



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

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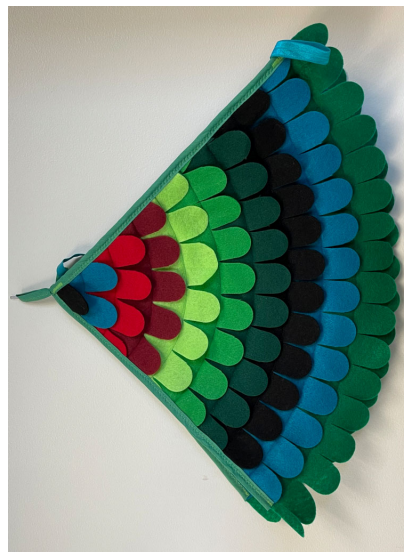
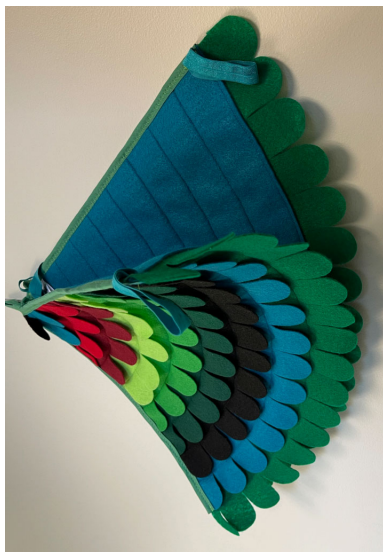
**Re: Second Request for Reconsideration of Refusal to Register Bird Costume
(SR # 1-11144670851; Correspondence ID: 1-5AIP6PM)**

Dear Mr. Haddow,

The Review Board of the United States Copyright Office (“Board”) has considered Ellen Okolita’s (“Ms. Okalita”) second request for reconsideration of the Registration Program’s refusal to register a sculpture claim in the work titled “Bird Costume” (“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 refusal of registration.

I. DESCRIPTION OF THE WORK

The Work is a sculptural artwork consisting of various pieces of fabric. One side of the work is lined with blue fabric, and two blue armbands are fixed to the Work. Pieces of red, blue, and green fabric form semi-circular patterns on the other side of the Work. The semi-circles of color are uniform in their shape and angles. Each semi-circle is comprised of smaller oval-like pieces of fabric. As a deposit, Ms. Okalita submitted two images depicting the Work:



II. ADMINISTRATIVE RECORD

On January 30, 2022, Ms. Okolita filed an application to register a copyright claim in the Work. In a January 31, 2022 letter, a Copyright Office registration specialist refused to register the claim, explaining that “it lacks the authorship necessary to support a copyright claim.” Initial Letter Refusing Registration from U.S. Copyright Office to Robert Mittel at 1 (Jan. 31, 2022).

On April 15, 2022, Ms. Okolita requested that the Office reconsider its initial refusal to register the Work, arguing that the Work is “a three-dimensional, whimsical representation of bird wings.” Letter from James Haddow to U.S. Copyright Office at 1 (Apr. 15, 2022) (“First Request”). The First Request asserts that “[t]he original authorship lies in the creative arrangement of [the] shapes and colors (multi-colored, overlapping, arced rows of elongated half ovals in an over-all triangular ‘wing’) to evoke effectively the image of bird wings without being strictly representational.” *Id.* at 1–2. Further, the First Request states that “[w]hile [the Work] incorporates familiar shapes and colors, the overall design is much more than just a collection of shapes and colors.” *Id.* at 1. 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 James Haddow (July 20, 2022). The Office explained that the Work did not demonstrate sufficient “original and creative artistic . . . authorship.” *Id.* at 1.

In a letter dated October 20, 2022, Ms. Okolita 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 Elizabeth Fontugne to U.S. Copyright Office (Oct. 20, 2022) (“Second Request”). Ms. Okolita argued that the Work is sufficiently creative to be copyrightable because “while the wings are composed of a creative arrangement of colors and pointed ovals, with neither the colors nor the pointed ovals being copyrightable in their separate right, the wings as a whole contain a sufficient amount of original and creative three-dimensional authorship for copyright registration.” *Id.* at 12. Ms. Okolita also asserts that the Work should be registered because it includes a previously unmentioned¹ “Hummingbird Mask” and the mask contains “more indicia of creativity” than works the courts have held are protected by copyright. *Id.* at 2, 11–12.

III. DISCUSSION

After carefully examining the Work and considering the arguments made in the First and Second Requests, the Board finds that the Work is a work of artistic craftsmanship and does not contain sufficient sculptural authorship to sustain a claim to copyright.

A work may be registered for copyright if it is an “original work[] of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102(a). To be “original,” a work must possess sufficient creativity. *Feist Publ’ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991); see 37 C.F.R. § 202.10(a) (“to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form”). Only a modicum of creativity is necessary, but some works fail to meet even this low threshold. *Feist*, 499 U.S. at 358–59. For

¹ Compare First Request at 1 (describing the Work as “a three-dimensional, whimsical representation of bird wings”) with Second Request at 2 (describing the Work as “a pair of wings and a hummingbird mask” and not “a bird’s wing that is triangular in shape”).

example, because familiar shapes and designs are not protected by copyright, works containing only those elements will generally not satisfy the creativity requirement, unless those elements are arranged in a sufficiently original way. *See* 37 C.F.R. § 202.1(a) (“familiar symbols or designs” are not protected by copyright); U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 906.1 (3d ed. 2021) (“COMPENDIUM (THIRD)”) (explaining that the Office “will not register a work that merely consists of common geometric shapes unless the author’s use of those shapes results in a work that, as a whole, is sufficiently creative”).

Costumes like the Work before the Board are generally classified as works of artistic craftsmanship, which are a type of “decorative or ornamental object that can be considered a ‘work of art,’ even though it ‘might serve a useful purpose.’” COMPENDIUM (THIRD) § 925.1; *see also id.* § 910 (describing works of artistic craftsmanship as works that “merely portray their own appearance or the item that the work represents”).² The Copyright Act protects “works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned.” 17 U.S.C. § 101; *see also Incredible Tech., Inc. v. Virtual Tech., Inc.*, 400 F.3d 1007, 1012 (7th Cir. 2005) (because “functional elements are also excluded from copyright protection,” if “the novel elements [of a work] are functional, the item cannot be copyrighted”). Though the term “works of artistic craftsmanship,” is not defined in the Act, the Supreme Court has described these works as “works of art that might also serve a useful purpose.” *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1011 (2017) (discussing Copyright Office regulations as considered in *Mazer v. Stein*, 347 U.S. 201 (1954)). When evaluating works of artistic craftsmanship, the Office applies the “mirror image” of the *Star Athletica* test for useful articles: the Office excludes the “mechanical or utilitarian aspects” of the work while considering the remainder for registration. COMPENDIUM (THIRD) § 925.2. Relevant here, a copyright registration for a work of artistic craftsmanship “does not extend to a work’s mechanical or useful aspects, . . . such as plain clasps, straps, or snaps that secure ornamental jewelry or a decorative mask to a person’s body.” *Id.*

Before turning to the Work, the Board concludes at the outset that the Hummingbird Mask cannot be considered as part of its analysis. While Ms. Okolita argues is “an integral part of Bird Costume, and cannot be considered apart from Bird Costume’s wings,” *see* Second Request at 7, it was not included in the deposits submitted to the Office. The Hummingbird Mask was first depicted in the Second Request, images from which are reproduced on the next page:

² While costumes “may be considered useful articles for purposes of registration” because they “serve the intrinsic useful function of clothing the human body,” COMPENDIUM (THIRD) § 911, the Bird Costume’s wings do not serve that purpose and therefore are more appropriately analyzed as a work of artistic craftsmanship.



Pursuant to the Office’s practices, the Board “will not consider any type of authorship that was not expressly claimed in the application when the claim was refused.” COMPENDIUM (THIRD) § 1708.5. As a result, although the Second Request focuses most of its arguments in favor of registration around the Hummingbird Mask, the Board cannot consider it as a basis for registration.³

Focusing on the Work before the Board, and applying the legal standards described above, the Board concludes the Work lacks sufficient creativity to be protected by copyright. Neither the armbands nor the inner blue fabric is copyrightable because they each have intrinsic utilitarian purposes. *See id.* § 925.1. The armbands are used to attach the Work to the wearer’s body and the inner blue fabric is used as a base to which the feathers are attached. These elements are “mechanical or utilitarian aspects” that cannot support copyright protection. 17 U.S.C. § 101 (definition of “pictorial, graphic, or sculptural work”). The remaining fabric design, however, can be considered a three-dimensional sculptural work within the meaning of the Copyright Act. Therefore, the Board considers whether the remaining design meets the requirements for copyright protection.

The individual elements of the Work are not protected by copyright. The pointed ovals on the Work are familiar geometric shapes in various solid colors, which copyright does not protect. Even in “three-dimensional form,” standard designs and shapes “including, without limitation, straight or curved lines [and]. . . ovals” are not copyrightable. COMPENDIUM (THIRD) § 906.1; *see also* 37 C.F.R. § 202.1(a) (copyright does not protect “familiar symbols and designs”). Additional flourishes and details, such as the points on the ovals, are minor variations that do not change the analysis. COMPENDIUM (THIRD) § 905 (“[m]erely bringing together only a few standard forms or shapes with minor linear or spatial variations” does not provide the sufficient amount of creative expression to warrant registration).


Similarly, the Work’s combination of these elements is also insufficiently creative to warrant copyright protection. A design that combines uncopyrightable elements is protected 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 805, 811 (9th Cir. 2003). A determination of copyrightability in the combination of standard design

³ The Board does not consider whether the Work would be registrable had the Hummingbird Mask been included in the initial application.

elements depends on whether the selection, coordination, or arrangement is done in such a way as to result in copyrightable authorship. *Feist*, 499 at 358; *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). Here, the pointed ovals are arranged in repeated, evenly spaced rows, with each oval having the same size as the others. And while Ms. Okolita argues that “[t]he constituent shapes in the wings were ‘combined in a distinctive manner indicating some ingenuity,’” Second Request at 12 (quoting *Atari Games Corp.*, 888 F. 2d at 883), the combination does not meet the statutory requirements for copyright protection. Arranging repeating, evenly spaced geometric shapes in semi-circular arcs is a garden-variety arrangement that copyright does not protect. *See* COMPENDIUM (THIRD) §§ 312.2, 905 (“arranging geometric shapes in a standard or symmetrical manner” is an example of a compilation of elements that may not merit copyright protection.”). Though the Work “contains no fewer than seven colors,” Second Request at 10, the arrangement of these colors, across individual rows, with ovals in the same row bearing the same color, is insufficiently creative to sustain copyright protection. *See* COMPENDIUM (THIRD) § 906.1 (“[m]ere coloration or mere variations in coloring alone are not eligible for copyright protection.”); 37 C.F.R. § 202.1(a). As a whole, the Work’s selection and arrangement of elements does not rise to the level required by the Copyright Act.

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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