United States Copyright Office
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August 12, 2013

Pearne & Gordon LLP
Attn: Steven J. Solomon
1801 East 9th Street
Suite 1200
Cleveland, Ohio 44114-3108

Re: Wave
Correspondence ID: 1-BSYQS1

Dear Mr. Solomon:

The Review Board of the United States Copyright Office (the "Board") is in receipt of your second request for reconsideration of the Registration Program's refusal to register the work entitled: *Wave*. You submitted this request on behalf of your client, ACO Polymer Products (the "Applicant"), on April 19, 2012. I apologize for the delay in the issuance of this determination. After periods of inaction, staff departures, and budgetary restrictions, the Register of Copyrights has appointed a new Board and we are proceeding with second appeals of registration refusals as expeditiously as possible.

The Board has examined the application, the deposit copies, and all of the correspondence in this case. After careful consideration of the arguments in your second request for reconsideration, the Board affirms the Registration Program's denial of registration of this copyright claim. 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

Wave (the "Work") is a design that consists of numerous rectangular shapes of different lengths arranged in a pattern so that the spaces between the rectangles align to create the appearance of a sinuous line flowing along the length of the work.

The below image is a photographic reproduction of the Work from the deposit materials:



II. ADMINISTRATIVE RECORD

On June 16, 2011, the United States Copyright Office (the "Office") issued a letter notifying the Applicant that it had refused registration of the above mentioned Work. *Letter from Registration Specialist, Sandra Ware, to Una Lauricia* (June 16, 2011). In its letter, the Office indicated that it could not register the Work because it lacks the authorship necessary to support a copyright claim. *Id.*

In a letter dated September 15, 2011, the Applicant requested that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusal to register the Work. *Letter from Una Lauricia to Copyright RAC Division* (September 15, 2011) ("First Request"). The letter set forth the reasons the Applicant believed the Office improperly refused registration. *Id.* Upon reviewing the Work in light of the points raised in the letter, the Office concluded that the Work "does not contain a sufficient amount of original and creative artistic or graphic authorship upon which to support a copyright registration" and again refused registration. *Letter from Copyright Office to Una Lauricia* at 2 (January 20, 2012).

Finally, in a letter dated April 19, 2012, you 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 Steven Solomon to Copyright R&P Division* (April 19, 2012) ("Second Request"). In arguing that the Office improperly refused registration, you claim the Work includes 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 Request* at 2. In support of this argument, you claim that the Applicant's selection and arrangement of the Work's constituent elements demonstrates sufficient creativity to support copyright registration. *Id.* at 1-3. Specifically, you assert that the Applicant's claim of copyright is directed to the "unique" design of "numerous rectangular shapes of different lengths arranged in a pattern so as to create the appearance of a wave flowing along the length of the work." You also assert that the design at issue, when embodied on a "piece of metal," will create "the appearance and feeling of fluidity and movement." *Id.* at 3.

In addition to *Feist*, your argument references several cases supporting the general principle that a work that is comprised solely of a combination of basic or common shapes is not, in and of itself, a sufficient basis for refusing copyright registration. *Id.* at 2.

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.*, 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 Work, and applying the legal standards discussed above, we find that the design embodied in the Work fails to satisfy the requirement of creativity.

The Board accepts the principle that combinations of geometric shapes may be eligible for copyright protection. However, in order to be accepted for registration, 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." *Feist,* 499 U.S at 359; *see also Atari Games,* 888 F.2d at 883. Here, as you point out in your *Second Request*, the Work consists of "a design of numerous rectangular shapes of different lengths" *Second Request* at 2. The Applicant has arranged these "rectangular shapes" in a pattern so that they "create the appearance of a wave flowing along the length of the work." *Second Request* at 2. This basic combination of short and long rectangles, configured so that, when stacked, the gaps between them line up in an ordinary, sinuous line, lacks the requisite "creative spark" for copyrightability. *See Feist*, 499 U.S. at 359; *see also* 37 C.F.R. §§ 202.1(a), 202.10(a). Thus, because the Applicant's selection and arrangement of the Work's design element is, at best, *de minimis*, we find the Work ineligible for registration under the Copyright Act.

Your assertion that the Applicant's arrangement of the rectangular shapes creates "the appearance and feeling of fluidity and movement" does not add to your claim of sufficient creativity. *Id. at* 3. Nor does your assertion that the design embodied in the Work is "unique." As discussed above, the Board does not assess a design's uniqueness, visual effect or appearance, or symbolism in determining whether a work contains the requisite minimal amount of original authorship necessary for registration. Thus, even if accurate, the mere fact that the Applicant's Work consists of a unique, aesthetically appealing arrangement of familiar shapes would not qualify the Work, as a whole, as copyrightable.

In sum, the Board finds that the Applicant's selection and arrangement of short and long rectangles lack a sufficient level of creativity to make the Work registerable 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: *Wave*. This decision constitutes final agency action on this matter. 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

BY: [redacted]
William J. Roberts, Jr.
Copyright Office Review Board