



United States Copyright Office

Library of Congress · 101 Independence Avenue SE · Washington, DC 20559-6000 · www.copyright.gov

October 5, 2018

David May, Esq.
Nixon Peabody
799 9th Street NW
Washington, DC 20001-4501

Re: Second Request for Reconsideration for Refusal to Register Hastens Sangar AB Fabric Pattern (repeating 2-dimensional fabric pattern); Correspondence ID: 1-2BDGRHF; SR 1-4268431251

Dear Mr. May:

The Review Board of the United States Copyright Office (“Board”) has considered Hastens Sangar AB’s (“Hastens Sangar”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional visual art claim in the work titled “Hastens Sangar AB Fabric Pattern (repeating 2-dimensional fabric pattern)” (“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 two-dimensional graphic pattern consisting of white, dark blue, medium, blue, and light blue rectangles arranged in a check pattern. A reproduction of the Work is set forth below.



II. ADMINISTRATIVE RECORD

On December 21, 2016, Hastens Sangar filed an application to register a copyright claim in the Work. In a May 3, 2017, letter, a Copyright Office registration specialist refused to register the claim, finding that “neither the color scheme of three shades of the color blue plus white, nor the design of box checks is sufficiently original or creative to support registration.” Letter from Sandra Ware, Registration Specialist, to David May (May 3, 2017).

Hastens Sangar then requested that the Office reconsider its initial refusal to register the Work. Letter from David May to U.S. Copyright Office (Aug. 3, 2017) (“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 consisted of standard squares with mere coloration that combined to create a “simple plaid pattern of equal sized squares [that] is not sufficiently creative to constitute a copyrightable work of authorship.” Letter from Stephanie Mason, Attorney-Advisor, to David May (Jan. 17, 2018).

Hastens Sangar next 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 David May, to U.S. Copyright Office (Apr. 16, 2018) (“Second Request”). Hastens Sangar presented three arguments that the Work as a whole merits copyright protection. First, Hastens Sangar contended that the Work “features a distinct combination of specifically chosen hues . . . which were specifically and carefully selected, coordinated, and arranged to create a distinctive look.” Second Request at 4. Second, Hastens Sangar asserted that a “great deal of thought and creativity were expended” in the creation of the Work. *Id.* Third, Hastens Sangar claimed that the squares produce an “optical illusion that the squares are 3-dimensional such that when put together it gives the presentation of a 3-dimensional cube.” *Id.* Hastens Sangar also compared the Work to other two-dimensional textile patterns that courts found to be sufficiently creative as well as “Staggered Carbon” and “Pattern for Paper and Textile Products,” two works that the Review Board found sufficiently creative in other proceedings. *Id.* at 5-7.

III. DISCUSSION

A. *The Legal Framework*

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.” U.S. COPYRIGHT OFFICE, 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.

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 authorship necessary to sustain a claim to copyright.

The Work falls squarely into the Copyright Office’s regulations barring registration of a simple combination of basic geometric shapes and mere variations of coloration. The Work essentially is a common check pattern, composed of simple squares and often used in a number of designs.¹ The different blue and white colors do not raise the Work into copyrightability; they are *de minimis* and the minimum required to evoke the check pattern.

The Work is decidedly different than the wrapping paper design depicted in the *Compendium* and cited by Hasten Sangar. The *Compendium* example included a variety of geometric shapes and colors, resulting in an “unusual pattern” that “culminates in a creative design that goes beyond the mere display of a few geometric shapes in a preordained or obvious arrangement.” COMPENDIUM (THIRD) § 906.2. Here, the Work consists of standard shapes colored in a few shades of blue, culminating in an obvious buffalo check or plaid arrangement. And while Hastens Sangar further argues that the Work is at least as creative as other works that have appeared before the Review Board or in litigation, the Copyright Office does not make comparisons between works. *Id.* § 309.1. “The determination of copyrightability will be made on a case-by-case basis” and “[a] decision to register a particular work has no precedential value and is not binding upon the Office when it examines any other application.” *Id.* § 309.3.

Nevertheless, Hasten Sangar argues that a “great deal of thought and creativity were expended” to produce an “optical illusion” of a 3-dimensional cube also does not support registration. When examining a work for copyrightable authorship, the Copyright Office uses objective criteria to determine whether a work is sufficiently creative for copyright protection.

¹ *See, e.g.*, WAYFAIR LLC, Search Results for “Buffalo Plaid,” WAYFAIR.COM, <http://www.wayfair.com/keyword.php?keyword=buffalo+plaid> (search conducted Sept. 14, 2018).

The symbolic meaning or impression that a work conveys is irrelevant to whether a Work contains a sufficient amount of creativity. *Id.* § 310.3. Equally irrelevant is the intent of the author. *Id.* § 310.5 (“The fact that a creative thought may take place in the mind of the person who created a work . . . has no bearing on the issue of originality unless the work objectively demonstrates original authorship.”).

Finally, the Review Board declines to accept Hasten Sangar’s assertion that the Constitutional principle of promoting progress of science and the useful arts requires protection. Second Request at 7. On the contrary, to extend copyrightability to works that are a mere simplistic arrangement of non-protectable elements would be inappropriate. *See L. Batlin & Sons, Inc. v. Snyder*, 536 F.2d 486, 492 (2d Cir. 1976).

I. 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

Karyn A. Temple, Acting Register of Copyrights and
Director, U.S. Copyright Office

Regan A. Smith, General Counsel and
Associate Register of Copyrights

Catherine Zaller Rowland, Associate Register of
Copyrights and Director, Public Information and
Education