

GSLT then requested that the Office reconsider its initial refusal to register the Work, alleging that the Work’s optical illusion and integration of the term “PALACE” into the largest triangle “come together to form a unique and protectable design.” Letter from Matthew Homyk to U.S. Copyright Office, at 2–3 (Feb. 8, 2019) (“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 “does not contain a sufficient amount of original and creative graphic or artistic authorship to support a copyright registration.” Refusal of First Request for Reconsideration from U.S. Copyright Office to Matthew Homyk, at 1 (June 19, 2019).

GSLT 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 Matthew Homyk, to U.S. Copyright Office (Sept. 19, 2019) (“Second Request”). In that letter, GSLT argued that the Work as a whole contains sufficient original and creative authorship to warrant registration because it embodies more than a *de minimis* amount of creativity and it contains a distinguishable variation of elements. *Id.* at 3. GSLT’s arguments focused on the fact that the Work generated an optical illusion, specifically arguing that “more than an ‘extremely low’ level of creativity was necessary to create such an optical illusion from the specific elements in Claimant’s work.” *Id.* at 5.

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 claim to 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 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 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.

Both the individual elements of the Work and the Work as a whole are insufficiently creative to warrant copyright registration. First, none of the individual elements themselves warrant copyright protection. The Work is a combination of equilateral triangles and the word “PALACE.” Individual triangles are a common and familiar geometric shape that are uncopyrightable. *See* 37 C.F.R. § 202.1(a); COMPENDIUM (THIRD) § 906.1. Similarly, singular words, such as the word “PALACE,” are also ineligible for copyright protection. *See* 37 C.F.R. § 202.1(a).

Second, when viewed as a whole, the Work does not combine or arrange the individual elements in a sufficiently creative manner. Merely combining independently un-protectable elements does not establish creativity if the selection and arrangement is “simplistic, obvious and expected.” COMPENDIUM (THIRD) § 905; *see Feist*, 499 U.S. at 362; *Satava*, 323 F.3d at 811. The Work is monochromatic with no shading or variations in line style. It consists of one repeated geometric shape and a mirrored-image word. The geometric shape is a common equilateral triangle, multiplied in identically proportioned and evenly-spaced intervals. Such an arrangement of the same geometric shape in a symmetrical, coaxial pattern is a familiar design and not creative enough to warrant copyright protection. *See* 37 C.F.R. § 202.1(a) (noting that copyright registration cannot be obtained for “familiar symbols or designs”); COMPENDIUM (THIRD) § 906.1 (stating that a symmetrical arrangement of white circles on a purple background does not contain a sufficient amount of creative expression). Combining those triangles with a single, mirrored word is also insufficiently creative to warrant copyright registration. *See, e.g., John Muller & Co, Inc. v. NY Arrows Soccer Team*, 802 F.2d 989, 990 (8th Cir. 1986) (affirming the refusal to register a logo consisting of four irregularly spaced angled lines with the word “Arrow” in cursive script below because it was insufficiently creative). Finally, the fact that the word “PALACE” creates a mirrored-image on either side of the triangle does not raise the level of creativity enough to support registration. *See, e.g., Coach*, 386 F. Supp. 2d at 496 (affirming the refusal to register a design consisting of linked and unlinked letter “C” shapes positioned “in a mirrored relationship”).

GSLT contends that the elements of the Work “come together to form a unique and protectable design.” Second Request at 3. But the fact that a work may be new, innovative, or unique is irrelevant to this analysis. COMPENDIUM (THIRD) § 310.1. The question is whether a work is sufficiently creative. *See Feist*, 499 U.S. at 346. A work of authorship may be original, even though it is neither new nor inventive or even if “it closely resembles other works.” *Id.* 499 U.S. at 345 (explaining that “[o]riginality does not signify novelty”).

GSLT’s claims regarding intended visual impact as an optical illusion and creative intent do not render the Work sufficiently creative. Second Request at 5 (“The fact that Claimant’s work generates an optical illusion in and of itself underscores Claimant’s position that its work . . . far exceeds the minimum threshold of creativity . . .”). The Office “will not consider the author’s inspiration for the work, creative intent, or intended meaning.” COMPENDIUM (THIRD) § 310.5; *see* 17 USC § 102(b) (Copyright protection does not extend to the ideas embodied in the work or the work’s visual effect, appearance or symbolism.). Neither will the Office consider how a viewer might interpret the Work. COMPENDIUM (THIRD) § 310.3 (“[T]he Office . . . will not consider any meaning or significance that the work may evoke. The fact that creative thought may take place in the mind of the person who encounters a work has no bearing on the issue of originality unless the work objectively demonstrates original authorship.”).

While the requisite level of creativity required to support copyright registration is low, some combinations of common design elements will not trigger copyright protection. *See Feist*, 499 U.S. at 358; *see also* COMPENDIUM (THIRD) § 913.1 (explaining the types of logo designs that the Office typically refuses to register). Here, the level of creative authorship involved in this configuration of unprotectable elements is too trivial to merit copyright registration.

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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