United States Copyright Office
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November 30, 2015

Kristen McCallion, Esq.
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601 Lexington Avenue
52nd Floor
New York, NY 10022

RE: Aberdeen Quartz and sixty-nine other applications.

Dear Ms. McCallion:

The Review Board of the United States Copyright Office (the "Board") has examined Cambria Company LLC's ("Cambria's") second request for reconsideration of the Registration Program's refusal to register two-dimensional artwork copyright claims in seventy works (the "Works").[1] After reviewing the applications, deposit copies, and relevant correspondence for these cases, along with the arguments raised in the second request for reconsideration, the Board affirms the Registration Program's denial of registration for these copyright claims.

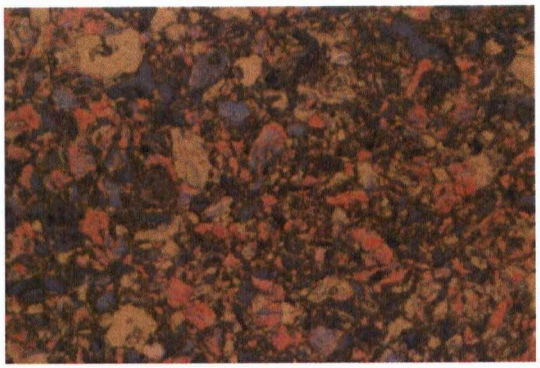
I. DESCRIPTION OF THE WORKS

The Works consist of multi-colored quartz slabs containing abstract shapes and coloring in random, asymmetrical patterns. The images below are photographic reproductions of three

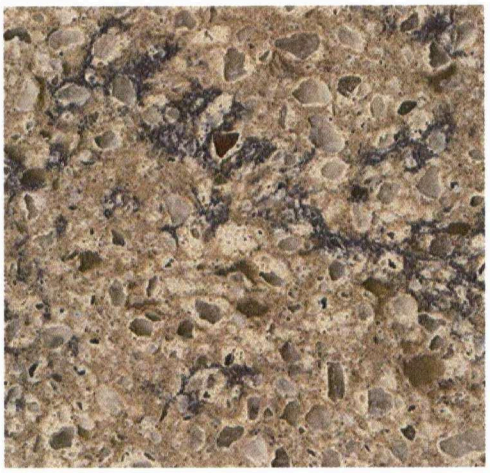
[1] The complete list of related service request numbers is: 1-716056601, 1-716048121, 1-857584961, 1-716048281, 1-716084328, 1-857664451, 1-716084415, 1-716581321, 1-857585087, 1-716581350, 1-716581437, 1-716581484, 1-716581541, 1-716581568, 1-716581645, 1-716581892, 1-716581939, 1-716581996, 1-716582094, 1-716582161, 1-716582219, 1-716582264, 1-716582289, 1-716625314, 1-716625339, 1-716625364, 1-716625399, 1-716625434, 1-716625499, 1-716625524, 1-716625549, 1-857664344, 1-716625624, 1-716625649, 1-716625674, 1-857585009, 1-716625699, 1-716625724, 1-716625749, 1-716625799, 1-716625774, 1-716625834, 1-716625929, 1-716626104, 1-716626129, 1-716626204, 1-716626249, 1-716645354, 1-716645379, 1-717792832, 1-857664692, 1-717792858, 1-717792883, 1-717793073, 1-717792908, 1-717792943, 1-717792968, 1-717793013, 1-717793038, 1-717793098, 1-717793153, 1-717793178, 1-717793203, 1-717793248, 1-718010313, 1-718010338, 1-718010393, 1-718010418, 1-718010463, and 1-718010488.

representative works from the deposit materials:

Aberdeen Quartz Material Design



Aragon Quartz Material Design



Armitage Quartz Material Design



II. ADMINISTRATIVE RECORD

Cambria filed seventy applications to register copyright claims in two-dimensional artwork on January 30, 2012. Following some initial telephone and email discussion, Mr. John Ashley, Chief of the Visual Arts Division, wrote to Cambria in a letter dated July 30, 2013 requesting additional clarification on certain points as well as identifying material, and notifying Cambria that the Office was considering cancellation for three similar claims previously registered under VA-1-797-761, VA-1-799-251, and VA-1-799-252. After exchanging additional correspondence with Cambria, Mr. Ashley again wrote to reject the seventy claims at issue here, and to formally notify Cambria of the Office's intent to cancel registrations VA-1-797-761, VA-1-799-251, and VA-1-799-252. *See* Letter from John Ashley, Chief, Visual Arts Division to Mr. Joel D. Leviton (Sept. 18, 2013) ("Initial Refusal").[2]

The initial refusal letter explained the Office's finding that Cambria's design and manufacture process produces "results that are highly random and hardly controllable to such an extent that it can be reasonably said that a human is the author of any alleged design that results," and that notwithstanding human intervention at various points throughout the process, "the current process cannot be controlled to produce anything other than a generalizable look-and-feel, rather than a precise intentional design." *Id.* at 2. This finding ultimately led the Office to reject Cambria's claims in two-dimensional artwork for the seventy applications because the quartz slab that results from Cambria's process "is machine, rather than human, authorship," and therefore copyright registration is not possible. *Id.*

In a letter dated December 17, 2013, Cambria requested, pursuant to 37 C.F.R. § 202.5(b), that the Office reconsider its initial refusal to register the Works. Letter from Kristen McCallion to Copyright RAC Division (Dec. 17, 2013) ("First Request"). Upon reviewing the Works in light of the points raised in the First Request, the Office again concluded "that there is no human authorship contributing to the resulting designs," and hence refused these registrations. Letter from Gina Giuffreda, Attorney-Advisor, to Kristen McCallion (May 12, 2014). This refusal was also based upon the quartz slabs at issue constituting "useful articles" under the Copyright Act, and the inseparability—either physical or conceptual—of the designs sought to be copyrighted from the non-copyrightable useful articles. *Id.* at 4-5.

Most recently, in a letter dated August 27, 2014, Cambria requested, pursuant to 37 C.F.R. § 202.5(c), that the Office reconsider for a second time its refusal to register the Works. Letter from Kristen McCallion to Copyright RAC Division (Aug. 27, 2014) ("Second Request"). In addition to providing a supplemental explanation of Cambria's design process, Cambria argued that the Office improperly refused to register the Works because Cambria's designs result from human authorship, and are therefore copyrightable.

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[2] Mr. Ashley's September 18 letter stated that Cambria had thirty days to respond to the Office's intent to cancel these registrations, and Cambria's October 18, 2014 reply has been received. Please note that the Registration Program Office will address registrations VA-1-797-761, VA-1-799-251, and VA-1-799-252 in a separate letter.

Id. at 9. The Second Request referred to U.S. Copyright Office registration practices, including the second and third editions of the *Compendium of U.S. Copyright Office Practices*. It also likened Cambria's designs to new forms of technology that courts have struggled with in the past, discussing a string of cases going back to the 1880s. *Id.* at 11-13. Additionally, Cambria argued that its designs are both physically and conceptually separable from the quartz slabs in which they are embodied. *Id.* at 15-20. Finally, Cambria directed the Board's attention to several examples of registered works—*e.g.*, designs portrayed on rugs, carpets, tiles, and fabric—claiming that these registrations "evidence the registrability of Cambria's designs." *Id.* at 23.

III. DISCUSSION

A. *The Legal Framework—Originality*

Copyright protection is available only for "original works of authorship fixed in [a] tangible medium of expression." 17 U.S.C. § 102. In *Feist Publications, Inc. v. Rural Tel. Service Co.*, the Supreme Court stated that originality consists of two elements, "independent creation plus a modicum of creativity." 499 U.S. 340, 346 (1991); *see also Alfred Bell & Co. v. Catalda Fine Arts,* 191 F.2d 99, 102 (1951) (finding that "'[o]riginal' in reference to a copyrighted work means that the particular work 'owes its origin' to the 'author.' No large measure of novelty is necessary."); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (using a definition of "author" to mean "he to whom anything owns its origin; originator; maker . . .," and describing copyright as being limited to the "original intellectual conceptions of the author."). Congress, however, did not extend copyright protection to concepts underlying the production of a work or to the process used to create a work, but rather only to the actual expression of that concept. Section 102(b) of the Copyright Act expressly prohibits copyright protection for "any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."

The Office has long recognized that works that are not the result of human authorship will not be registered. *See* COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES, THIRD EDITION § 313.2 ("COMPENDIUM III") ("[T]he Office will not register works produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author"). *Compendium III* cites several examples of claims containing insufficient human authorship to support a registration including "[a] claim based on a mechanical weaving process that randomly produces irregular shapes in the fabric without any discernible pattern." COMPENDIUM III, § 313.2. While the third edition of the *Compendium*, effective December 22, 2014, was cited in your Second Request (Second Request at 10), it should be noted that the second edition of the *Compendium* is the version that was in effect at the time Cambria originally submitted the applications for the Works, and it takes the similar position that

> [i]n order to be entitled to copyright registration, a work must be the product of human authorship. Works produced by

> mechanical processes or random selection, without any contribution by a human author, are not registrable. Thus, a linoleum floor covering featuring a multicolored pebble design which was produced by a mechanical process in *unrepeatable, random patterns, is not registrable*. Similarly, a work owing its form to the forces of nature and lacking human authorship is not registrable; thus, for example, a piece of driftwood even if polished and mounted is not registrable.

COMPENDIUM OF COPYRIGHT OFFICE PRACTICES ("COMPENDIUM II") §503.03(a) (1984) (emphasis added).

B. *Analysis of the Works*

Here, Cambria has not created copyrightable works, but rather, a process or formula for creating a product to look and feel a particular way each time the process is completed. Cambria has provided several detailed descriptions of the process used to create the quartz slabs at issue. *See, e.g.*, Second Request at 4-8. As explained in the Second Request, "each of Cambria's designs is first made by a Cambria designer—by hand—in small (approximately 12" x 12") prototypes. The purpose of the hand-made design process is to create and perfect each design and then decide what Cambria will make on a commercial scale." Second Request at 4. Cambria also described several instances where a Cambria designer must make decisions about what types of materials and pigments to add to the process, and at what times. *Id.*, at 5-6. Then, Cambria employees "scale-up" the process to create larger slabs using the same process utilized in creating selected 12" x 12" prototypes. *Id.*, at 8. However, as we have noted in previous correspondence, these larger slabs are not identical copies of the prototype, but rather are the results of using the same process to produce large quartz slabs with the same overall appearance as the smaller prototypes. As can be seen in the photos you submitted at page three of the Second Request, the smaller prototypes incorporate the same colors, shapes, and design density of their larger counterparts, but they are not identical. That is to say, two of Cambria's quartz slabs made using the same process will resemble, or "match" each other in general, but they are not the same, as a photocopy of a painting would be. Neither this process, nor the resulting works, are protectable by copyright.

Cambria also claims that the designs are the result of significant "acts of human authorship." *Id.* at 4. While the Office recognizes that Cambria employees are closely involved in the creation of these slabs, their actions are in the nature of following a prescribed process rather than in producing copyrightable authorship. In considering only the works at issue, the Board evaluates whether each work is the product of human authorship and, if so, whether the work contains sufficient originality to merit protection. In this case, the Board has determined that the works do not have sufficient human authorship to be copyrightable. Therefore, the Office need not reach the originality analysis to determine whether the works contains sufficient creativity to support a copyright registration.

The Second Request also disagrees with the Registration Program's reliance on the Copyright Act's prohibition of copyright protection for ideas, procedures, processes, systems, methods and the like because, Cambria claims, it "is not seeking registration of its design process or manufacturing process," *Id.* at 9. However, as it is impossible to identically replicate the smaller prototypes in the larger slabs, it is clear that this process is precisely what Cambria is seeking registration for. As Cambria has explained at all stages of this registration process and review, a Cambria designer begins the process by creating a quartz design in a 12" x 12" prototype. *Id.* at 4. Then, once the smaller prototype has been created, the method and ingredients used to create that particular piece are employed on a larger scale to mass produce quartz slabs. *Id.* These larger slabs are not exact copies of the smaller prototypes, but merely have the "*same overall appearance*" as the original design. First Request at 5, 8, and 10 (emphasis added). There can be no copyright that extends to all works created by a particular process no matter how complex the combination of particular materials, colors, methods, techniques, and steps may be, and the Office cannot issue a certificate of registration that would recognize what it appears that your client is seeking: a blanket copyright in all the end products of such a process.

Cambria also asserts that the "Compendium [of U.S. Copyright Office Practices] compels the conclusion that as long as there is a single contribution by a human author in creating a visual art work, that work is copyrightable and registrable." Second Request at 11. However, neither *Compendium II* nor *Compendium III* "compel" any such result, and neither document states a rule providing that any work to which a human made a contribution is *per se* copyrightable. As the examples from *Compendium II* and *III* cited above demonstrate, the mere fact that a human may have contributed to the creation of a work does not automatically mean that the requisite level of human authorship required for copyright protection is present. In Cambria's case, the quartz slabs are similar to the unregistrable linoleum floor covering featuring a random, unrepeatable, multicolored pebble design produced by a mechanical process cited in § 503.03(a) of *Compendium II*. Though the process may be controlled by humans in such a way as to consistently generate products with the "same overall appearance," this process is not protectable by copyright.

The Second Request also argues that "centuries of case law" support the proposition that the copyright law has evolved to afford copyright protection to new types of works developed through new advancements, processes, and technologies. Second Request at 11. The Second Request then discusses several cases in support of this argument and analogizes Cambria's design process to the various new forms of technology courts have struggled with in copyright cases, such as cameras and video game screen displays. Second Request at 12. The Office routinely registers sound recordings, motion pictures, and photographs, none of which could be created without the aid of a machine. The fact that Cambria's designs are embodied in quartz, or are created with the aid of machines, does not prevent them from being registered. Rather, the fact that these works are not the result of human authorship is what places them outside the scope of copyright protection.

Regarding the argument that the Office has registered works similar those in contention, the Review Board's policy is to not compare works that have been previously registered or refused registration. Each claim of copyright is examined on its own merits,

with the Office applying uniform standards of copyrightability throughout the examination process. Because copyrightability involves a mixed question of law and fact, differences between any two works can lead to different results. Thus, the fact that an individual examiner might have previously registered a work that is, arguably, less original than the work at issue does not require the Board to reverse the denial of a work that we find lacks sufficient creative, or in this case *human*, authorship. *See Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q.2d (BNA) 1074, 1076 (D.D.C. 1991) (stating that that the court was not aware of "any authority which provides that the Register must compare works when determining whether a submission is copyrightable."); *accord Coach, Inc. v. Peters*, 386 F. Supp.2d 495, 499 (S.D.N.Y. 2005) (indicating the Office "does not compare works that have gone through the registration process").

Finally, the Board has considered the separability argument in the Second Request. Second Request at 15. We conclude that, because these works do not possess sufficient human authorship to warrant registration, we need not analyze whether they constitute useful articles or whether their design elements are separable from their utilitarian function. *See Esquire, Inc. v. Ringer,* 591 F.2d 796, 800 (D.C. Cir. 1978) (finding although works which may be useful articles themselves, or are incorporated into a useful article, are eligible for protection, such protection only extends to the pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article). As explained above, the quartz slabs at issue lack sufficient human authorship required for copyrightability. Thus, even if assessed under a separability analysis, the works would not warrant registration.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the copyright claims in these Works. This decision constitutes final agency action on this matter. *See,* 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

BY: 

Stephen Ruwe
Member of the Review Board