United States Copyright Office
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January 3, 2011

Pryor Cashman LLP
Attn: Michael Goldberg, Esq.
410 Park Avenue
New York, NY 10022

Re: 6676 FLOCK GINGHAM
Correspondence ID: 1-2BQ22V

Dear Mr. Goldberg:

I write on behalf of the Copyright Office Review Board (Board) in response to your letter, received on June 30, 2009, in which you requested reconsideration of the Copyright Office's refusal to register 6676 Flock Gingham (the Design) on behalf of your client, Zelouf International Corp. The Board has carefully examined the application, the deposit, and all correspondence concerning this application and affirms the denial of registration for this work.

I. DESCRIPTION OF THE WORK

"6676 FLOCK GINGHAM," a fabric design, consists of five evenly spaced intersecting lines. The first, third, and fifth lines are thin in width, and the second and fourth lines are wider. The pattern has two additional of the wider lines, evenly spaced on each side of the five lines. The pattern is placed both vertically and horizontally on a bias so that the lines intersect each other. The result of the intersection creates a series of small squares of the same size, larger squares of one size, and rectangles. A reproduction of "6676 FLOCK GINGHAM" Design appears here.



II. ADMINISTRATIVE RECORD

A. Initial submission and Office's refusal to register

On November 6, 2008, the Copyright Office received a Form VA application along with the required deposit and fee for the work "6676 FLOCK GINGHAM" ("the Design"). The submission was made by your client, Zelouf International Corp. In a letter dated December 8, 2008, Assistant Chief of the Visual Arts and Recordation Division, William Briganti, refused registration of the Design because it did not meet the requisite level of creative authorship necessary to support a claim of copyright. (Letter from Briganti to Schwartz, Zelouf International Corp., of 12/08/2008, at 1).

Mr. Briganti cited the Copyright Act's originality requirement as referred to in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). He noted that in order for a work to be copyrightable, it must find its origin or source with the author and contain a certain amount of creative authorship. He explained that copyright does not protect familiar symbols or designs, basic geometric shapes, or mere variations of typographic ornamentation, lettering, or coloring. *See* 37 CFR § 202.1. Mr. Briganti explained that copyright protection does not extend to any idea, concept, system, or process which may be embodied in a work. 17 U.S.C. § 102(b). Neither the aesthetic appeal, nor the amount of time and effort expended to create a work, are factors that are considered when determining if a work can be registered. *See Bleistein v. Donaldson*, 188 U.S. 239 (1903).[1]

Because there are no elements or features embodied in the work at issue here, either alone or in combination, to sustain a claim of authorship, Mr. Briganti concluded that the Copyright Office could not issue registration for this work. (Letter from Briganti to Schwartz of 12/8/2008, at 1).

B. First request for reconsideration

In a letter dated December 24, 2008, you requested that the Copyright Office reconsider the decision to refuse registration of the Design. (Letter from Goldberg to Briganti, of 12/24/2008). In this letter, you argued that the Design satisfies the minimal threshold for creative authorship because it was independently created and contains some modicum of creativity. *Id.*

You contend that the Design contains a unique appearance not previously found in the marketplace because of the variation of line width, the intersection of the lines, and the Design's overall angled presentation. *Id.* Additionally, you add that geometric shapes and familiar

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[1] Although not appearing in the Office's response to the first submission of a claim to copyright, we point to a citation to *Feist,* 499 U.S. at 358: "not every selection, coordination, or arrangement will past muster" "...[T]o merit protection, [the constitutive elements] must be selected, coordinated, or arranged 'in such a way' as to render the work as a whole original."

symbols have received copyright protection in similar circumstances. *Id.* at 2. For example, both a checkered plaid design in *Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, 558 F.2d 1090 (2nd Cir. 1977), and fabric designs incorporating geometric shapes in *Queenie, Ltd. v. Sears, Roebuck & Co.*, 124 F. Supp.2d 178 (S.D.N.Y. 2000) have received copyright protection. Citing *Prince Group, Inc. v. MTS Products*, 967 F. Supp. 121 (S.D.N.Y. 1997) and *Couleur Int'l. Ltd. v. Opulent Fabrics, Inc.*, 330 F. Supp. 152-153 (S.D.N.Y. 1971), you further add that the standard for originality is minimal, and the threshold for originality is low. (Letter from Goldberg to Briganti of 12/24/2008 at 1).

C. Examining Division's response to first request for reconsideration

After receiving your letter on December 30, 2008, attorney advisor Virginia Giroux-Rollow of the Registration and Recordation Program responded to your request for reconsideration. (Letter from Giroux-Rollow to Goldberg of 02/09/2009). Ms. Giroux-Rollow stated that the Copyright Office was not able to register a copyright claim in the work because the Design does not contain a sufficient amount of original and creative artistic or graphic authorship, either individually or in the selection or arrangement of elements. *Id.* at 1.

Ms. Giroux-Rollow acknowledged that fabric design works may fall within the subject matter of copyright as pictorial, graphic, or sculptural works of art. *Id.* But she explained that not all fabric designs are copyrightable : they must "possess more than a *de minimis* quantum of creativity." *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). With fabric designs, a certain minimum amount of pictorial or graphic material in the work must have originated with the author. *Id.* The courts have defined originality as authorship that constitutes more than a trivial variation or arrangement of public domain or non-copyrightable elements. *See Alfred Bell v. Catalda Fine Arts. Inc.*, 191 F. 2d 99 (2d Cir. 1951). She further clarified that the Copyright Office does not make judgments based on aesthetics, the attractiveness of a design, its uniqueness, its visual effect or appearance, the time, effort, and expense it took to create, or its commercial success in the marketplace. (Letter from Giroux-Rollow to Goldberg of 02/09/2009, at 1).

In order for the Design to be granted copyright protection it needs a sufficient amount of original and creative artistic or graphic authorship within the meaning of copyright statutory law and settled case law. *Id.* at 1 - 2. The overall design, consisting of diagonal, parallel, and intersecting lines, cannot be registered because these lines are common shapes that are arranged in a common, symmetrical manner, including only minor variation on a common grid design. *Id.* Ms. Giroux-Rollow concluded that, in the view of the Copyright Office, the combination of lines and a very few colors on the fabric does not meet the quantum of authorship necessary to support a copyright registration. *Id.* at 2. She cited the *Compendium of Copyright Office Practices II*, § 503.02a (1984) [hereinafter *Compendium II*], stating that a minimal design involving public domain elements in a common and simple arrangement cannot be protected by copyright. (Letter from Giroux-Rollow to Goldberg of 02/09/2009 at 2).

Ms. Giroux-Rollow cited several judicial decisions to support her conclusion and further clarified the principles of law mentioned above. *Id.* In *John Muller & Co. v. New York Arrows*

Soccer Team, 802 F.2d 989 (8th Cir. 1986), a logo consisting of four angled lines forming an arrow, with the word "arrows" in cursive script below the design was uncopyrightable. *Id.* at 990. The Court explained that the design lacked the minimal creativity necessary to support a copyright and that a "work of art" or a "pictorial, graphic, or sculptural work must embody some creative authorship in its delineation of form." *Id.* She also cited *Forstmann Woolen Co. v. J.W. Mays, Inc.*, 89 F. Supp. 964 (E.D.N.Y. 1950) where a label with a short phrase and a three fleur-de-lis design was uncopyrightable; *Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q.2d 1074 (D.D.C. 1991) involved refusal to register chinaware with a "gothic" pattern composed of simple variations on, and combinations of, geometric designs; *Jon Woods Fashions, Inc. v. Curran*, 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988) upheld a refusal to register a fabric design made of striped cloth with small grid squares superimposed on the stripes; and *Tompkins Graphics, Inc. v. Zipatone, Inc.*, 222 U.S.P.Q. 49 (E.D. Pa. 1983) held that the work in this case, consisting of a collection of various geometric shapes, was uncopyrightable.

Ms. Giroux-Rollow agreed that a work should be viewed in its entirety without separating copyrightable and noncopyrightable elements, instead considering the work as a whole, including the selection and arrangement of uncopyrightable elements. *Atari Games Corp. v. Oman*, 888 F.2d 878 (D.C. Cir. 1989). She continued, however, that even under *Atari*, this particular Design at issue before the Review Board does not contain a sufficient amount of original and creative artistic or graphic authorship to support copyright registration. (Letter from Giroux-Rollow to Goldberg of 02/09/2009, at 3).

She also distinguished the cases cited by you, including *Prince Group, Inc. v. MTS Products*, 967 F. Supp. 121 (S.D.N.Y. 1997), where a fabric design containing irregularly shaped polka dots with crescent shading and a variety of colors was protected by copyright. *Id.* at 125. Ms. Giroux-Rollow cited *Novelty Textile Mills v. Joan Fabrics*, 558 F. 2d 1090 (2d Cir. 1979), upholding registration for a fabric that had interwoven diamonds forming a stripe in a variety of colors; she distinguished *Couleur International Ltd. v. Opulent Fabrics, Inc.*, 330 F. Supp. 152 (S.D.N.Y. 1971), where a variety of geometric shapes were used in a unique arrangement; and she pointed out *Queenie, Ltd. v. Sears, Roebuck & Co.*, 124 F. Supp. 2d 178 (S.D.N.Y. 2000), where a valid copyright existed in a tile-like pattern consisting of regular and irregular boxes and tears. Ms. Giroux-Rollow explained that in each case listed above, copyright protection was given because the author created a design that was more than a trivial variation of a theme. (Letter from Giroux-Rollow to Goldberg of 02/09/2009, at 3). This was achieved by incorporating either unique shapes and color combinations, or creatively arranging the shapes in an original way. *Id.*

Finally, she noted that although the process of creating the Design at issue here included choices, and there were other ways in which the lines and colors could have been selected or arranged, these choices are a part of every design. *Id.* It is not the variety of choices available, but the copyrightable authorship that exists in the design that is assessed. *Id.* Even though the author had choices when developing the design, the choices the author made must have resulted in the required standard of creativity under copyright law. *Id.*

Ms. Giroux-Rollow concluded that the decision to decline registration was warranted because the Design lacked sufficient creativity to support a claim of authorship.

D. Second request for reconsideration

In a letter dated June 25, 2009, you submitted a second request for reconsideration to the Copyright Office. (Letter from Goldberg to RAC Division of 5/25/2009, at 1). You argued that the application for the Design was improperly denied because of the "substantial effort" put forth to create the Design and the Design's "distinctive appearance." *Id.*

You further stated that the Copyright Office's references of statutes, case law, and treatises actually *support* registration for the design. *Id.* at 2. You cited *Nimmer on Copyright,* § 201[B], stating that "any distinguishable variation of a prior work will constitute sufficient originality to support a copyright if such variation is the product of the author's independent efforts, and is more than merely trivial." 1 M.B. Nimmer & D. Nimmer, *Nimmer on Copyright* § 2.01[B] at 2-12 (2002) [hereinafter *Nimmer*], the treatise citing *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

You further argue that the standard for creativity is low and that only a "scintilla" of creativity is required. *Luck's Music Library, Inc. v. Ashcroft*, 321 F. Supp. 2d 107, 118 (D.D.C. 2004). You note that creativity "does not mean an 'inventive leap' or 'new idea' in the sense of never having been conceived before. *Nimmer* § 2.01[B]. "Instead it refers to matter bearing a spark of distinctiveness in copyrightable expression." *Id.*

In arguing that the Design is not a common geometric figure, you point out that it is composed of lines intersecting at an angle to create a distinctive visual appearance. (Letter from Goldberg of 06/25/2009, at 2). You also state that the cases cited by the Copyright Office do not apply because the Design does not involve standard geometric shapes. *Id.* at 3. You cite three cases where you believe copyright registration was granted to works that have the same amount of creativity as (or less than) the Design at issue here: *Queenie, Ltd. v. Sears, Roebuck & Co.*, 124 F.Supp.2d 178 (S.D.N.Y. 2000); *Prince Group, Inc. v. MTS Products*, 967 F. Supp. 121 (S.D.N.Y. 1997); and *Couleur Int'l Ltd. v. Opulent Fabrics, Inc.*, 330 F. Supp. 152, 153 (S.D.N.Y. 1971). You also state that the Design in question here has more creativity than other plaids registered by the Copyright Office. (Letter from Goldberg of 06/25/2009, at 3). You conclude by asking the Copyright Office to reconsider its prior "unfair, arbitrary, and capricious" decision and grant registration for Zelouf's Design. *Id.* at 4.

III. DECISION

The Copyright Office Review Board affirms the Examining Division's refusal to register the Design entitled "6676 FLOCK GINGHAM" after reviewing the application and all deposit materials as well as the arguments you have presented. The Board confirms that the Office is not able to register the Design because it does not reach the minimum standard of creativity required for registration.

A. Analysis of the Work

1. Creativity standard

The Supreme Court has stated that originality for copyright purposes consists of two elements, "independent creation plus a modicum of creativity." *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 346 (1991). It is not disputed that the Design at issue here was developed by one of Zelouf's designers [Letter from Goldberg of 6/25/2009, at 1] and meets the requirement of independent creation. The Design was refused registration, however, because it fails to meet the minimum standard of creativity.

The Supreme Court reaffirmed in *Feist* that the standard for creativity is minimal. *Id.* *Feist* also emphasized, however, that there are works in which the "creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359. Such works are incapable of sustaining copyright protection. *Id.*, citing *Nimmer* § 2.01[B]. The Court observed that "as a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity." 499 U.S. at 363. It further stated that there can be no copyright in works in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359. Works that consist of common or obvious arrangements fail to meet the low standard of creativity required for copyrightability. *Id.* at 362-363.

The Copyright Office considered both the individual elements of the Design, and the Design as a whole when examining for creativity. Because familiar objects and geometric shapes are not available for copyright protection, the Board agrees that the individual elements of this design (lines of varying width) consist of commonly found shapes that are in the public domain and cannot, in themselves, be copyrighted. The Board also examined the overall selection, coordination, and arrangement of the design to determine whether the combination of the lines met the minimum standard of creativity. Because the Design at issue here consists of trivial variations amongst the lines (only two variations of line width; one line color against a second, different color background; and one repetition of the pattern crossing at the same angle, resulting in two sizes of squares and one size of rectangles), the Board has determined that the Design does not constitute a sufficient level of creative expression by the author to meet the standard required for a claim of copyright.

2. Copyrightable subject matter; analysis of authorship

Copyright Office regulations contain an illustrative list of uncopyrightable works including "words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; and mere listing of ingredients or contents." 37 CFR § 202.1. These elements are the building blocks for creative works and it is important that protection is not extended to such means of expression. Because they are in the public domain, they are uncopyrightable.

The fabric Design at issue here is composed of familiar symbols and shapes. The Design consists of five evenly spaced lines displayed on a bias. The first five lines alternate in width,

and two additional lines appear on either side of the crossing portion of the pattern; the crossing lines are extended and criss-crossed by another straight line and extended further until the five-line crossing appears again. Although the crossing of the lines creates a pattern, the individual elements of the work are straight lines. Straight lines fall within the meaning of familiar symbols or designs that are not copyrightable. Lines are considered one of the simplest forms of building blocks for pictorial and graphic works. The design as a whole may not be a familiar geometric shape but because both the individual compositional elements and the arrangement may be the elements that provide the required level of creativity, it is necessary to examine the selection, coordination, and arrangement of the uncopyrightable elements taken as a whole.

3. Selection, coordination, and arrangement

Although familiar shapes and objects may not individually qualify for copyright protection, in some cases the combination of the elements can be copyrightable. *United States v. Hamilton*, 583 F.2d 448 (9th Cir. 1978). "Originality may be found in taking the commonplace and making it into a new combination or arrangement." *Id.* at 451. Not every combination of unprotectable elements may be available for copyright protection. *Satava v. Lowry*, 323 F. 3d 805 (9th Cir. 2003). Combining unprotected elements will only result in a copyrightable work if those elements are numerous enough, and their selection and arrangement original enough, that their combination constitutes an original work of authorship. *Id.* at 811. Viewing the work in its entirety, the selection, coordination, and arrangement of the material will dictate whether the work has reached the minimum standard necessary for copyright protection. *Diamond Direct, LLC v. Star Diamond Group, Inc.*, 116 F. Supp. 2d 525, 528 (S.D.N.Y. 2000).

You cite *Nimmer*, stating that it confirms the Design's originality. "Any distinguishable variation of a prior work will constitute sufficient originality to support a copyright if such variation is the product of the author's independent efforts, and is more than merely trivial." *Nimmer* § 2.01[B] at 2-12. Letter from Goldberg of 6/25/2009, at 2. Again, we note that the Design at issue originated with Zelouf International. Ms. Giroux-Rollow cited *Nimmer* for her discussion on creativity. Sec. 2.01 [B] states that "there remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright." *Nimmer* § 2.01[B]. The Copyright Office believes the Design at issue here falls within this area. "Expressions that are standard, stock, or common to a particular subject matter or medium are not protectable under copyright law." *Satava v. Lowry*, 323 F.3d 805, 810 (9th Cir. 2003). The Design's components and arrangement consist of common-place elements found in many fabric patterns. Like the alphabetical arrangement in *Feist*, the arrangement and coordination of the elements in the Design are uncopyrightable because the lines in the pattern are formed in an obvious criss-cross pattern, common to many gridiron patterns. The Design does not reflect an overall combination of multiple variations of lines, or of more than one orienting direction of the lines, or of more than their few criss-cross meetings (intersections), or of multiple colors.

While we accept that the employee-designer put forth thought and consideration into designing the fabric, *Feist* rejected the "sweat of the brow" theory. *Id.* at 341. It is not a matter of effort or thought, but the degree of creativity resulting in the arrangement. Just as "registration cannot be based upon the simplicity of standard ornamentation such as chevron

stripes, the attractiveness of a conventional fleur-de-lys design, or the religious significance of a plain, ordinary cross," it cannot be based on a simple grid pattern or trivial or simple variation thereof. *Compendium II*, § 503.02(a) (1984). While *Feist* held that only a modicum of creativity is necessary to support a copyright, the Court also ruled that some works (such as the work at issue in *Feist*) fail to meet the standard. The Court observed that "as a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity," 499 U.S. at 363, and 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.

We agree that a work must be judged in its entirety, with analysis of the combination of the constituent elements of a work of authorship as well as the relationship of such elements to each other. The selection and arrangement of individual design elements that are *de minimis* in themselves, *i.e.*, they carry no copyright protection as such, within an overall design, be it 2-, or 3-dimensional, may be protected, depending on the use of such elements and whether the chosen elements are sufficient in quantity within the design as a whole. The Ninth Circuit said it well: "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." *(Again) Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003). The Ninth Circuit there quoted *Feist* to bolster its explanation: "[T]he principal focus should be on whether the selection, coordination, and arrangement are sufficiently original to merit protection." 323 F.3d at 811, *citing Feist*, at 358. The focus, therefore, must be on the overall design that fairly may be said to be synonymous with the selection, coordination, or arrangement of individual (possibly) trivial elements– here, straight lines of merely two widths with just five of the lines intersecting once and with an extension of those lines so that they intersect again– brought together to form a more-than-trivial, copyrightable overall design. We do not find the Design before us as meeting this standard of consisting of sufficient constituent elements arranged in a sufficiently original work of authorship.

4. Case law

The cases cited by Ms. Giroux-Rollow exemplify the standard set forth in *Compendium II* for evaluating arrangements of unprotectable shapes and trivial combinations. (Letter from Giroux-Rollow of 02/09/2009). Each case reinforces the principle that when public domain elements are compiled in a work, the arrangement itself, i.e., the overall combination in its characteristic and essence must be more than trivial. Ms. Giroux-Rollow compared *John Mueller & Co. v. New York Arrows Soccer Team, Inc.*, 802 F.2d 989 (8th Cir. 1986) to the Design at issue here as an example of another work that failed to meet the minimum standard of creativity. That work, like the Design, was created by a series of straight lines with a difference of one angle, containing two colors and varying distances between the lines. The Arrows logo was not registered because the arrangement of these lines and colors did not contain enough variation to form copyrightable originality. *Id.*

The Board agrees with the case law cited by Ms. Giroux-Rollow to reinforce the principles in *Compendium II*. *Woolen Co. v. J.W. Mays, Inc.*, 89 F. Supp. 964 (E.D.N.Y. 1950) supports the *Compendium II* principle that if the elements of the work are familiar shapes, the arrangement itself of such familiar shapes needs to produce a minimum level of creativity. *Id.* at 971. *Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q. 2d 1074 (D.D.C. 1991) was also cited by Ms. Giroux-Rollow to demonstrate that the Copyright Office will not register familiar patterns. *Id.* at 1075. In the case of *Homer Laughlin*, the work in question was a pattern common to chinaware. *Id.* It consisted of a series of lines with only slight variations of width and color. *Id.* Similarly, the court upheld the Register's decision to reject the pattern in *Jon Woods Fashions Inc. v. Curran*, 8 U.S.P.Q. 2d 1870 (S.D.N.Y. 1988) because it was a combination of stripes on a grid forming squares, lacking the minimal level of creative authorship necessary for copyright. *Id.* at 1871. Finally, *Tompkins Graphics Inc. v. Zipatone*, Inc., 222 U.S.P.Q. 49 (ED Pa. 1983) reinforced the rule that a work composed of public domain shapes or symbols (in this case geometric shapes) is copyrightable only if the arrangement has a sufficient level of artistic expression. *Id.* at 51.

The cases you cite in support of your position are readily distinguishable. Each pattern or work in the cited cases exhibits more copyrightable expression than does the Design at issue here. In *Queenie, Ltd. v. Sears, Roebuck & Co.*, 124 F.Supp.2d 178 (S.D.N.Y. 2000), the fabric design in question there consisted of "[S]pecifically, boxes, both regular and irregular, staggered or straight, as well as rips and tears." 124 F. Supp. 2d at 180. Although the Court, in an infringement action, was considering the defendant's motion for summary judgment on substantial similarity, it noted that, although one cannot copyright a box or a rip, it is the "exact expression resulting from the arrangement, colors, textures, rips, etc.– that can be protected by the copyright laws" *Id.* at 181. The Board points out that the pattern or design in *Queenie* consisted of elements themselves which reflected a greater quantum of authorship [regular and irregular boxes, ripped/torn/wrinkled lines or edges of the boxes], brought together in an overall design of multiple colors, some of which reflected shading treatments, in a checkerboard layout having some irregular spacing between the squares. *Queenie*, 124 F. Supp. 2d at 181-182. The Review Board considers this design as reflecting a greater extent of authorship than in the Design work before it with the overall combination of essentially two different width lines where such lines are oriented in one direction on the surface of the fabric and where the few criss-cross meetings (intersections) of the lines, all of the same color, appear against a different color background. The Design a issue here consists of so few elements arranged in a familiar pattern or, at the very best, in a minor variation of this pattern, that it is not copyrightable.

The District Court noted in *Prince Group, Inc. v. MTS Products*, 967 F. Supp. 121 (S.D.N.Y. 1997) that the design there was much more complex than a basic polka dot design. *Id.* at 125. The design had irregular shaped circles, shading within the circles, and a variety of colors that were placed on imperfect and conflicting diagonal lines. *Id.* This pattern distinguished itself by incorporating creative elements of expression. *Id.* In comparison, the fabric Design at issue here does not possess the same level of creativity because it consists of only two colors, a series of straight lines having only two variations of width, and a repetition laid out in the same direction where the lines cross at an angle, resulting in two sizes of squares and one size of a rectangle shape.

In *Couleur International Ltd. v. Opulent Fabrics Inc.*, 330 F. Supp.152 (S.D.N.Y. 1971) the plaintiff owned the copyright to a stripe design. The design had a variety of constitutive elements: a repetition of six stripes combined with circles with dots around them, spirals, small repeating triangles, and several colors. *Id.* at 153. The Court here was willing to issue a preliminary injunction against the defendant because it found infringement of the plaintiff's stripe design; in other words, the copyright in that design, a combinations of shapes and colors, was considered valid. *Id.* at 154. The Design at issue before the Review Board is not comparable.

Finally, you make the argument that the Design in question here should be registered because it is as creative, if not more creative, than other unspecified plaid patterns allegedly registered by the Copyright Office in the past. Such vague assertions are impossible to assess, since you cite no particular registrations. Moreover, the Copyright Office's policy is to make its decision based on the individual merits of each work. *See*, *Compendium II* § 108.03. Based on this policy, the Copyright Office does not compare works previously registered in its analysis of works for which reconsideration is sought. As we have stated above as the rule from *Feist*, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity," 499 U.S. at 363, and there can be no copyright in works in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359. The Review Board thus considers the Design at issue here to fall within those works of authorship which the Supreme Court in *Feist* has declared ineligible for copyright protection.

IV. CONCLUSION

For the reasons stated in this letter, the Copyright Office Review Board affirms the Examining Division's refusal to register the 6676 Flock Gingham fabric Design. This decision constitutes final agency action.

Sincerely,

/s/

Nanette Petruzzelli
Associate Register,
Registration & Recordation Program
for the Review Board
United States Copyright Office