



United States Copyright Office

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April 25, 2016

St. Onge Steward Johnston & Reens LLC
Attn: Fritz Schweitzer, Jr.
986 Bedford St.
Stamford, CT 06905-5691

**Re: Second Request for Reconsideration for Refusal to Register Bug Eyes (7091)
Correspondence ID: 1-M9MD6N**

Dear Mr. Schweitzer:

The Review Board of the United States Copyright Office (the “Board”) has examined K’NEX Limited Partnership Group (“K’NEX’s”) second request for reconsideration of the Registration Program’s refusals to register a three-dimensional artwork copyright claim in the work titled “Bug Eyes (7091)” (the “Work”). After reviewing the application, the deposit copy, and the relevant correspondence in the case, along with the arguments in the second request for reconsideration, the Board affirms the Registration Program’s denial of registration of this copyright claim.

I. DESCRIPTION OF THE WORK

Bug Eyes (7091) is a three-dimensional design that is comprised of a single piece of plastic molded into the shape of a pair of eyes with eyelids. The sclera portions of the eyes are colored white. The pupil portions of the eyes are colored black, save two white triangles that appear in the upper left portion of the pupils. The lid portions of the eyes are colored with a single, solid color.

A photographic reproduction of the Work is included as Appendix A.

II. ADMINISTRATIVE RECORD

On October 11, 2012, K’NEX filed an application to register a copyright claim in a three-dimensional work titled “Bug Eyes (7091).” Specifically, K’NEX asserted a claim to copyright in “sculpture.”

In a letter dated November 13, 2013, a Copyright Office registration specialist refused to register the Work, finding that it “lacks the authorship necessary to support a copyright claim.” *See* Letter from Ivan Proctor, Registration Specialist, to Fritz Schweitzer Jr., St. Onge Steward Johnston & Reens LLC (Nov. 13, 2013). The letter stated that the Work does not possess sufficient creative authorship within the meaning of the copyright statute and settled case law to support a claim to copyright. *Id.*

In a letter dated December 10, 2013, K’NEX requested that the Office reconsider its initial refusal to register the Work. *See* Letter from Fritz Schweitzer Jr., St. Onge Steward Johnston &

Reens LLC, to U.S. Copyright Office (Dec. 10, 2013) (“First Request”). After reviewing the Work in light of the points raised in the First Request, the Office re-evaluated the claims and in a letter dated April 9, 2014, again concluded that the Work does not contain a sufficient amount of original and creative artistic or graphic authorship to support a copyright registration. See Letter from Stephanie Mason, Attorney-Advisor, to Fritz Schweitzer Jr., St. Onge Steward Johnston & Reens LLC (Apr. 9, 2014).

In a letter dated July 2, 2014, K’NEX requested that, pursuant to 37 C.F.R. § 202.5(c), the Office again reconsider its refusal to register the Work. Letter from Fritz Schweitzer Jr., St. Onge Steward Johnston & Reens LLC, to U.S. Copyright Office (July 2, 2014) (“Second Request”). In that letter, K’NEX disagreed with the Office’s conclusion that the Work, as a whole, does not include the minimum amount of creativity required to support registration under the Copyright Act. Specifically, K’NEX claimed that the selection and arrangement of the Work’s constituent elements possesses a sufficient amount of creative authorship to warrant copyright protection. In support of its claim, K’NEX asserted that it “has taken a relatively simple concept and made it into something that is both creative and highly attractive in the form of a cartoon caricature.” *Id.* at 2. K’NEX also disagreed with the Office’s view that it does not matter whether others have copied a work in determining whether the Work contains the requisite minimal amount of original authorship necessary for registration. *Id.* at 1-2.

III. DECISION

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 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 nonexistent.” *Id.* at 359.

The Office’s regulations implement the long-standing requirements of originality and creativity set forth in the Copyright Act 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”); 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”).

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.C. Cir. 1989).

A mere simplistic arrangement of non-protectable elements does not automatically demonstrate the level of creativity necessary to warrant protection. For example, the Ninth Circuit rejected a claim of copyright in a piece of jewelry where the manner in which the parties selected and arranged the work's component parts was more inevitable than creative and original. See *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971). Likewise, the Ninth Circuit held that a glass sculpture of a jellyfish consisting of clear glass, an oblong shroud, bright colors, proportion, 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) (emphasis in original).

Finally, Copyright Office registration specialists (and the Board) do not make aesthetic judgments in evaluating the copyrightability of particular works. See COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 310.2 (3d ed. 2014) (“COMPENDIUM (THIRD)”). 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); *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, the Board finds that the Work fails to satisfy the requirement of creative authorship necessary to sustain a claim to copyright.

Here, it is undisputed that the Work's constituent elements—a single piece of plastic molded into the shape of a pair of eyes with eyelids, a basic back pupil design, and a basic white sclera design—are not individually subject to copyright protection. It is true that public domain elements may satisfy the requirement for copyrightable authorship as a compilation if they are selected, coordinated, and/or arranged in a sufficiently creative manner. See COMPENDIUM (THIRD) § 312.2. Thus, although the individual components of a given work may not be copyrightable, the Copyright Office follows the principle that works should be judged in their entirety and not judged based solely on the protectability of individual elements within the work. *Atari Games Corp. v.*

Oman, 979 F.2d 242, 244-245 (D.C. Cir. 1992). Works comprised of public domain elements may be copyrightable, but only if the selection, arrangement, or modification of those elements reflects sufficient choice and authorial discretion 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. “Merely bringing together only a few standard forms or shapes with minor linear or special variations does not satisfy this requirement.” COMPENDIUM (THIRD) § 905.


The Board finds that, viewed as a whole, the selection, combination, and arrangement of the shapes and colors that comprise the Work are not sufficient to render the Work original. *See Feist*, 499 U.S. at 358. No copyright protection may be afforded to the idea of such naturally occurring features, such as eyes, or to the elements of expression that naturally follow from the idea of such features. *See Satava*, 323 F. 3d at 811. While the Board recognizes that it may be possible to create a three-dimensional rendition of an eye with eyelids that is sufficiently creative to warrant registration, we find that the design at issue does not reach that level of authorship. Specifically, we find that K’NEX’s incorporation of the lid, sclera, and pupil design elements so that they represent a pair of cartoon-like, bulging eyes with white triangles representing light glare, lacks the requisite amount of creativity in its selection, combination and arrangement to warrant copyright protection. Thus, we find 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 Feist*, 499 U.S. at 359; COMPENDIUM (THIRD) § 313.4(B).

The Board further finds that the mere fact that others have copied the Work is extrinsic to the relevant creative authorship of the Work, and has no bearing on whether the Work is copyrightable. That a work may have been copied is not a factor in the determination of whether a work can support a claim in copyright. Originality, as interpreted by the courts, means that authorship must constitute more than a trivial variation or arrangement of public domain, pre-existing, or noncopyrightable elements. *Feist*, 499 U.S. at 359. In applying this standard (and as demonstrated above), the Office examines every work submitted for registration to determine whether it contains elements, either alone or in combination, on which a copyright can be based. The Office does not assess a design’s standing in the marketplace in determining whether a work contains the requisite minimal amount of original authorship necessary for registration. *See* 17 U.S.C. § 102(b); *see also Bleistein*, 188 U.S. 239. Thus, even if accurate, the mere claim that the Work is allegedly unique and that others have copied it would not qualify the Work for copyright protection.

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 the Work. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action in this matter.

BY:



Chris Weston

Copyright Office Review Board Member

APPENDIX A

