



Copyright Review Board

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

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Re: Second Request for Reconsideration for Refusal to Register Script Bride with Diamond Headband (Correspondence ID: 1-3S7858D; SR # 1-6518103401)

Dear Ms. Stradley:

The Review Board of the United States Copyright Office (“Board”) has considered Party Storm Co.’s (“Party Storm’s”) second request for reconsideration of the Registration Program’s refusal to register a jewelry design claim in the work titled “Script Bride with Diamond Headband” (“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 metal headband with the word “Bride” in cursive on top of the band. A round-cut diamond forms the top stroke of the letter “i.” A reproduction of the Work is as follows:



II. ADMINISTRATIVE RECORD

On April 23, 2018, Party Storm filed an application to register a copyright claim in the Work. In a May 16, 2019, letter, a Copyright Office registration specialist refused to register the claim, finding that it “lacks the authorship necessary to support a copyright claim.” Initial Letter Refusing Registration from U.S. Copyright Office to Stephanie Storm (May 16, 2019).

Party Storm then requested that the Office reconsider its initial refusal to register the Work. Letter from Paige Stradley to U.S. Copyright Office (Aug. 16, 2019) (“First Request”). After reviewing the Work in light of the points raised in the First Request, the Office re-evaluated the claims, noted that the work was a useful article, and concluded that the Work’s separable features “consist[ing] of the word ‘Bride’ accented with a gemstone in place of the top stroke of the letter ‘i’” were insufficiently creative. Refusal of First Request for Reconsideration from U.S. Copyright Office to Paige Stradley, at 4 (Nov. 8, 2019).

Party Storm subsequently 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 Paige Stradley to U.S. Copyright Office (Feb. 7, 2020) (“Second Request”). Party Storm asserts that the Work is not a useful article because it is “used for decorative purposes” and “the sole purpose of [the Work] is to portray the appearance of the article and convey information.” Second Request at 2. Party Storm further asserts that the Work is a sculptural work that exhibits sufficient creativity to warrant registration because the diamond shape “demonstrates an original selection of choices” regarding the size, positioning and arrangement of triangles. *Id.* at 4. The applicant also suggests that combining the diamond with the stylized word “Bride” demonstrates “a sufficient amount of creativity to warrant registration.” *Id.*

III. DISCUSSION

A. The Legal Framework

1) *Useful Articles and Separability*

Copyright does not protect useful articles as such, which are defined in the Copyright Act as “article[s] having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.” 17 U.S.C. § 101. Importantly, however, 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.’” *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1007 (2017) (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 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.* at 1007; *see also* COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 924 (3d ed. 2021) (“COMPENDIUM (THIRD)”). This analysis focuses on “the extracted feature and not on any aspects of the useful article that remain after the imaginary extraction [because the] statute does not require the decisionmaker to imagine a fully functioning useful article without the artistic feature.” *Star Athletica*, 137 S. Ct. at 1013. Put another way, while useful articles as such are not copyrightable, if an artistic feature “would have been copyrightable as a standalone pictorial, graphic, or sculptural work, it is copyrightable if created first as part of a useful article.” *Star Athletica*, 137 S. Ct. at 1011; *see also* 17 U.S.C. § 113(a) (“[T]he 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.”); *Esquire, Inc. v. Ringer*, 591 F.2d 796, 800 (D.C. Cir. 1978) (holding that copyright protection is not available for the “overall shape or configuration of a utilitarian article, no matter how aesthetically pleasing that shape . . . may be”).

2) *Works of Artistic Craftsmanship*

Copyright protects works of artistic craftsmanship as pictorial, graphic, or sculptural works “insofar as their form but not their mechanical or utilitarian aspects are concerned.” 17 U.S.C. § 101; *see* 37 C.F.R. § 202.10(a). A work of artistic craftsmanship is a decorative or ornamental object that can be considered a “work of art,” even though it “might also serve a useful purpose.” *See Star Athletica*, 137 S. Ct. at 1011 (interpreting U.S. Copyright Office regulation 37 C.F.R. § 202.8(a) (1948) governing “works of artistic craftsmanship”); *Mazer v. Stein*, 347 U.S. 201, 212, 213–14 (1954) (same).

The definition for a work of artistic craftsmanship is the mirror image of the definition for a useful article. Where a useful article is intrinsically utilitarian, a work of artistic craftsmanship is intrinsically aesthetic. *See United States v. Perry*, 146 U.S. 71, 75 (1892) (distinguishing between “objects primarily designed for a useful purpose” and works of art “which serve primarily an ornamental, and incidentally useful, purpose”). In determining whether a work is a work of artistic craftsmanship, the Office considers the overall appearance of the item, including the form, shape, and configuration of the object as a whole. COMPENDIUM (THIRD) § 925.1. The Office does not consider subjective factors, such as the author’s intent, skill, experience, or reputation, or the marketability of the object. *See, e.g., Star Athletica*, 137 S. Ct. at 1015; 37 C.F.R. § 202.10(a); H.R. REP. NO. 94-1476, at 54 (1976), *reprinted in* 1976 U.S.C.C.A.N. at 5667.

When examining works of artistic craftsmanship for copyrightable authorship, the Office looks at the work as a whole for copyright protection and determines what mechanical or utilitarian aspects must be excluded from the claim. COMPENDIUM (THIRD) § 925.2.

3) *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 nonprotectable 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.

IV. ANALYSIS OF THE WORK

After careful examination and analysis, the Board finds that the Work does not contain the requisite authorship necessary to sustain a claim to copyright.

Party Storm claims the Work consists of “the headband fixture, ‘bride’ design element, and faceted stone shape” that together “forms an ornamental work of art that contains unique and separable copyrightable features.” Second Request at 2. Party Storm contends that the Office erred when it “simply determined that it is a foregone conclusion that Applicant’s work is a useful article.” *Id.*

A headband may have either a decorative or utilitarian purpose. *See Headband*, OXFORD ENGLISH DICTIONARY (3d ed. 2013) (“A band or strip of material worn round the head, typically as a decoration or to keep hair or perspiration off the head.”). Accordingly, the Board considers whether the Work is a useful article or work of artistic craftsmanship under the legal standards outlined above.¹

The Board accepts Party Storm’s assertion that the Work does not have an intrinsic utilitarian function and its primary purpose is to convey information, namely to identify the wearer as a bride or bride-to-be. *See* Second Request at 2–3. Accordingly, the Board treats the Work as a work of artistic craftsmanship with both three-dimensional and utilitarian aspects. Nevertheless, the Board does not find that it is registrable.

As with any other pictorial, graphic, or sculptural work, a work of artistic craftsmanship may be registered if the “delineation and form” of the work is sufficiently creative. *See* 37 C.F.R. § 202.10(a). In making this determination, the Board considers the overall shape and configuration of the work but will not consider any of the mechanical or utilitarian aspects of the work, nor any nonprotectable elements incorporated into the work as such. *Id.* In this case, the headband element appears entirely functional, as it is required to secure the “Bride” sculpture onto the wearer’s head, while also serving the useful purpose of keeping hair away from the face.

¹ Party Storm previously objected to the “added grounds and arguments” raised in the Response to the First Request for Reconsideration and asserted that it “reserves the right to respond to any forthcoming refusal[.]” Second Request at 4–5. Both the First Request and the Second Request, however, are subject to *de novo* review, “which means that the [Office] will take a fresh look at whether the work meets the statutory requirements for copyright registration.” COMPENDIUM (THIRD) §§ 1703.2, 1704.2; *see also* 37 CFR § 202.5(b)(1), (c)(1).

The Board focuses its inquiry on the nonutilitarian elements—the stylized word “Bride” and the diamond accent—but concludes they lack sufficient creative authorship, alone or in combination, for copyright protection. Individually, the word “Bride” and the diamond are not copyrightable. *Id.*; COMPENDIUM (THIRD) § 906.1. Fonts generally are not copyrightable and, while the applicant asserts that the diamond alone is sufficiently creative to warrant registration of the work, it is a basic round-cut diamond shape. *Id.* § 906.4 (“As a general rule, typeface, typefont, lettering, calligraphy, and typographic ornamentation are not registrable.”). The Work incorporates a basic diamond shape that is a common and familiar representational symbol and geometric shape, and thus not protected by copyright law.² *Id.*, §§ 313.4(J) (“common representational symbols, such as a . . . diamond” are not copyrightable), 906.1 (“The Copyright Act does not protect common geometric shapes . . . including . . . diamonds . . .”); 908.3 (“Faceting of individual stones (*i.e.*, gem-cutting)” is generally not copyrightable).

Neither is the Work as a whole protectable. The individually unprotectable elements are not numerous enough, and their arrangement not creative enough, to constitute an original work of authorship. *See Satava*, 323 F.3d at 811. The use of a diamond atop the “i” is a common typographic ornamentation. *See Reece v. Marc Ecko Unltd.*, No. 10-cv-2901, 2011 U.S. Dist. LEXIS 102199, at *9 (S.D.N.Y. Aug. 19, 2011), *report and recommendation adopted*, No. 10-cv-02901, 2011 U.S. Dist. LEXIS 101851 (S.D.N.Y. Sept. 9, 2011) (copyright protection is not afforded to familiar symbols or designs or mere variations of lettering, such as the use of “circles, squares, or stars to ornament the ‘i’ in the words ‘Dip’ and ‘Dipism’”). And affixing the nonprotectable word in nonprotectable script to a functional headband does not elevate these few choices out of the ordinary. Indeed, this appears to be a popular combination in the marketplace for bachelorette or bridal headbands.³ The Board finds the Work’s combination, selection, and arrangement of elements is insufficiently creative to warrant copyright protection. *See Satava*, 323 F.3d at 811.

Party Storm’s remaining arguments do not alter the Board’s analysis. First, Party Storm suggests that the diamond “demonstrates an original selection of choices . . . in the face of an innumerable range of shape types, sizes, and tilts which could have been combined to achieve

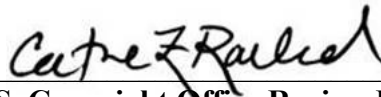
² The most popular diamond in the marketplace is the round cut, representing more than 70% of diamonds sold. *GIA Diamond Cut Grade: Six Things You Need to Know*, THE GEMOLOGICAL INSTITUTE OF AMERICA, <https://4cs.gia.edu/en-us/blog/gia-diamond-cut-grade-six-things-to-know/> (last visited May 26, 2021); *see Round Loose Diamonds*, FASCINATING DIAMONDS, <https://www.fascinatingdiamonds.com/wholesale-diamonds/round-cut> (last visited May 26, 2021).

³ *See, e.g., Gem Bride Gold Headband*, THE HOUSE OF BACHELORETTE, <https://www.thehouseofbachelorette.com/products/gem-bride-gold-headband> (last visited May 26, 2021); *Metallic Gold Bride Headband*, PARTY CITY, <https://www.partycity.com/metallic-gold-bride-headband-835416.html> (last visited May 26, 2021); *Bride Gold Diamond Bachelorette Party Headband*, MRS. BRIDAL SHOP, <https://mrsbridalshop.com/products/bride-gold-diamond-bachelorette-party-headband> (last visited May 26, 2021); *Plastic “Bride to Be” Bachelorette Party Headband*, MICHAELS, <https://www.michaels.com/plastic-bride-to-be-bachelorette-party-headband/D229880S.html> (last visited May 26, 2021); *Bachelorette Party Headband Veil – Bride*, WEDDING SHOP, <https://weddingshop.theknot.com/product/bachelorette-party-headband-veil-bride> (last visited May 26, 2021); *Bride Headband Veil - Bachelorette Veil - Bride To Be Veil - Future Mrs. Veil*, ETSY, https://www.etsy.com/listing/737977481/bride-headband-veil-bachelorette-veil?ga_order=most_relevant&ga_search_type=all&ga_view_type=gallery&ga_search_query=bride+to+be+veil&ref=sr_gallery-1-5&from_market_listing_grid_organic=1&bes=1&col=1 (last visited May 26, 2021).

the ‘diamond’ formation.” Second Request at 4. Neither variety of choices available to the author nor the creative process involved in creating the work, however, are germane to the question of creativity. COMPENDIUM (THIRD) § 310.8. Evaluating these factors would require the Board to inappropriately “consider evidence of the creator’s design methods, purposes, and reasons.” See *Star Athletica*, 137 S. Ct. at 1015. Second, Party Storm notes that the Office has registered a number of works that contain the word “Headband” in the title. Second Request at 4. The Office does not compare works that have been previously registered or refused registration. COMPENDIUM (THIRD) § 309.3. Even if it did, simply providing a list of works with similar or the same title does not demonstrate that those works contain common creative elements not present in the design here, and thus provides no support for copyrightability.

V. 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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