



**Copyright Review Board**

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

August 17, 2022

Jeanne M. Hamburg, Esq.  
Norris McLaughlin, P.A.  
7 Times Square, 21st Floor  
New York, NY 10036

**Re: Second Request for Reconsideration for Refusal to Register Diamant bottle  
(SR # 1-10923198141; Correspondence ID: 1-565XPQI)**

Dear Ms. Hamburg:

The Review Board of the United States Copyright Office (“Board”) has considered E. Rémy Martin & Co.’s (“Rémy Martin”) second request for reconsideration of the Registration Program’s refusal to register a sculpture claim in the work titled “Diamant bottle” (“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 bottle. Its body has the shape of a circular disk with flat and angled polygon and triangle facets covering both sides of its surface to form a donut shape. The center octagon in the body is recessed on both sides. The cork also features quadrilateral and octagonal facets covering its sides and its top and a recessed band in the center. Images of the Work from several different angles are reproduced below:





## II. ADMINISTRATIVE RECORD

On October 20, 2021, Rémy Martin filed an application to register a copyright claim in the Work. In an October 21, 2021, letter, a Copyright Office registration specialist refused to register the claim, determining that “it does not contain any non-useful design element that could be copyrighted and registered.” Initial Letter Refusing Registration from U.S. Copyright Office to Jeanne Hamburg at 1 (Oct. 21, 2021).

On October 26, 2021, Rémy Martin requested that the Office reconsider its initial refusal to register the Work, arguing that the “three-dimensional design is a faceted sculpture with certain geometric qualities that are original and unique.” Letter from Jeanne Hamburg to U.S. Copyright Office at 3 (Oct. 6, 2021) (“First Request”). 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 could not be registered. Refusal of First Request for Reconsideration from U.S. Copyright Office to Jeanne Hamburg at 1 (Mar. 18, 2022). The Office explained that the overall shape of the Work is a utilitarian, not decorative, aspect of the design that does not have the “capacity to exist apart from the utilitarian aspects” of the Work. *Id.* at 3 (citing *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017)). Although the Office recognized that the Work contains a number of separable features, including a flat circular disc and geometric faceting, those features are “not sufficiently creative to support a copyright claim,” either alone or in their “combination and arrangement.” *Id.* at 4.

In a letter dated June 17, 2022, Rémy Martin 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 Jeanne Hamburg to U.S. Copyright Office (June 17, 2022) (“Second Request”). The Second Request encloses the declaration of Mechanical Engineer and Certified Packaging Professional Jim Goldman and argues that “the embellishments and ornamental features of the Diamant bottle are not only non-functional but are also original and creative elements of its design.” *Id.* at 2. Rémy Martin contends that the Work “is a unique work of creative art that draws inspiration from the radial symmetry of diamonds and flowers found in nature without simply reproducing either of those objects.” *Id.* (internal quotations omitted). Specifically, Rémy Martin points to “the creator’s *selection* and *arrangement* of the facets of the Diamant bottle” as evidence of the creativity of the design, and notes that while “[t]here are infinite possible combinations of the separate elements,” “the creator chose particular combinations and arrangements to express his artistic creativity.” *Id.* at 3–4 (emphasis in original).

### III. DISCUSSION

After carefully examining the Work and considering the arguments made in the First and Second Requests, the Board finds that the Work does not satisfy the statutory requirements for a claim to copyright.

First, it is undisputed that the Work, as a bottle, is a useful article. *See* 17 U.S.C. § 101 (defining a “useful article” as “an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information”); *see also* First Request at 1 (recognizing that the Work is a useful article). The Copyright Act does not protect useful articles as such. *Star Athletica*, 137 S. Ct. at 1008. Rather, 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.” *Id.* at 1007 (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 first 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.*; *see also* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 924.3 (3d ed. 2021) (“COMPENDIUM (THIRD)”). Here, while the overall configuration of the bottle, as intrinsically utilitarian, cannot be identified separately from the useful aspects of the article, the Board finds that there are separable three-dimensional design features—the geometric facets on the surface of the body and cork and the recessed flat octagon in the center of the body—that can 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; *see also* COMPENDIUM (THIRD) § 924.3(F) (“[T]he copyright law does not protect the overall form, shape, or configuration of the useful article itself, no matter how pleasing or attractive it may be.”). If these sculptural details were conceptually removed from the body and cork of the bottle and imagined in another medium of expression, they could be considered sculptural works under the Act.

The fact that these faceted and geometric elements meet the separability requirement, however, does not mean they are automatically entitled to copyright protection; the Work must qualify as an “original work[] of authorship.” 17 U.S.C. § 102(a); *see also Star Athletica*, 137 S. Ct. at 1010. In the copyright context, the term “original” consists of two components: independent creation and sufficient creativity. *See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991). First, the work must have been independently created by the author, “as opposed to copied from other works.” *Id.* Second, the work must possess sufficient creativity. *Id.* Only a modicum of creativity is necessary, but the Supreme Court has held that some works fail to meet even this low threshold. *Id.* at 345, 363 (stating “copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity”); COMPENDIUM (THIRD) § 906.1.

Here, the Board finds that the Work’s individual separable components on the body and cork are insufficiently creative to be eligible for copyright protection. The separable features consist solely of common geometric shapes—polygons and triangles around the body and cork of the bottle and an octagon at its center—which copyright law does not protect. *See, e.g.*, 37 C.F.R. § 202.1(a) (prohibiting registration of “familiar symbols or designs”).

Likewise, viewed as a whole, the selection, coordination, and arrangement of the separable elements on the body and cork are insufficient to render the Work eligible for copyright protection. The Copyright Office follows the principle that works should be judged in their entirety and not based solely on the protectability of individual elements within the work. *See Atari Games Corp. v. Oman*, 979 F.2d 242, 244–45 (D.C. Cir. 1992); COMPENDIUM (THIRD) §§ 309, 313.4(J), 906.1. Works comprised of public domain elements may be copyrightable if the selection, arrangement, and modification of the elements reflects choice and authorial discretion that is not so obvious or minor that the “creative spark is utterly lacking or so trivial as to be virtually nonexistent.” *Feist*, 499 U.S. at 359. In this case, the Work’s geometric faceting follows standard mathematical principles, which do not qualify as sufficient creative expression. COMPENDIUM (THIRD) § 905 (“In all cases, a visual art work must contain a sufficient amount of creative expression. Merely bringing together only a few standard forms or shapes with minor linear or spatial variations does not satisfy this requirement.”).

Indeed, Rémy Martin concedes that “functionality and geometric laws constrained the sculptural design of the Diamant Bottle.” Second Request at 3. Even though it argues that the author had “freedom, within those constraints, to balance the number of facets against their size, and to choose their angles and shapes,” the Work merely duplicates the “radial symmetry of diamonds and flowers,” which is a commonplace arrangement. *Id.* at 2–3; *see also* COMPENDIUM (THIRD) § 906.1. Rémy Martin lauds the Work as “similar in artistry” to the “‘Rose’ stained glass window of the Notre Dame Cathedral and other Rose windows recognized as creative works of art.” Second Request at 2. While the Board does not compare works, COMPENDIUM (THIRD) § 309.1, it notes that the stained glass works referenced demonstrate far more creativity than the Work, arranging different pictorial elements within numerous standard geometric shapes and combining various colors to create dimension. Second Request, Declaration of Expert Jim Goldman at 5. Here, the Work’s geometric shapes are clear and do not contain any pictorial elements in frame. In their attempt to “evoke[] the facets of a diamond,” the separable features ultimately imitate a garden-variety faceting arrangement built exclusively with common geometric shapes. *Id.* at 3; *cf.* COMPENDIUM (THIRD) §§ 908.2, 908.3 (“Common *de minimis* designs include . . . gemstone cuts.”).

Rémy Martin argues that there were “infinite possible combinations of the separate elements of the Diamant bottle and the creator chose particular combinations and arrangements to express his artistic creativity.” Second Request at 4. While the Board appreciates the author’s choices, the Office does not “consider possible design alternatives that the author may have considered when he or she created the work.” COMPENDIUM (THIRD) § 310.8. The fact that a work could be presented in a different arrangement, in a different size, or with a different orientation is of no consequence. The Board does not evaluate the “variety of choices available to the author.” *Id.* Rather, the Board focuses on the actual work the author created.

Finally, Rémy Martin contends that the Work is “the result of . . . choosing multiple times to favor aesthetic appeal over functionality, and is therefore a creative work of original authorship, eligible for copyright protection and registration.” Second Request at 5 (internal quotations omitted). The Board notes, however, that the Office does not consider aesthetic value or artistic merit in determining whether a work contains a sufficient amount of original authorship. See H.R. REP. NO. 94-1476, at 51 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664; see also COMPENDIUM (THIRD) § 310.2. The Board evaluates the expression that is perceptible. Where a design combines uncopyrightable elements, as is the case here, it is protected by copyright only when the “elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.” *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003). Here, the contributions are too few and their use too standard to constitute an original work of authorship. While “[t]he standard of originality is low, . . . it does exist,” and the Board concludes that this Work lacks the creativity required for copyright protection. *Feist*, 499 U.S. at 362.

#### 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**

Suzanne V. Wilson, General Counsel and Associate  
Register of Copyrights

Maria Strong, Associate Register of Copyrights and  
Director of Policy and International Affairs

Jordana Rubel, Assistant General Counsel