United States Copyright Office
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July 13, 2016

Susan E. Farley
Heslin, Rothenberg, Farley & Mesiti P.C.
5 Columbia Circle
Albany, NY 12203

Re: Second Request for Reconsideration for Refusal to Register American Flag Bat Display; Correspondence ID: 1-18OTC58

Dear Ms. Farley:

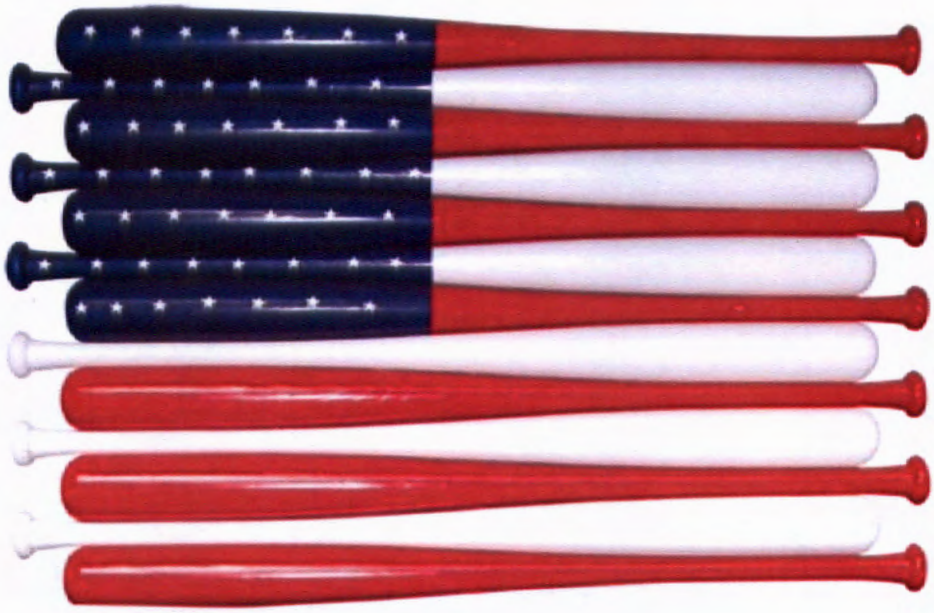
The Review Board of the United States Copyright Office ("Board") has considered Cooperstown Bat Company, Inc.'s ("Cooperstown's") second request for reconsideration of the Registration Program's refusal to register a claim in the two-dimensional artwork, sculpture, creative modification, adaptation and arrangement of American flag elements[1] in the work titled American Flag Bat Display ("Work"). After reviewing the application, deposit copy, and relevant correspondence, along with the arguments in the second request for reconsideration, the Board affirms the Registration Program's denial of registration.

I. DESCRIPTION OF THE WORK

The Work in its sculptural form consists of thirteen baseball bats arranged in an alternating fashion so that the grip of one bat meets the end cap of the next bat. The baseball bats are painted to depict the American flag: the upper left side of the bat configuration is painted with a blue background with white stars to resemble the stars on the flag; and the remaining areas of the bat configuration are painted red and white, alternating to resemble the stripes of the flag. As noted, Cooperstown also seeks to register the Work

[1] The claim excluded "Inspiration from original American Flag."

as a two-dimensional artwork. The overall arrangement is a rectangular shape with uneven edges. A reproduction of the Work is set forth below:



II. ADMINISTRATIVE RECORD

On March 18, 2015, Cooperstown filed an application to register a copyright claim in the "Work." In a March 26, 2016 letter, a Copyright Office registration specialist refused to register the claim, finding that it "lack[ed] the authorship necessary to support a copyright claim." Letter from Rebecca Barker, Registration Specialist, to Shanna Sanders, Esq., Heslin Rothenberg Farley & Mesiti P.C. (Mar. 26, 2015).

In a letter dated December 11, 2015, Cooperstown requested that the Office reconsider its initial refusal to register the Work. Letter from Shanna K. Sanders, Esq., Heslin Rothenberg Farley & Mesiti P.C., to U.S. Copyright Office (June 26, 2015) ("First Request"). After reviewing the Work in light of the points raised in the First Request, the Office re-evaluated the claims and again concluded that the Work "does not contain a sufficient amount of original and creative artistic or graphic authorship to support a copyright registration," adding that "[c]opyright does not protect familiar designs [such as] the American flag . . . formed using the common design of baseball bats." Letter from Stephanie Mason, Attorney-Advisor, to Shanna K. Sanders, Esq., Heslin Rothenberg Farley & Mesiti P.C. (Sept. 14, 2015).

In a letter dated December 11, 2015, Cooperstown 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 Susan E. Farley, Heslin Rothenberg Farley & Mesiti P.C., to U.S. Copyright Office (Dec. 11, 2015) ("Second Request"). In that letter, Cooperstown argued that the

Work "does not take the shape of a baseball bat [or] the conventional shape of a flag," because "[t]he top and bottom borders of the work are not straight across, but rather unevenly tapered." Second Request at 3. Cooperstown also argued that Section 313.4(J) of the *Compendium of U.S. Copyright Office Practices, Third Edition*, which explains why familiar symbols and designs are uncopyrightable "provides examples of familiar symbols and designs" but lists "[n]either the American Flag, nor a sculptural arrangement of bats," and that "none of the examples listed . . . are analogous to the American Flag or a sculptural arrangement of bats." Second Request at 3-4; *see also* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.4(J) (3d ed. 2014) ("COMPENDIUM (THIRD)"). And finally, Cooperstown argued that it met the standard for creativity set forth in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). Second Request at 5–6.

III. DISCUSSION

A. The Legal Framework - Originality

A work may be registered if it qualifies as an "original work[] of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a). In this context, the term "original" consists of two components: independent creation and sufficient creativity. *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). 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.* Only a modicum of creativity is necessary, but the Supreme Court has ruled that some works (such as the alphabetized telephone directory at issue in *Feist*) fail to meet even this low 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 virtually nonexistent." *Id.* at 359.

The Office's regulations implement the long-standing requirement of originality set forth in the Copyright Act and described in the *Feist* decision. *See, e.g.*, 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"); *id.* § 202.10(a) (stating "to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form"). 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 test. *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"). A determination of copyrightability in the combination of standard design elements depends 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.C. Cir. 1989).

A mere simplistic arrangement of non-protectable elements does not demonstrate the level of creativity necessary to warrant protection. "For example, the United States District Court for the Southern District of New York upheld the Copyright Office's refusal to register simple designs consisting of two linked letter "C" shapes "facing each other in a mirrored relationship" and two unlinked letter "C" shapes "in a mirrored relationship and positioned perpendicular to the linked elements." *Coach Inc. v. Peters*, 386 F. Supp. 2d 495, 496 (S.D.N.Y. 2005). Likewise, the Ninth Circuit has held that a glass sculpture of a jellyfish consisting of clear glass, an oblong shroud, bright colors, 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 language in *Satava* is particularly instructive:

> It 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).

Similarly, while the Office may register a work that consists merely of geometric shapes, for such a work to be registrable, the "author's use of those shapes [must] result[] in a work that, as a whole, is sufficiently creative." COMPENDIUM (THIRD) § 906.1; *see also Atari Games Corp.*, 888 F.2d at 883 ("[S]imple shapes, when selected or combined in a distinctive manner indicating some ingenuity, have been accorded copyright protection both by the Register and in court."). Thus, the Office would register, for example, a wrapping paper design that consists of circles, triangles, and stars arranged in an unusual pattern with each element portrayed in a different color, but would not register a picture consisting merely of a purple background and evenly-spaced white circles. COMPENDIUM (THIRD) § 906.1.

B. Analysis of the Work

After carefully examining the Work and applying the legal standards discussed above, the Board finds that the Work does not contain the requisite amount of creativity necessary to sustain a claim to copyright.

Here, it is undisputed that the Work's constituent elements—baseball bats painted red, white and/or blue with white stars applied to the blue areas of paint—are not individually subject to copyright protection. *See* 37 C.F.R. § 202.1(a) ("examples of works not subject to copyright [include] familiar symbols or designs [and] coloring."). The question then is whether the combination of those elements is protectable. In evaluating this question, the Copyright Office follows the principle that works should be judged in their entirety and not based solely on the protectability of individual elements within the work. *See Atari Games Corp. v. Oman*, 979 F.2d 242 (D.C. Cir. 1992). Works composed

of public domain elements may be copyrightable, but only if the selection, coordination, and/or arrangement of those elements reflect authorial discretion that is not so obvious or minor that the "creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Feist*, 499 U.S. at 359.

The Board finds that, viewed as a whole, the Work's selection, combination, and arrangement of individually non-protectable elements is not sufficient to render it original. The overall arrangement of red, white, and blue baseball bats into a pseudo-rectangular shape is dictated by a symbol firmly in the public commons—the American flag. While the arrangement of the baseball bats so that the end cap of one bat meets the grip of another results in an unevenly tapered rectangle, these uneven ends are determined by the shape of the baseball bats. The result is an obvious placement of a familiar symbol—the American flag—onto a *de minimis* arrangement of baseball bats that, as a whole, falls into the "narrow category of works in which the creative spark is . . . so trivial as to be nonexistent." *Feist*, 499 U.S. at 359; *see also* COMPENDIUM (THIRD) § 906.2 ("A work that includes familiar symbols . . . may be registered if . . . the author used these elements in a creative manner and [] the work as a whole is eligible for copyright protection.").

Cooperstown argues that Section 313.4(J) of the *Compendium* which "provides examples of familiar symbols and designs" lists "[n]either the American Flag, nor a sculptural arrangement of bats," and that "none of the examples listed . . . are analogous to the American Flag or a sculptural arrangement of bats." Second Request at 3-4. But, as Cooperstown concedes, the *Compendium*'s list is exemplary, not exhaustive. *Id.* at 4. The American flag is certainly as familiar a symbol as the fleur de lys or yin yang, and a baseball bat is as recognizable as a barber pole, hazard warning symbols, "or the like." COMPENDIUM (THIRD) § 313.4(J). That the American flag is depicted on baseball bats is a very slight variation on the familiar symbol only in three-dimensional form. *Id.* § 906.2 ("[T]he copyright law does not protect mere variations on a familiar symbol . . . either in two or three-dimensional form."). Thus, the Board finds that the level of creative authorship involved in this configuration of unprotectable elements is, at best, *de minimis*, and too trivial to enable copyright registration. *See id.* §313.4(B).

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the copyright claim in the Work. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action in this matter.

BY: _____
Regan Smith
Copyright Office Review Board