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August 29, 2012

Via First Class Mail and Fax

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Re: PINSTRIPE NTW napl (fabric design)
WAFFLE WAF DPU (fabric design)
Control Number: 61-201-6191(W)

Dear Mr. Paynter:

The Copyright Office Review Board[1] has reviewed your second request for reconsideration of a refusal to register two fabric designs: PINSTRIPE NTW na-pl (fabric design)[hereinafter referred to as PINSTRIPE] and WAFFLE WAF DPU (fabric design)[hereinafter referred to as WAFFLE]. The Review Board has carefully examined the applications, the deposits, and all correspondence concerning these two works, and concludes that neither work contains a sufficient amount of creative authorship to support a copyright registration.

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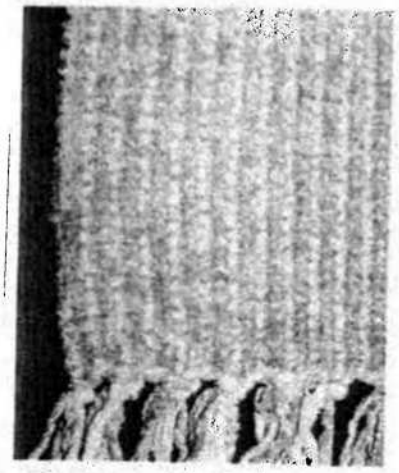
[1] On December 24, 2004, the Copyright Office published a final rule addressing what were formerly characterized as appeals from refusals to register, and now are characterized as requests for reconsideration. Final Rule, Reconsideration Procedure. 69 Fed. Reg. 77636 (Dec. 24, 2004). The regulation changed the name of what had been known as the Board of Appeals to the Review Board.

I. DESCRIPTION OF WORK

The two fabric designs involved in this reconsideration are as follows:

1. PINSTRIPE

This work is a weave design pattern, consisting of alternating white and beige stripes combined in such a way as to create a type of pinstriped pattern. The deposit reveals the work as follows:



2. WAFFLE

This work is a checker pattern fabric design created by a weave of purple and light grey colored yarn. The deposit reveals the work as follows:



II. ADMINISTRATIVE RECORD

A. Initial Applications and Office's Refusal to Register

On September 12, 2003, the Copyright Office received applications, deposits and fees under special handling for the two fabric designs in issue. In a letter dated September, 17, 2003, John Martin, Copyright Examiner, refused registration because the designs did not display the minimum creativity required to be considered original works of authorship. Letter from Martin to Paynter of 10/17/03, at 1. He stated that copyright protects original works of authorship that are fixed in some form, citing 17 U.S.C. § 102(a). *Id.* at 1. Citing *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340, 345 (1991), Mr. Martin clarified that the term "original" means that the work was independently created by the author and that it possesses at least a minimal degree of creativity. Letter from Martin to Paynter of 10/17/03, at 1.

Mr. Martin stated that to satisfy the creativity requirements, a work of the visual arts must contain a minimum amount of pictorial, graphic, or sculptural authorship. He clarified further that copyright does not protect familiar symbols or designs; basic geometric shapes; words and short phrases, such as names, titles, and slogans; or mere variations of typographic ornamentation, lettering, or coloring, citing regulation 202.1. Additionally, he asserted that under section 102(b) of the copyright law, copyright does not extend to any idea, concept, system, or process which may be embodied in a work. *Id.* at 1. Citing *Bleistein v. Donaldson*, 188 U.S. 239 (1903), and *Feist*, Mr. Martin stated that neither the aesthetic appeal or commercial value of a work, nor the amount of time and effort expended to create a work are factors that are considered under the copyright. The question, he asserted, is whether there was sufficient creative authorship within the meaning of the copyright statute and settled case law. Applying those standards, Mr. Martin concluded the two works could not support a claim to copyright. Letter from Martin to Paynter of 10/17/03, at 1.

B. First Request for Reconsideration

In a letter dated September 17, 2003, you responded to Mr. Martin's letter. You argued that the standard for creativity/originality set by *Feist Publications*, 499 U.S. at 345, is minimal. Letter from Paynter to the Examining Division of 9/17/03, at 2-3. You stated that the U.S. Court of Appeals for the District of Columbia Circuit, in *Atari Games Corp. v. Oman*, 979 F.2d 242, 243 (D.C. Cir. 1992) ("*Atari II*") found that a refusal to register an audiovisual work was "unreasonable when measured against the Supreme Court's instruction [in *Feist*] that 'the requisite level of creativity [for copyrightability] is extremely low.'" Letter from Paynter to the Examining Division of 9/17/03, at 3.

You asserted that in *Atari II*, the Court reversed a refusal to register a relatively simple video game for failing to consider the work as a whole, including consideration of the sequential arrangement of the images presented, among other things. The *Atari II* Court indicated that even if simple geometric shapes and colors relating to the representation of a ball, a wall, and paddle are *per se* uncopyrightable, the arrangement of those elements in the video game could provide the requisite originality/creativity. You also observed that the *Atari II* Court further noted that "it is not the Register's task to shape the protection threshold or ratchet it up beyond the 'minimal creative spark required by the Copyright Act and the Constitution.'" *Id.* at 3. In reaching this result, you stated that the Court favorably relied upon *Reader's Digest Ass'n v. Conservative Digest, Inc.*, 821 F.2d 800, 806 (DC Cir. 1987) in which the requisite creativity/originality was found in the arrangement of public domain elements for a magazine cover considering it as a whole. Letter from Paynter to the Examining Division of 9/17/03, at 3-4.

You cited a number of cases upholding copyright in fabric designs which you asserted supported registration of PINSTRIPE and WAFFLE. One of those cases, *Folio Impressions, Inc. v. Byer California*, 937 F.2d 759, 765 (2d Cir. 1991), protected a repeated placement of a floral design because although "the arrangement may have required little creative input, it was still Sadjan's [the author's] original work and, as such, copyrightable." Likewise, in *Soptra Fabrics Corp. v. Stafford Knitting Mills, Inc.*, 490 F.2d 1092, 1093 (2d Cir 1974), you contended that the court protected an arrangement of relatively simple shapes, including "a strip of crescents, scalloping or ribbons between that strip, and then rows of semicircles." Letter from Paynter to the Examining Division of 9/17/03, at 4. You stated that in that case, the court noted that "[t]he embellishment or expansion of the original design [copies] 'in repeat,' so as to broaden the design and thereby cover a bolt of cloth, together with beginning the pattern in a particular way so as to avoid showing an unsightly joint when the pattern is printed on textiles on a continual basis, constitutes modest but sufficient originality so as to support copyright." *Soptra Fabrics*, 490 F.2d at 1094. You also cited to *Novelty Textile Mills, v. Joan Fabrics Corp.*, 558 F.2d 1090, 1092 (2d Cir. 1977), remanding a case to impose a preliminary injunction regarding the infringement of a copyright in a "bias" or "argyle" plaid pattern for upholstery fabric. Letter from Paynter to the Examining Division of 9/17/03, at 5.

You argued that both the PINSTRIPE and the WAFFLE copyright claims, considered as a whole, greatly surpassed the minimal standards of originality/creativity, particularly in the arrangement and selection of various elements in each of the claims. You asserted that an employee of the claimant independently created both works, without copying any other work. *Id.* at 5. With respect to PINSTRIPE, you stated it included a weave pattern of alternating stripes of contrasting appearance, in which a light-colored stripe occupies less surface area than a dark-colored stripe of the weave. You identified as elements of your client's authorship, the spacing and size of the contrasting stripes relative to one another; the broken, intermittent pattern with respect of the light-colored stripe, contrasting with the

darker color stripe defining breaks in the pattern; the sculptural texture of the weave; and the selection and arrangement in the weave of two different yarn types. *Id.* at 5-6.

With respect to the WAFFLE claim, you asserted that it included a weave pattern of contrasting rectilinear regions. You identified as elements of your client's authorship the spacing and sizing of the light-colored, approximately square-shaped regions relative to a dark-colored grid that surrounds and isolates the square-shaped regions from one another; the sculptural appearance in terms of height and texture; and the selection and arrangement of two yarn types. *Id.* at 6.

After reviewing your first request for reconsideration, Examining Division Attorney Advisor Virginia Giroux responded in a letter dated March 19, 2004. Ms. Giroux began by stating that the material utilized in a work does not determine copyrightability, and therefore the different types of yarn could not contribute to the copyrightability of the two works. Letter from Giroux to Paynter of 3/19/04 at 1.

Ms. Giroux clarified that the Copyright Office does not dispute that the two works are original with the author and not copied from another source. *Id.* at 1. Citing *Feist Publications*, she stated that a work must not only be original, but must possess more than a de minimis quantum of creativity. *Id.* at 1. She elaborated that originality, as interpreted by the courts, means that the authorship must constitute more than a trivial variation of public domain elements, citing *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951). Letter from Giroux to Paynter at 1. She stated that in applying that standard, the Copyright Office examines the work to determine whether it contains elements, either alone or in combination, on which copyright can be based. In the examining process, factors which cannot be considered include aesthetic judgments, the attractiveness of a design, its uniqueness, its visual effect and appearance, the time and effort it took to create, and its commercial success in the marketplace. She concluded that the only relevant question is whether there was sufficient original and creative authorship within the meaning of the copyright law and settled case law. Letter from Giroux to Paynter of 3/19/04, at 1.

Turning to the works in issue, Ms. Giroux stated that both fabric designs are repetitive in nature. *Id.* at 2. Ms. Giroux described PINSTRIPE as a weave design pattern consisting of alternating white and beige strips where the beige stripes are wider and thicker than the white stripes, and both are combined in such a way as to create a type of pinstripe pattern. She described WAFFLE as also a weave pattern consisting of think stripes whose intersections form and contain gray-colored square shaped and grid regions so that, as a whole, a waffle or checkered like pattern of two colors is formed. She stated that rectangles, squares, stripes and checks, no matter what their size or thickness, or any minor variations thereof, are common and familiar shapes or designs, and are not copyrightable, referring to Copyright Office regulation 37 C.F.R. § 202.1. She elaborated that coloring per se is also not copyrightable, as stated in the same regulation. She concluded that the simple

combination and arrangement of the shapes, coupled with their coloring, do not rise to the level of copyrightable authorship necessary to support a copyright registration, and the resulting designs are *de minimis*, citing to *Compendium II, Copyright Office Practices,* sec. 503.02(a).

Ms. Giroux cited a number of cases concerning standard designs and simple arrangements held to be uncopyrightable. The cases included *John Muller & Co., Inc. v. N.Y. Arrows Soccer Team*, 802 F.2d 989 (8th Cir.)(a logo consisting of four angled lines forming an arrow, with the word "arrows" in cursive script below); *Jon Woods Fashions, Inc. v. Curran*, 8 USPQ2d 1879 (S.D.N.Y. 1988)(a fabric design consisting of striped cloth with small grid squares superimposed on the stripes); *Forstmann Woolen Co. v. J.W. Mays, Inc.*, 89 F.Supp 964 (E.D.N.Y. 1950)(a label with the words "Forstmann 100% Virgin Wool" interwoven with three fleur-de-lis) and *Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q. 2d 1074(D.D.C. 1991) (a chinaware "gothic" pattern of simple variations and combinations of geometric designs).

She conceded that while it is true that even a slight amount of creativity will suffice to obtain copyright protection, the Nimmer treatise, 1 M. Nimmer & D. Nimmer, Nimmer on Copyright, §2.01(b)(1998), provided: "there remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright." She concluded the works in issue fall within this narrow area. Letter from Giroux to Paynter of 3/19/04, at 2-3.

Ms. Giroux also expressed her agreement that in both *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903) and *Feist Publications*, the Supreme Court established a very low requisite level of creativity for copyright. However, she concluded that in this instance, neither the pinstripe nor the checkered patterns, coupled with their coloring, meet even the low threshold for copyrightable authorship as set forth in *Feist Publications*. Letter from Giroux to Paynter of 3/19/04, at 3. Likewise, she stated that *Atari Games Corp. v. Oman,* 888 F.2d 878 (D.C. Cir. 1989) (*"Atari I"*) holding that a work must be viewed in its entirety, could not be extended to protect the pinstripe and checkered patterns because those works simply failed to rise to the level of coprightability necessary to support a copyright registration. Letter from Giroux to Paynter of 3/19/04, at 3.

With respect to the three cases cited by you involving fabric designs, Ms. Giroux concluded the works involved in those cases were different from the two fabric designs of your client. In *Soptra Fabrics, Folio Impressions*, and *Novelty Textile Mills*, the works generally dealt with the copyrightability of a non-representational graphic or artistic design, which was more than a trivial variation of a theme - either by selecting a variety of shapes, or arranging them in a creative manner, or both. Likewise, the case of *Reader's Digest v. Conservative Digest, Inc.*, 821 F.2d 800 (D.C. Dir. 1989), she stated, was primarily a trade

dress case involving a combination of elements which was more complex than the two works in issue.

C. Second Request for Reconsideration

In a memorandum received on July 9, 2004 (Second Appeal Letter), you filed a second request for reconsideration. You begin your argument in favor of registration by characterizing the two claims. Regarding PINSTRIPE, you state that it is a weave pattern of alternating stripes in which a light-colored stripe occupies less surface area that a dark-colored stripe of the weave. (Second Appeal Letter at 3.) You assert that among the original and creative characteristics of this work are the spacing and size of the contrasting stripes; the broken, intermittent pattern of the light-colored stripe with the darker stripe defining the breaks in the pattern; the sculptural texture of the weave; and the selection and arrangement in the weave of two differently appearing yarns in terms of shape, texture, and relative size. *Id.* at 3.

With respect to WAFFLE, you state that it is a weave pattern of contrasting rectilinear regions. You assert that among the original and creative characteristics of this work are the spacing and sizing of the light-colored, approximately square-shaped regions relative to a dark-colored grid that surrounds and isolates the square-shaped regions from one another; the sculptural appearance in terms of relative height and texture; and the selection and arrangement of two contrasting yarns for the weave that differ in terms of shape, texture, and relative size. *Id.* at 3-4.

You summarize the creative selection and arrangement of the two fabric designs as including the following elements: (1) undulating yarn type; (2) incorporation of one yarn type wrapped with a shiny helical thread; (3) incorporation of another yarn type having a shiny appearance; (4) an intermittent shiny or lightly speckled appearance; (5) appearance and arrangement of the weave of contrasting yarns; (6) selected geometric figures; (7) selected geometric sizes; (8) visual patterns formed by the geometric figures; and (9) three-dimensional textural contours in the overall work. *Id.* at 4-5.

You argue that the requisite level of creativity is extremely low, citing to *Feist_ Publications*. You state further that *Atari II*, 979 F.2d at 247, provided that "[i]t is not the Register's task to shape the protection threshold or rachet it up beyond the minimal creative spark required by the Copyright Act and the Constitution." Under that decision, you assert that the Register must consider the creative elements viewing the work as a whole. You cite further to the *Atari I* Court's reference to *Reader's Digest v. Conservative Digest, Inc.*, 821 F.2d. 800 (D.C. Cir. 1989) upholding copyright in the design and layout of the Reader's Digest cover. Second Appeal Letter at 6.

You cite three cases concerning fabric designs that had also been cited in your first letter for reconsideration. *Folio Impressions*, you state, protected a repeated placement of a floral design because "the arrangement may have required little creative input, it was still Sadjan's [the author's] original work and, as such, copyrightable" (citing 937 F.2d at 765). You assert that *Soptra Fabrics* protected an arrangement of relatively simple shapes, including "a strip of crescents, scalloping or ribbons between that strip, and then rows of semicircles," 490 F.2d at 1093, and concluded that the "embellishment or expansion of the original design 'in repeat,' so as to broaden the design and thereby cover a bolt of cloth, together with beginning the pattern in a particular way so as to avoid showing an unsightly joint when the pattern is printed on textiles on a continual basis, constitutes modest but sufficient originality so as to support the copyright." 490 F.2d at 1094. *citing Peter Pan Fabrics, Inc. v. Dan River Mills, Inc.*, 295 F. Supp. 1366, 1367-1368 (S.D.N.Y. 1969). You state that in *Novelty Textile Mills*, the court remanded in order to impose a preliminary injunction regarding the infringement of a copyright is a "bias" or "argyle" plaid pattern for upholstery fabric. *Id.* at 6. To these cases you add *Covington Industries Inc. v. Nichols*, 2004 U.S. Dist. LEXIS 6210 (S.D.N.Y. 2004), upholding copyright in a plaid fabric utilizing a basket weave technique in which the authorship included the selection of the width, spacing and repeat pattern of strips. Second Appeal Letter at 7.

You criticize the grounds cited in the denial of the first request for reconsideration as inappropriate in light of copyright precedents. First, you state Ms. Giroux's letter emphasized the individual elements in the work, such as yarn type, and shapes, rather than judging copyrightability by looking at the work as a whole. You refer to the *Atari* cases as requiring the latter approach. You state that you cited the different yarn types used in the works in your first request for reconsideration in order to highlight the abundance of different selections from which to choose. Second Appeal Letter at 8.

Second, you assert that the refusal to register the two fabric designs suggested a heightened threshold of creativity beyond that enunciated by the Supreme Court. *Id.* at 9. You criticize the distinction of *Reader's Digest* that that case involved a more complex combination of elements on the grounds that such a distinction raised the bar beyond the "minimal creative spark" threshold test set by the Supreme Court. *Id.* at 10.

III. DECISION

After reviewing the applications and deposits submitted for registration and the arguments you have presented, the Copyright Office Review Board affirms the Examining Division's refusal to register the PINSTRIPE and WAFFLE fabric designs because neither work contains sufficient creative authorship to support registration.

A. *Feist Publications'* principle and Office practice

Feist Publications straightforwardly articulated the principle that only a modest level of creativity is needed to sustain copyright protection. Under *Feist Publications*, originality in a work of authorship means that the work was independently authored and that the work possesses at least some minimal degree of creativity. 499 U.S. at 345. We focus our analysis on the second *Feist Publications* requirement – creativity – in order to determine copyrightability of the overall design.

Before proceeding with that analysis, we point out that the Supreme Court also ruled that some works (such as the white pages telephone listing at issue in *Feist Publications*) fail to meet this 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 works in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359. We point out that pre-*Feist Publications* case law recognized no demanding standard for copyrightability. *See, e.g., Alfred Bell & Co.,* 191 F.2d at 102 ("'Original' in reference to a copyrighted work means that the particular work 'owes it origin' to the 'author.' No large measure of novelty is necessary."). This does not mean, however, that no standard at all existed. Although *Catalda* itself stated that "no large measure of novelty is necessary" in a work of authorship in order to enjoy copyright protection, the same Second Circuit opinion also held that the distinguishable variation in a work of authorship for which copyright protection is sought, must be "more than a 'merely trivial' variation." 191 F.2d at 102-103. Forty years later, *Feist Publications* again confirmed that the "standard of originality is low, but it does exist." 499 U.S. at 362.

The *Compendium of Copyright Office Practices, Compendium II* (1984) ("*Compendium II*") has long recognized this principle: "[w]orks that lack even a certain minimum amount of original authorship are not copyrightable." *Compendium II*, sec. 202.02(a)(1984). With respect to pictorial, graphic, and sculptural works, the class within which these fabric designs fall [enumerated at 17 U.S.C. 102(a)(5)], *Compendium II* states that a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." *Compendium II*, sec. 503.02(a). *Compendium II* recognizes that it is the presence of creative expression that determines the copyrightability of a work, and that registration cannot be based upon the simplicity of standard ornamentation. This *Compendium* principle is confirmed by numerous judicial decisions. In *John Muller & Co., Inc. v. New York Arrows Soccer Team, Inc.*, 802 F.2d 989 (8th Cir. 1986), the court, citing 37 C.F.R. § 202.10[a], upheld a refusal to register a logo consisting of four angled lines forming an arrow, with the word "arrows" in cursive script below, noting 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." 802 F.2d at 990. *See also Bailie v. Fisher,*

258 F.2d 425 (D.C. Cir. 1958) (cardboard star with two folding flaps allowing star to stand for display not copyrightable 'work of art'); *Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc.*, 634 F. Supp. 769 (W.D. Pa. 1986) (envelopes with black lines and words "gift check" or "priority message" did not contain minimal degree of creativity necessary for copyright protection); *Forstmann Woolen Co., v. J. W. Mays, Inc.*, 89 F. Supp. 964 (E.D.N.Y. 1950) (label with words "Forstmann 100 % Virgin Wool" interwoven with three fleurs de lis held not copyrightable); *The Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q. 2d 1074 (D.D.C. 1991) (upholding refusal to register chinaware design pattern composed of simple variations or combinations of geometric designs due to insufficient creative authorship to merit copyright protection); *Jon Woods Fashions, Inc. v. Curran*, 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988) (upholding refusal to register fabric design consisting of striped cloth with small grid squares superimposed on the stripes where Register concluded design did not meet minimal level of creative authorship necessary for copyright); *Tompkins Graphics, Inc. v. Zipatone, Inc.*, 222 U.S.P.Q. 49 (E.D. Pa. 1983) (collection of various geometric shapes not copyrightable).

In applying the above standards, it is important to keep in mind that the determination of whether a work contains a sufficient amount of original artistic authorship cannot be made in accordance with bright-line rules. As the court in *Homer Laughlin* stated, "[w]hether a particular work reflects a sufficient quantum of creativity to satisfy the copyright laws is not susceptible to bright line rules or broad principles." *Homer Laughlin China Co.* 22 U.S.P.Q.2d at 1075. The court went on to observe: "However, in determining creativity, such a decision necessarily requires the exercise of informed discretion, and the Register, in part due to having to make such determinations on a daily basis, is generally recognized to possess considerable expertise over such matters." *Id. citing Norris Industries, Inc. v. International Tel. & Tel. Corp.*, 696 F.2d 918, 922 (11th Cir.), *cert. denied*, 464 U.S. 818 (1983).

Given the considerable case law sustaining Copyright Office decisions of refusal to register simple designs, the Office nevertheless recognizes that the use of public domain elements, of commonly known and/or geometric shapes, and of familiar symbols may yet result in a copyrightable graphic work as long as the overall resulting design, or overall pattern, taken in its entirety, constitutes more than a trivial variation of the constitutive elements. The complementary principles that a work of authorship should be considered as a unified entity in order to determine its copyrightability and that a work may be copyrightable even if it is composed of elements all of which are not copyrightable in themselves are principles established in case law and which the Copyright Office applies in its examining procedures. However, for the reasons detailed below, the Review Board concludes that neither of the two fabric designs, PINSTRIPE and WAFFLE, contains a sufficient amount of creative authorship to support a copyright registration.

B. Analysis of the works

You describe PINSTRIPE, as a weave pattern of alternating strips in which a light-colored stripe occupies less surface area that a dark-colored stripe of the weave. (Memorandum from Paynter to Review Board of 7/9/04 at 3.) You assert among the original and creative characteristics of this work are the spacing and size of the contrasting strips; the broken, intermittent pattern of the of the light-colored stripe with the darker stripe defining the breaks in the pattern; the sculptural texture of the weave; and the selection and arrangement in the weave of two differently appearing yarns in terms of shape, texture, and relative size. *Id.* at 3. WAFFLE is described as a weave pattern of contrasting rectilinear regions. You assert among the original and creative characteristics of this work are the spacing and sizing of the light-colored, approximately square-shaped regions relative to a dark-colored grid that surrounds and isolates the square-shaped regions from one another; the sculptural appearance in terms of relative height and texture; and the selection and arrangement of two contrasting yarns for the weave that differ in terms of shape, texture, and relative size. *Id.* at 3-4.

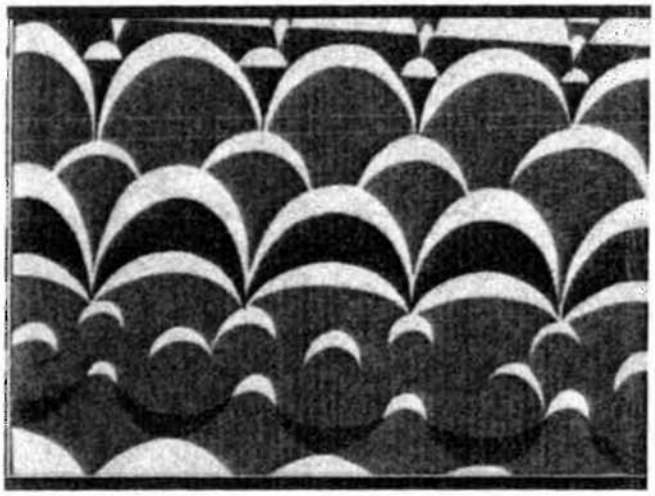
The Board finds that both PINSTRIPE and WAFFLE consist of common and familiar geometric shapes: stripes (in the case of PINSTRIPE) and minor variations of a rectangle (in WAFFLE). With respect to PINSTRIPE, the work is essentially a trivial variation of alternating white and beige stripes where the beige stripes are wider and thicker than the white stripes and the white stripes are elevated as is not uncommon in many fabrics. With respect to WAFFLE, the work is a trivial variation of a grid of rectangles. These simple patterns reflect in a simple combination of only a few familiar shapes; such a combination fails to rise to the level of creativity required to support a copyright registration. Again, from *Compendium II*, sec. 503.02(a): "It is not possible to copyright... a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations."

In an effort to distinguish your client's fabric designs from the public domain, you enumerate features such as undulating yarn type; incorporation of one yarn type wrapped with a shiny helical thread; incorporation of another yarn type having a shiny appearance; selected geometric figures; etc. Not all selections and arrangements rise to the level of copyrightable authorship; if they did, then all man-made products would be copyrightable. The U.S. Court of Appeals for the Ninth Circuit addressed this issue in *Satava v. Lowry*, 323 F.3d 805 (9th Cir. 2003). In that case, an artist brought a copyright infringement action against a competitor over the artist's life-like glass-in-glass sculptures of jellyfish. The court stated: "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. The combination of unprotectable

elements in Satava's sculpture fall short of this standard. The selection of the clear glass, oblong shroud, bright colors, proportion, vertical orientation, and stereotyped jellyfish form, considered together, lacks the quantum of originality needed to merit copyright protection." *Id.* at 811. The combination described in *Satava* is no less creative than the combinations in PINSTRIPE and WAFFLE.

You rely on four cases involving fabric designs which you claim support registration of PINSTRIPE and WAFFLE. The Board observes that the precedential value of cases finding copyrightability in pictorial and graphic works is problematic without a copy of the work involved in the case. Descriptions in judicial opinions do not necessarily reveal the full extent (or lack) of creativity in a particular work. Fortunately, in at least one of the cases you have relied upon the Copyright Office has a copy of the work in question and in another of the cases the court made no finding as to copyrightabilty. With respect to the remaining two cases, the Board's analysis is constrained by its inability to examine the works that the courts found to be copyrightable.

Each of the four fabric design cases that you have cited involves graphic designs or patterns consisting of elements from the public domain or elements which in themselves are otherwise not protectible. The Board does not find persuasive your position that these cases give weight to your argument in favor of registering the two works in issue. In *Soptra_ Fabrics*, the fabric design at issue contained a variety of elements, including a strip of crescents, scalloping or ribbons between that strip, and four rows of semicircles. These elements were presented in two colors and superimposed on a white background. The Second Circuit found that the design was "unmistakably original," and that the embellishment and expansion of that design in a repeating pattern constituted a "modest but sufficient originality so as to support the copyright" because it avoided an "unsightly joint" when the pattern was printed on textiles. 490 F.2d at 1093, 1094. The copy of the design deposited with the Copyright Office is reproduced below:



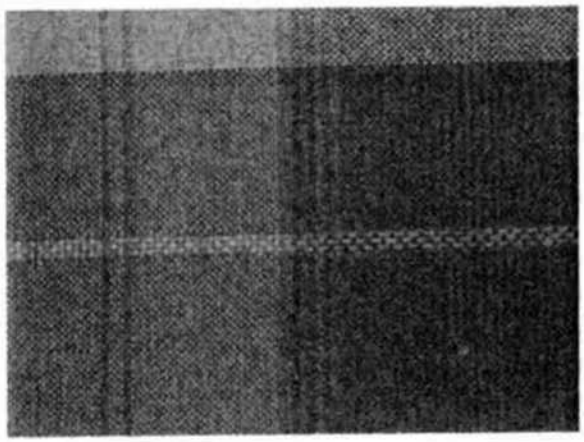
Even a glance at the deposit reveals considerably more creativity in the artistic authorship at issue in Soptra than in either of the two works at issue here.

In *Folio Impressions,* the author placed a rose design in horizontal rows, imposed randomness by positioning the flowers so that they faced in different directions, and then superimposed the design against an ornate background. The court found that "what is protected in this case is the Folio Rose itself and the way in which that rose is arranged; the copyright umbrella does not cover the idea of arranging roses generally in a straight line pattern." 937 F.2d at 765 (emphasis in original). The Board finds no such creativity in the overall arrangement of the designs at issue in this appeal, low as the standard of creativity may be under *Feist.* And while the court in *Folio Impressions* concluded that the work at issue satisfied the "minimal creativity" standard of *Feist Publications,* the Board observes that the Folio Rose must represent the bare minimum of creativity that would pass muster; as the court noted, "[t]he pattern thereby made was one of only slight originality" and that "the arrangement may have required little creative input." As described in the opinion, the design in Folio Impressions was more creative than either of the two designs at issue here.

Novelty Textile Mills, involved a "bias" or "argryle" plaid containing a wide variety of colors, stripes, and shapes. Significantly, however, the court did not address whether that particular plaid design was copyrightable. The court stated, "Novelty's ownership and the validity of its copyright are not disputed for the purpose of this motion." 558 F.2d at 1092. The court further noted that "The Copyright Office certificate of registration is prima facie evidence of the facts stated therein. 17 U.S.C. § 209. This has generally been held to mean prima facie proof of ownership and validity. *See 2 M. Nimmer, Nimmer on Copyright* § 141.1 at 611 (1976). In the absence of evidence to the contrary, therefore, the District Court was correct in its conclusion that such ownership and validity here must be presumed." *Id.* at 1092 fn. 1.

In *Covington Industries Inc. v. Nichols,* 2004 U.S. Dist. LEXIS 6210 (S.D.N.Y. 2004), involving the "Maxwell" fabric design, which had been registered with the Copyright Office. The Copyright Office deposit for "Maxwell" is reproduced at the right. The court cautioned that "vertical and horizontal stripes are so basic an element and shape that on their own they cannot be copyrighted;" and "[n]either are individual colors copyrightable." *Id.* at 5. However, the court ruled further: "[a]lthough individually stripes, colors, and a basket weave effect may not be original, taken together their use and arrangement exhibits the requisite level of creativity." *Id.* at 6. The court noted that the particular "use and arrangement" of stripes, colors and basket weave – and in particular the basket weave effect, which the court observed "has not previously been incorporated into a plaid," along with an unusual 17-inch sett repeat, as well as the author's "choices as to the width and spacing of the various stripes as well as the manner in which to incorporate color," crossed the threshold of copyrightablity. *Id.* at 9-11. A review of the Copyright Office deposit for

"Maxwell," reproduced below, reveals far more creativity than can be found in PINSTRIP or WAFFLE.



You allege that Ms. Giroux in rejecting the first request for reconsideration focused on isolated elements such as the yarn, rather than the overall work as required by the *Atari* cases. Ms. Giroux discussed the individual elements because you identified these elements as part of your client's authorship in your first request for reconsideration. However, Ms. Giroux clearly reached her conclusion by looking at the works as a whole, as made evident by her statement that "the overall combination and arrangement of elements in these works simply do not rise to the level of copyrightable authorship." Letter from Giroux to Paynter of 3/19/04 at 2. In any event, the Board has evaluated the works as a whole, taking into account the selection and arrangement of various elements, but finds insufficient creativity.

You state further that reference to yarn types in your first request for reconsideration was merely to show the abundance of different selections from which to choose. The Board notes that in theory an author creating any work has an unlimited choice of alternatives. However, it is not the possibility of choices that determines copyrightability, but whether the resulting expression contains copyrightable authorship. *See Florabelle Flowers, Inc. v. Joseph Markovits, Inc.*, 296 F. Supp. 304, 307 (S.D.N.Y. 1968) (an "aggregation of well known components [that] comprise an unoriginal whole" cannot support a claim to copyright). The Board finds that the fabric designs here, upon examination of its elements individually and as a whole, does not contain a sufficient amount of original and creative authorship to sustain a copyright claim. The fact that an author had many choices does not necessarily mean that the choice the author made meets even the modest creativity requirement of the copyright law.

You rely extensively on *Atari II* as support for your argument that the public domain elements comprising the fabric design when viewed as a whole provide the requisite originality/creativity. (Memorandum from Paynter to Review Board of 7/9/04 at 6.) In *Atari*

II, the court found several aspects of the BREAKOUT game – such as the motion created by the selection and arrangement of the graphic elements and the subsequent selection and arrangement of the sequence of the screens, the use of a square ball, a rectangular shrinking paddle, the placement and design of the scores, and the use of sounds – as beyond mechanical, typical or garden variety. *Atari II*, 979 F.2d at 246, 247. Indeed, the court's analysis of the work – an audiovisual work of greater complexity than the fabric designs at issue here – as a whole focused on "the flow of the game as a whole" and "the entire effect of the game as it appears and sounds, its sequence of images." *Id.* at 245 (internal quotes omitted). The court's analysis also took into account "the synchronized graphics and sounds which accompany the ball's bounces behind the wall." *Id.* at 247. In contrast, in the works involved in this matter, the selection and arrangement of the public domain design elements comprising the fabric designs – stripes, rectangles, a few colors – when viewed as a whole, are not sufficiently creative to warrant registration.

The Review Board also finds your reliance upon *Reader's Digest v. Conservative Digest, Inc.*, 821 F.2d. 800 (D.C. Cir. 1989) to be misplaced. In that case, the court found that the selection and arrangement of common elements in the magazine cover at issue was entitled to protection as a graphic work because the complexity of the layout of numerous components as a whole comprised a "distinctive arrangement and layout" of elements such as multiple lines, typefaces and colors. Again, the arrangement of the design elements in PINSTRIPE and WAFFLE are not distinctive and comprise standard designs, repetitive in nature.

IV. CONCLUSION

For the reasons stated in this letter, the Copyright Office Review Board affirms the Examining Division's refusal to register the fabric designs PINSTRIPE and WAFFLE. This decision constitutes final agency action in this matter.

Sincerely,

David O. Carson
General Counsel
for the Review Board
United States Copyright Office