United States Copyright Office
Library of Congress · 101 Independence Avenue SE · Washington, DC 20559-6000 · www.copyright.gov

September 24, 2013

Kilparick Townsend
Attn: Marc A. Lieberstein
1114 Avenue of the Americas
New York, NY 10036-7703

Re: Kia Stripe (Correspondence ID: 1-F3OWAT)
Racha Texture (Correspondence ID: 1-F30W38)

Dear Mr. Lieberstein:

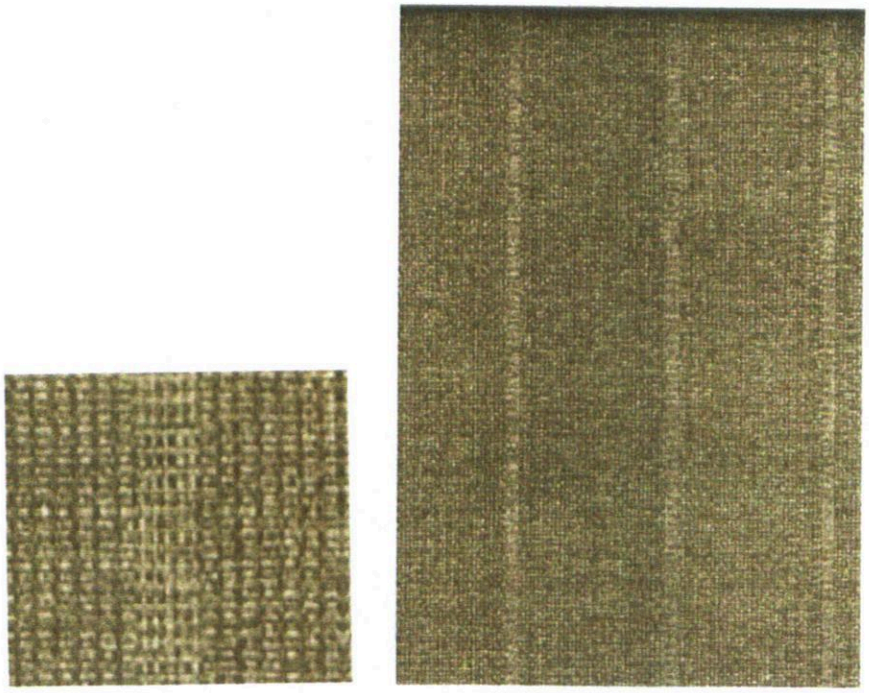
The Review Board of the United States Copyright Office (the "Board") is in receipt of your second requests for reconsideration of the Registration Program's refusal to register the works entitled: *Kia Stripe* and *Racha Texture*. You submitted these requests on behalf of your client, Colour Design, Inc., on June 29, 2013. Administratively, your previous registration requests for the two works were addressed by separate correspondence. However, because the issues associated with the two works are similar, for the purpose of second reconsideration, we will address both claims in this one letter.

The Board has examined the application, the deposit copies, and all of the correspondence in these cases. After careful consideration of the arguments in your second requests for reconsideration, the Board affirms the Registration Program's denial of registration of these copyright claims. The Board's reasoning is set forth below. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action on this matter.

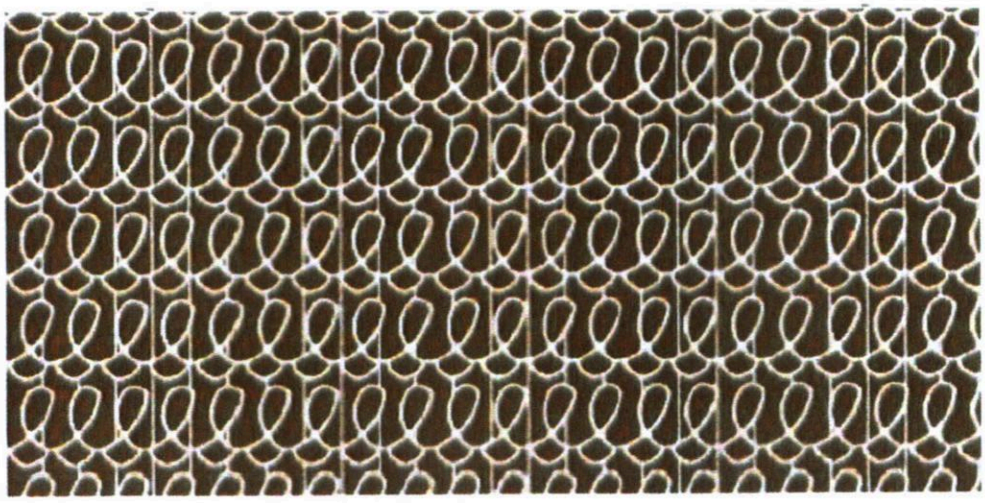
I. DESCRIPTION OF THE WORK

Kia Stripe and *Racha Texture* (the "Works") are 2-D designs intended to appear on textured wallpaper. The *Kia Stripe* design consists of vertical and horizontal lines configured into a basic weave pattern. The weave pattern covers the entire design, except for small sections of five vertical and five horizontal stripes that are woven together in a less intricate fashion than the dominant pattern and appear at consistent intervals throughout the

design. The below image is a photographic reproduction of the work from the deposit materials:



The *Racha Texture* design consists of connected, repeating loop shapes, each with a semi-circular line closing off the bottom portion of the loop. The loops and semi-circle shapes are overlaid with thin vertical lines. The below image is a photographic reproduction of the work from the deposit materials:



II. ADMINISTRATIVE RECORD

On September 13, 2012, the United States Copyright Office (the "Office") issued a letter notifying Colour Design, Inc. (the "Applicant") that it had refused registration of the above mentioned Works. *Letter from Registration Specialist, Ivan Proctor, to Marc A. Lieberstein* (September 13, 2012). In its letter, the Office stated that it could not register the Works because they lack the authorship necessary to support a copyright claim. *Id.*

In two letters dated December 13, 2012, you requested that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusals to register the Works. *Letters from Marc A. Lieberstein to Copyright RAC Division* (December 13, 2012) ("First Requests"). Upon reviewing the Works in light of the points raised in your letters, the Office concluded that the Works do not contain a sufficient amount of original and creative artistic or graphic authorship and again refused registration. *Letters from Attorney-Advisor, Stephanie Mason, to Marc A. Lieberstein* (March 29, 2013).

Finally, in letters dated June 29, 2013, you requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusals to register the Works. *Letters from Marc A. Lieberstein to Copyright R&P Division* (June 29, 2013) (hereinafter "Second Racha Request" and "Second Kia Request"). In arguing that the Office improperly refused registration, you claim the Works include at least the minimum amount of creativity required to support registration under the standard for originality set forth in *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). *Second Racha Request* at 1; *Second Kia Request* at 1. In support of this argument, you claim that the Applicant's careful selection and arrangement of the Works' constituent elements possess a sufficient amount of creative authorship to warrant registration under the Copyright Act. Specifically, you assert that the Applicant's claims of copyright are directed to the Works' "unique, unexpected, and anything but typical" selections and arrangements. *Id.* at 2.

In addition to *Feist*, your argument references several cases in support of the general principle that, to be sufficiently creative to warrant copyright protection, a work need only possess a "modicum of creativity." *Id.* at *passim*. You also you claim the Office "misapprehends Claimant's reliance on certain cases, conflates the complexity of the works at issue in others, and misattributes certain cases to Claimant." *Id.* at 7-8.

III. DECISION

A. *The Legal Framework*

All copyrightable works must qualify as "original works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a). As used with respect to copyright, the term "original" consists of two components: independent creation and sufficient creativity.

See Feist, 499 U.S. at 345. 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.* While only a modicum of creativity is necessary to establish the requisite level, the Supreme Court has ruled that some works (such as the telephone directory at issue in *Feist*) fail to meet this 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 nonexistent." *Id.* at 359.

The Office's regulations implement the long-standing requirements of originality and creativity set forth in the law and, subsequently, the *Feist* decision. *See* 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"); *see also* 37 C.F.R. § 202.10(a) (stating "[i]n order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form").

Of course, 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 grade. *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"). Ultimately, the determination of copyrightability in the combination of standard design elements rests 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.D.C. 1989).

To be clear, the mere simplistic arrangement of unprotectable elements does not automatically establish the level of creativity necessary to warrant protection. For example, the Eighth Circuit upheld the Copyright Office's refusal to register a simple logo consisting of four angled lines which formed an arrow and the word "Arrows" in a cursive script below the arrow. *See John Muller & Co., Inc. v. NY Arrows Soccer Team, Inc. et. al.*, 802 F.2d 989 (8th Cir. 1986). Likewise, the Ninth Circuit held that a glass sculpture of a jellyfish that consisted of elements including clear glass, an oblong shroud, bright colors, proportion, 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 court's language in *Satava* is particularly instructional:

> [i]t 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) (emphasis in original).

Finally, Copyright Office Registration Specialists (and the Board, as well) do not make aesthetic judgments in evaluating the copyrightability of particular works. They are not influenced by the attractiveness of a design, the espoused intentions of the author, the design's uniqueness, its visual effect or appearance, its symbolism, the time and effort it took to create, or its commercial success in the marketplace. *See* 17 U.S.C. § 102(b); *see also Bleistein v. Donaldson*, 188 U.S. 239 (1903). The fact that a work consists of a unique or distinctive shape or style for purposes of aesthetic appeal does not automatically mean that the work, as a whole, constitutes a copyrightable "work of art."

B. *Analysis of the Work*

After carefully examining the Works, and applying the legal standards discussed above, the Board finds that *Kia Stripe* and *Racha Texture* fail to satisfy the requirements of creative authorship. Below, we list each work and indicate why neither design is sufficiently creative to warrant copyright registration.

(1) Racha Texture

We find that none of the *Racha Texture* design's constituent elements, considered individually, are sufficiently creative to warrant protection. As noted, 37 C.F.R. § 202.1(a), identifies certain elements that are not copyrightable. These elements include: "[w]ords and short phrases such as names, titles, slogans; familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering, or coloring." *Id.* Here, the work is comprised of loop shapes, semi-circle shapes, and thin vertical lines. Consistent with the above regulations, loops, semi-circles, and straight lines qualify as unprotectable "familiar symbols or designs." *See id.* (prohibiting the registration of basic symbols or designs). Thus, we conclude the Work's constituent elements do not qualify for registration under the Copyright Act.

We further find that the *Racha Texture* design, considered as a whole, fails to meet the creativity threshold set forth in *Feist*. 499 U.S. at 359. As explained, the Board accepts the principle that combinations of unprotectable elements may be eligible for copyright registration. However, in order to be accepted, such combinations must contain some distinguishable variation in the selection, coordination, or arrangement of their elements that is not so obvious or minor that the "creative spark is utterly lacking or so trivial as to be

nonexistent." *Id.*; *see also Atari Games,* 888 F.2d at 883 (finding a work should be viewed in its entirety, with individual uncopyrightable elements judged not separately, but in their overall interrelatedness within the work as a whole).

Viewed as a whole, the work consists of connected, repeating loop shapes, each with a simple semi-circular line closing off the bottom portion of the loop, overlaid with thin vertical lines. This basic, repetitive arrangement of an ordinary loop shape, an unprotectable semi-circle, and a plain vertical line is, at best, *de minimis*, and fails to meet the threshold for copyrightable authorship. *Feist,* 499 U.S. at 359; *see also Atari Games,* 888 F.2d at 883. Despite you claim that the work resembles a "scriptive lower-case letter 'L' sitting atop an egg" followed by your assertion that the work "defies" characterization (*Second Racha Request* at 5), the fact remains that the work is little more than a combination of unprotectable loop shapes augmented, in a trivial fashion, with semi-circles and vertical lines. Accordingly, we conclude that the *Racha Texture* design, as a whole, lacks the requisite "creative spark" necessary for registration. *Feist,* 499 U.S. at 359; *Satava*, 323 F.3d at 811.

(2) Kia Stripe

We find that none of the *Kia Stripe* design's constituent elements, considered individually, are sufficiently creative to warrant protection. The work's design is comprised solely of intersecting vertical and horizontal lines. Consistent with section 37 C.F.R. § 202.1(a), vertical and horizontal lines are unprotectable "familiar symbols or designs." *See id.* (prohibiting the registration of basic symbols or designs). Thus, we conclude the work's constituent elements do not qualify for registration under the Copyright Act.

We further find that the *Kia Stripe* design, considered as a whole, fails to meet the creativity threshold set forth in *Feist*. 499 U.S. at 359. Viewed as a whole, the work consists of vertical and horizontal lines configured into two basic weave patterns and repeated indefinitely. This basic, repetitive "weaving" of vertical and horizontal lines is, at best, *de minimis*, and fails to meet the threshold for copyrightable authorship. *Feist,* 499 U.S. at 359; *see also Atari Games,* 888 F.2d at 883. Despite your claim that the work "exhibits a careful selection, arrangement, and coordination of shading, spacing and layering of graphic and textural elements to achieve an original and unique work that goes well beyond familiar symbols, designs and basic geometric shapes" (*Second Kia Request* at 5), the fact remains that the whole of the 2-D design that is the basis of you claim of copyright consists of little more than lines arranged in ordinary, common weave patterns. Accordingly, we conclude that the *Kia Stripe* design, as a whole, lacks the requisite "creative spark" necessary for registration. *Feist,* 499 U.S. at 359; *Satava*, 323 F.3d at 811.

In sum, the Board finds that both the individual elements that comprise the Works, as well as the selection, organization, and arrangement of those elements lack the sufficient level of creativity to make the Works eligible for registration under the Copyright Act.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the work entitled: *Kia Stripe* and *Racha Texture*. This decision constitutes final agency action on this matter. 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

BY: _____
William J. Roberts, Jr.
Copyright Office Review Board