



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

May 18, 2021

Thomas K. Richards
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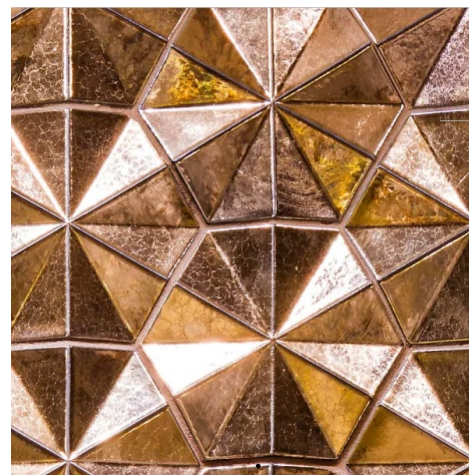
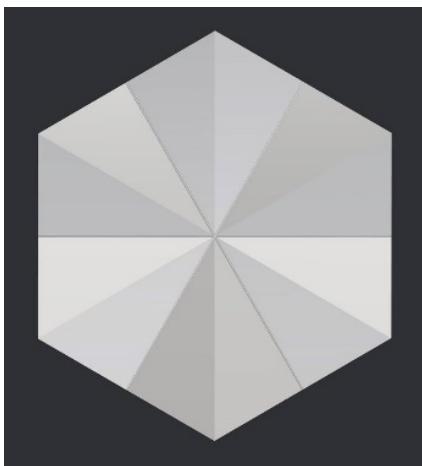
**Re: Second Request for Reconsideration for Refusal to Register Tile Design
(Correspondence ID: 1-3ZD39L7; SR # 1-7976179121)**

Dear Mr. Richards:

The Review Board of the United States Copyright Office (“Board”) has considered Ogassian, Inc.’s (“Ogassian’s”) second request for reconsideration of the Registration Program’s refusal to register a three-dimensional artwork claim in the work titled “Tile Design” (“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 tile design consisting of a hexagon divided into twelve triangles or six pyramid sections. The original deposit’s identifying material shows twelve triangles in various shades of beige. Subsequent procedural history clarified that the shading represented varying heights. The Work is as follows:



II. ADMINISTRATIVE RECORD

On August 16, 2019, Ogassian filed an application to register a copyright claim in the Work. That same day, a Copyright Office registration specialist refused to register the claim, on the basis that the Work was a useful article that did not contain the requisite separable authorship. Initial Letter Refusing Registration from U.S. Copyright Office, to Thomas K. Richards, Singh, Singh & Trauben, LLP (August 16, 2019).

In a letter dated November 13, 2019, Ogassian requested that the Office reconsider its initial refusal to register the Work, specifically objecting to the rejection on the grounds that the work was a useful article. Letter from Thomas K. Richards to U.S. Copyright Office (Nov. 13, 2019) (“First Request”). After reviewing the Work in light of the points raised in the First Request, the Office re-evaluated the claims and agreed that the Work “should be viewed as a 2-D ‘tile design’ rather than as a useful article.” Refusal of First Request for Reconsideration from U.S. Copyright Office, to Thomas K. Richards, at 1 (Mar. 23, 2020). The Office, however, concluded that the Work “merely brings together a few standard forms and shapes that are not combined in any way that rises to the level of creativity necessary for copyright registration.” *Id.* at 4.

In a letter dated June 23, 2020, Ogassian requested that, pursuant to 37 C.F.R. § 202.5(c), the Copyright Office reconsider for a second time its refusal to register the Work. Letter from Thomas K. Richards to U.S. Copyright Office (June 23, 2020) (“Second Request”). In that letter, Ogassian asserted that the Office erred by limiting the claim to two-dimensional artwork, noting the three-dimensional features of the tile, which consist of “unique pyramids, positioned at various degrees of elevation, oscillating between raised and lowered planes.” *Id.* at 3. According to Ogassian, this authorship is an “exquisitely striking play between a two-dimensional repeating unit, and a three-dimensional carved surface that together make something original and artistic.” *Id.*

III. DISCUSSION

A. *The Legal Framework - 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. *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.” U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 906.1 (3d ed. 2021) (“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.

B. Analysis of the Work

After careful examination and application of the legal standard discussed above, the Board finds that the Work does not contain the requisite authorship necessary to sustain a claim to copyright.

As a threshold matter, the Board accepts Ogassian's characterization of the Work as a three-dimensional sculpture that consists of a hexagon broken into six pyramid sections that meet in the Work's center. These individual pyramid sections are not in and of themselves copyrightable as they are common geometric shapes. *See* 37 C.F.R. § 202.1(a) (prohibiting registration of "familiar symbols or designs"); COMPENDIUM (THIRD) § 906.1.

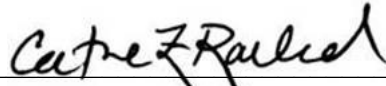
Even viewed as a whole, however, the Work is not sufficiently creative. The selection, coordination, and arrangement of these pyramids is insufficient to render the Work eligible for copyright protection. COMPENDIUM (THIRD) § 313.4(J). The edge of each pyramid bisects an interior angle of the hexagon, while the raised midpoint of each pyramid falls at the midpoint of a hexagon side. This arrangement follows standard mathematical principles, which do not qualify as sufficient creative expression. *Id.* § 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 special variations does not satisfy this requirement."); *see also The Homer Laughlin China Co. v. Oman*, Civ. A. No. 90-3160, 1991 WL 154540 (D.D.C. July 30, 1991) (upholding refusal to register a chinaware "gothic" design pattern composed of simple variations and combinations of geometric shapes due to insufficient creative authorship to merit copyright protection); *John Woods Fashions, Inc. v. Curran*, No. 85 Civ. 3203 (MJL), 1988 WL 38585 (S.D.N.Y. Apr. 19, 1988) (upholding refusal to register a fabric design consisting of striped cloth with small grid squares superimposed on the stripes).

Ultimately, Ogassian's variation of standard geometric shapes consists of the "oscillat[ion] between raised and lowered plains," Second Request at 3, an alteration that is *de minimis*. Where a design combines uncopyrightable elements, 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*, 323 F.3d at 811. 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.

Finally, Ogassian invites the Board to compare the Work with a number of prior Review Board cases because it believes the work contains a similar level of authorship. Prior registration decisions have "no precedential value" and are "not binding" on the Office. COMPENDIUM (THIRD) § 309.3. The Board notes, however, that each example cited by Ogassian contains far more creative expression than the Work before it.

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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Associate Register of Copyrights

Catherine Zaller Rowland, Associate Register of
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Kimberley Isbell, Deputy Director of Policy and
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