 5, 2021).

On July 30, 2021, Pennoyer requested that the Office reconsider its initial refusal to register the Work, arguing that “the subject work is entitled to copyright registration” and explaining that there is no claim to the clock face or internal machinery. Letter from Laura Winston to U.S. Copyright Office at 1–2 (July 30, 2021) (“First Request”). After reviewing the Work in light of the points raised in the First Request, the Office reevaluated the claims and again concluded that the Work could not be registered. Refusal of First Request for Reconsideration from U.S. Copyright Office to Laura Winston (Dec. 10, 2021) (“Second Refusal”). The Office explained that “the separable features of this design are common and familiar shapes,” and “the combination and arrangement of those shapes does not contain the requisite amount of creativity [for registration].” *Id.* at 5.

In a letter dated March 9, 2022, Pennoyer 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 Laura Winston to U.S. Copyright Office (Mar. 9, 2022) (“Second Request”). In that letter, Pennoyer argued that “[t]he work is so much more than multiples of a common shape” and identified that creativity can be found in the “uneven nature” of the design because the Work’s top has one fewer tier than the bottom. *Id.* at 1. Pennoyer further asserted that the registration program “overlook[ed] the creativity it took for the Author to conceive of the idea of the arrangement.” *Id.*

III. DISCUSSION

After carefully examining the Work and considering the arguments made in the First and Second Requests, the Board concludes that the Work is a useful article that contains separable elements, but these elements do not contain the requisite creativity necessary for copyright registration.

Because the Work is a clock, it is a “useful article” under the Copyright Act and must be analyzed as such. *See* 17 U.S.C. § 101; U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES AND PROCEDURES § 924.1 (3d ed. 2021) (“COMPENDIUM (THIRD)”) (citing “[h]ousehold appliances, such as. . . clocks” as examples of useful articles). The Act defines useful articles as those “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 (defining “useful article”). Useful articles may receive copyright protection “only if, and only to the extent that,” they “incorporate[] pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.” *Id.* (defining “pictorial, graphic, and sculptural works”). The Board must therefore apply the test articulated by the Supreme Court in *Star Athletica L.L.C. v. Varsity Brands, Inc.*, to determine whether the work includes features that “(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.” 580 U.S. 405, 424 (2017).

To warrant registration, the separable features must be “original works of authorship.” 17 U.S.C. § 102(a). As the Supreme Court has explained, the statute requires that works contain “some minimal degree of creativity” to qualify for copyright protection. *See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). Though only a “modicum” of creativity is necessary, copyright will not protect works in which “the creative spark is utterly lacking or so trivial as to be virtually nonexistent.” *Id.* at 346, 359. The Court has 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.

When considering useful articles, the Office must contemplate whether any separable features satisfy the *Feist* standard for originality. 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 claim. Nevertheless, not every combination or arrangement will be sufficient to meet this test. *See id.* 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, 883 (D.C. Cir. 1989); *Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 498–99 (S.D.N.Y. 2005). A simplistic arrangement of non-protectable elements does not demonstrate the level of creativity necessary to warrant protection. *See Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) (“[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.”).

Applying the above framework to the Work, the Board finds that the Work contains separable elements, but those elements do not contain sufficient creativity for registration.

The case surrounding the clock is a separable sculptural design that can be perceived notwithstanding the utilitarian aspects of the clock mechanism. The Work’s separable features consist of rectangles and recessed trapezoids arranged into rectangular-shaped tiers. Due to how the trapezoids are arranged, with the shorter bases of the trapezoids joined together and the longer bases connected to an adjoining rectangle, the top and bottom edges of each tier consist of evenly spaced triangular indentations. The middle tier of each side has a circular band surrounding the clock face. As such, the design features are regularly shaped and neatly arranged rectangles, trapezoids, and circles.

The separable features, considered individually or in combination are insufficiently creative to sustain copyright protection. Rectangles, trapezoids, and circles are common shapes and not copyrightable. *See* COMPENDIUM (THIRD) § 906.1 (noting that common geometric shapes are not protectable, even in three-dimensional form). Though a combination of unprotectable elements could cross the threshold for creativity, “[m]erely bringing together only


a few standard forms or shapes with minor linear or spatial variations does not satisfy this requirement.” *See id.* § 905. The few basic shapes in the Work are arranged in an expected and obvious manner. They are evenly spaced and organized symmetrically—even lacking minor variations in form. The fact that the case’s top has one fewer tier than its bottom is not enough to meet copyright’s creativity standard. *Id.* As the Office explained, “[t]his simple, garden-variety arrangement of multiples of a common shape in no way demonstrates the minimal creativity necessary to support a copyright registration.” Second Refusal at 4; *see also Satava*, 323 F.3d at 811.

Pennoyer suggests that *Prince v. MTS Prods.* supports their assertion that the Work demonstrates copyrightable creativity. Second Request at 1 (citing 967 F. Supp. 121 (S.D.N.Y. 1997)). This argument is unpersuasive. In discussing the work at issue in *Prince*, the court explained that it was the irregularity of the arrangement and atypical design of the work’s shapes that made the use of common shapes more than garden-variety. 967 F. Supp. at 125 (“First, they are irregularly shaped, and not the perfect circles of a standard polka dot.”). Here, the common shapes are regularly shaped in seemingly identical rectangles, circles, and trapezoids, and arranged in an expectedly neat manner. While Pennoyer asserts that the different number of tiers on the top and bottom of the work represents creativity, Second Request at 1, this singular differentiation is not the type of unexpected irregularity contemplated in by the court in *Prince*. As such, the comparison to *Prince* is inapposite.

Lastly, Pennoyer asserts that, as opposed to the telephone book at issue in *Feist*, the Work here is a “distinctive and striking sculptural design” that was “inspired by art deco.” *Id.* at 1. The Office, however, does not consider a work’s aesthetic value or artistic merit, which have no bearing on whether these works’ separable elements satisfy the standard for originality. *See* COMPENDIUM (THIRD) §§ 310.2, 310.5, 924.5; *Star Athletica*, 580 U.S. at 423 (“[O]ur inquiry is limited to how the [work is] perceived, not how or why [it] was designed.”). Accordingly, whether the sculpture was “inspired by art deco” or is “striking” does not factor into the copyrightability analysis. Because the separable features of this design are common and familiar shapes arranged in an expected manner, the Board concludes that there is not sufficient creativity to warrant registration.

IV. CONCLUSION

For the reasons stated herein, the Board 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
Maria Strong, Associate Register of Copyrights and
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