



United States Copyright Office

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February 10, 2017

Amy M. Brozenic
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Re: Second Request for Reconsideration for Refusal to Register 3-Dimensional Pattern 6 – Gradient Smooth, 3-Dimensional Pattern 7 -- Knights Smooth, 3-Dimensional Pattern 8 – Oats Smooth, and 3-Dimensional Pattern 20 – Laundry Knit; Correspondence IDs: 1-1JB0UU7 and 1-1JB3669; SR # 1-2492677334

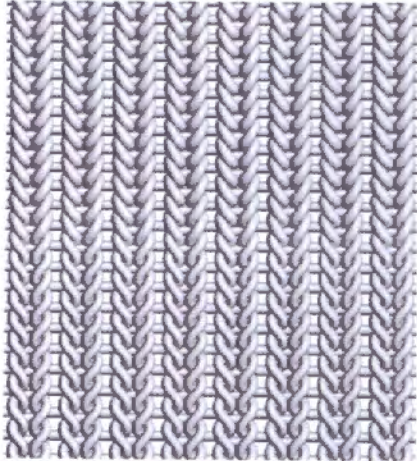
Dear Ms. Brozenic:

The Review Board of the United States Copyright Office (“Board”) has considered Keter Plastic Ltd.’s (“Keter Plastic’s”) second request for reconsideration of the Registration Program’s refusal to register three-dimensional sculpture claims in the four works titled “3-Dimensional Pattern 6 – Gradient Smooth,” “3-Dimensional Pattern 7 – Knights Smooth,” “3-Dimensional Pattern 8 – Oats Smooth,” and “3-Dimensional Pattern 20 – Laundry Knit” (each a “Work” and collectively, the “Works”). After reviewing the applications, deposit copies, 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 WORKS

The Works at issue are designs made of molded plastic so that each Work appears to have “strands” of plastic arranged into a weave pattern. The work titled “3-Dimensional Pattern 6 – Gradient Smooth” (“Gradient Smooth”) consists of columns of interlocking loops that are tight at the top so that they create a “V” shape, and gradually loosen toward the bottom. The work titled “3-Dimensional Pattern 7 – Knights Smooth” (“Knights Smooth”) also consists of interlocking loops, but rather than forming “V” shapes, these loops are more loosely intertwined. The work titled “3-Dimensional Pattern 8 – Oats Smooth” (“Oats Smooth”) also consists of interlocking loops and follows generally the same pattern as “Gradient Smooth,” except that the loops are tighter, there is no gradual loosening toward the bottom, and the columns in “Oats Smooth” are closer together. Finally, the work titled “3-Dimensional Pattern 20 – Laundry Knit” (“Laundry Knit”) is highly similar to “Knights Smooth,” but the loops in “Laundry Knit” are looser than those in “Knights Smooth.” All four works share the same underlying looping pattern.

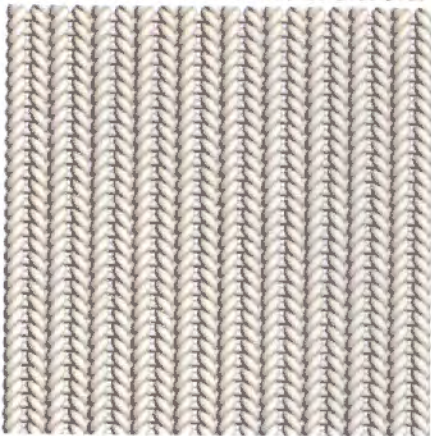
The Works are depicted below:



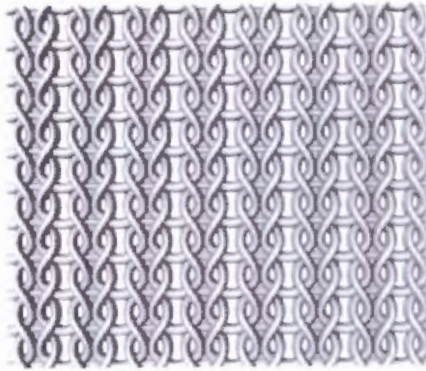
3-Dimensional Pattern 6 – Gradient Smooth



3-Dimensional Pattern 7 – Knights Smooth



3-Dimensional Pattern 8 – Oats Smooth



3-Dimensional Pattern 20 – Laundry Knit

II. ADMINISTRATIVE RECORD

On June 23, 2015, Keter Plastic filed applications to register copyright claims in the Works. In an October 16, 2015 letter, a Copyright Office registration specialist refused to register the claim, finding that the Works “lack the authorship necessary to support a copyright claim.” Letter from Robin Jones, Registration Specialist, to Shirley Gal, Eitan, Mehulal & Sadot Attorneys 1 (Oct. 16, 2015).

In a letter dated January 16, 2016, Keter Plastic requested that the Office reconsider its initial refusal to register the Works. Letter from Shirley Gal, Eitan, Mehulal & Sadot Attorneys, to U.S. Copyright Office (January 16, 2016) (“First Request”). After reviewing the Works in light of the points raised in the First Request, the Office re-evaluated the claims and again refused registration “[b]ecause all of the elements or features of these works are related to the utilitarian aspects of the underlying item (baskets, ottomans, beds), or if separable, lack sufficient original and creative authorship to sustain a claim in copyright.” Letter from Stephanie Mason, Attorney-Advisor, to Shirley Gal, Eitan, Mehulal & Sadot Attorneys 4 (April 28, 2016).¹

In four separate letters each dated July 26, 2016, Keter Plastic requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Works. Letter from Amy M. Brozenic, Lathrop & Gage LLP, to U.S. Copyright Office (July 26, 2016) (“Second Request—Gradient Smooth”); Letter from Amy M. Brozenic, Lathrop & Gage LLP, to U.S. Copyright Office (July 26, 2016) (“Second Request—Knights Smooth”); Letter from Amy M. Brozenic, Lathrop & Gage LLP, to U.S. Copyright Office (July 26, 2016) (“Second Request—Oats Smooth”); Letter from Amy M. Brozenic, Lathrop & Gage LLP, to U.S. Copyright Office (July 26, 2016) (“Second Request—Laundry Knit”). For each work, Keter Plastic asserted that the “Work is an original work of authorship that exhibits the requisite amount of creativity necessary to support a copyright claim.” Second Request—Gradient Smooth, at 4. Keter Plastic further argued that a “great deal of thought, imagination or artistry was necessary to conceive of the way these patterns were combined in one seemingly continuous weave,” and that “there has

¹ The letter also refused claims in 12 other works not at issue here.

been no evidence put forth on how the intricate weave pattern embodied in the Work is common or familiar.” *Id.* at 2.

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 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.” COMPENDIUM (THIRD) § 906.1; *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.

Finally, Copyright Office registration specialists (and the Board) do not make aesthetic judgments in evaluating the copyrightability of particular works. *See* COMPENDIUM (THIRD) § 310.2. The attractiveness of a design, the espoused intentions of the author, the design’s visual effect or appearance, its symbolism, the time and effort it took to create, or the design’s commercial success in the marketplace are not factors in determining whether a design is copyrightable. *See, e.g., Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

B. Analysis of the Works

After carefully examining the Works and applying the legal standards discussed above, the Board finds that the Works do not contain the requisite authorship necessary to sustain claims to copyright.

As a threshold matter, the Board does not consider the Works to be useful articles. In her letter of April 28, 2016, the Attorney Advisor “address[ed] these works as ‘useful articles.’” Letter from Stephanie Mason, Attorney Advisor, to Shirley Gal, Eitan, Mehulal & Sadot Attorneys 2 (Apr. 28, 2016). The Board, however, recognizes that the pictures included in the Second Requests merely depict possible uses of the Works, and that the Works are the patterns themselves. *See* 17 U.S.C. § 113(a) (“the exclusive right to

reproduce a copyrighted pictorial, graphic, or sculptural work in copies under section 106 includes the right to reproduce the work in or on any kind of article, whether useful or otherwise”). Therefore, the only relevant inquiry is whether the Works possesses sufficient originality to sustain a claim to copyright.

The first prong of the originality requirement is independent creation. *See Feist*, 499 U.S. at 345. Creation of a work can be considered independent even if a similar or identical work already exists, provided that the author of the new work did not actually copy from the existing work. *See, e.g.*, COMPENDIUM (THIRD) § 313.4(A). The Copyright Office will, as a general rule, accept a claimant’s assertion that a work submitted for registration was independently created, unless this statement is implausible or contradicted by other information in the registration materials, in the Office’s records, or known to the registration specialist. *See id.* § 308.1. Here, while it is demonstrable that the Works are all minor variants of a single common stitch (see below), the Office will accept Keter Plastic’s statement that the Works were independently created. Nevertheless, the Works cannot be registered, as they fail the second prong of the originality requirement—creativity.

The Copyright Act does not protect “familiar symbols and designs.” 37 C.F.R. § 202.1(a); *see also* COMPENDIUM (THIRD) § 906.2. Keter Plastic asserts that “the Work is certainly not comprised of ‘familiar symbols or designs’ that comprise ‘common’ or ‘simple’ weave patterns.” Second Request—Gradient Smooth at 3. That assertion is incorrect; these Works are actually only minor variations on a basic stitching pattern in the public domain. All four Works replicate the underlying pattern commonly referred to in the knitting community as the stockinette stitch. *See, e.g.*, Daniel C. Isaksen & Alabama P. Petrofsky, *Transverse Strips*, MOBIUS KNITTING, <http://www.math.wayne.edu/~isaksen/Expository/vismath-paper/node2.html>; *see also* Lacie Vasquez, *Knitting 101: How to Knit the Stockinette Stitch for Beginners*, NEW STITCH A DAY (Jan. 5, 2013), <http://newstitchaday.com/knitting-101-how-to-knit-the-stockinette-stitch-for-beginners/> (“Stockinette stitch is the most common stitch in knitting”). When the loops are drawn together more tightly, as in “Gradient Smooth” and “Oats Smooth,” the pattern creates the impression of rows of “V”s. Moreover, “Knights Smooth” and “Laundry Knit” both rely on the same pattern underlying “Gradient Smooth” and “Oats Smooth,” the former being looser versions of the latter.

Works that are mere copies of works in the public domain generally are not copyrightable. The Second Circuit, in *L. Batlin & Son, Inc. v. Snyder*, stated that “(w)hile a copy of something in the public domain will not, if it be merely a copy, support a copyright, a distinguishable variation will.” *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir. 1976) (quoting *Gerlach-Barklow Co. v. Morris & Bendien, Inc.*, 23 F.2d 159, 161 (2d Cir. 1927)) (parentheses in original). The *L. Batlin & Son* case concerned a plastic copy of a cast iron “Uncle Sam” bank that had passed into the public domain. There were a number of differences between the two works, including the smooth “carpetbag shape of the plastic bank,” the thickness of the metal bank bag, the objects held in the eagle’s talons, the shape of Uncle Sam’s face, the shape and texture of the hats, and so forth. *Id.* at 489. Despite these differences, the Second Circuit found that the plastic bank was not “in a category of


substantial originality,” and affirmed the lower court’s finding that the bank was not copyrightable. *Id.* at 492. Like the plastic bank in *L. Batlin & Son*, the Works at issue here constitute only minor variations on the stockinette stitch that do not rise to “a category of substantial originality.” If anything, the variations here—the spacing of the loops, and the gradually increasing looseness of the loops in the work “Gradient Smooth,” for example—do not even approach the level of difference between the plastic and cast iron banks in *L. Batlin & Son*.

Keter Plastic correctly points out that “patterns for sewing, knitting, crochet, [and] needlework” are eligible for registration. Second Request—Gradient Smooth, at 2; *see also* U.S. Copyright Office, *Copyright Registration for Pictorial, Graphic, and Sculptural Works*, COPYRIGHT.GOV 2 (Sept. 2015), <https://www.copyright.gov/circs/circ40.pdf>. The courts have previously accorded protection to lace and knit designs. *See, e.g., Malibu Textiles, Inc. v. Carol Anderson, Inc.*, No. 07Civ.4780, 2008 WL 2676236 (S.D.N.Y. July 8, 2008) (granting partial summary judgment as to liability for copyright infringement of a “floral lace design.”); *Textile Innovations, Ltd. v. Original Textile Collections, Ltd.*, No. 90 Civ. 6570, 1992 WL 125525, at *5 (S.D.N.Y. May 26, 1992) (finding that plaintiff has valid and enforceable copyright in a floral pattern). In such cases, however, the patterns have exhibited significant complexity or color variation. The Works at issue here, on the other hand, are monochromatic and merely demonstrate one of the most basic knitting stitches; they are not among the kinds of knitted or woven works that are eligible for copyright protection.

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 Works. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action in this matter.

BY:



Chris Weston
Copyright Office Review Board