



United States Copyright Office

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

August 31, 2016

Brent P. Johnson, Esq.
Sheridan Ross PC
1560 Broadway Suite 1200
Denver, CO 80202-5141

**Re: Second Request for Reconsideration for Refusal to Register Large KONG Sculpture;
Correspondence ID: 1-10K3R3H**

Dear Mr. Johnson:

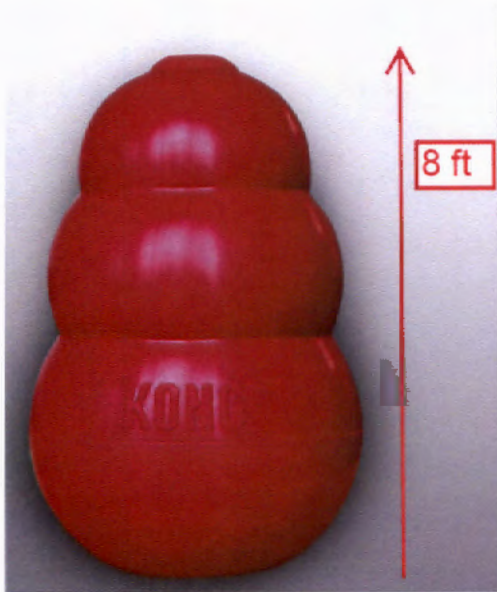
The Review Board of the United States Copyright Office (“Board”) has considered The KONG Company, LLC’s (“KONG’s”) second request for reconsideration of the Registration Program’s refusal to register a sculptural copyright claim in the work titled “Large KONG Sculpture” (“Work”). After reviewing the 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

As described by KONG in correspondence with the Copyright Office, the Work is an eight foot tall sculptural design that is formed from a single piece of red glass. The body of the Work is made up of three compressed spheres stacked one atop another, increasing in circumference from top to bottom. The word “KONG” is embossed above a lip positioned approximately at the widest point of the bottom sphere, and is followed by an ® symbol. The top of the work is capped with a “cup”-type piece.

The Office notes that the image of the Work included in the deposit copy does not match the work pictured in KONG’s second request for reconsideration. See Letter from Brent P. Johnson, Sheridan Ross PC, to U.S. Copyright Office, at 3 (June 3, 2015) (“Second Request”). The original deposit copy appears to be constructed of rubber, while in the Second Request, the work depicted in the photograph reflects light as glass does. Furthermore, the work shown in the Second Request includes an additional piece placed on top of the three spheres. Per section 504.2 of the *Compendium of U.S. Copyright Office Practices*, a registration for a work “does not cover authorship that does not appear in the deposit copy(ies), even if the applicant expressly claims that authorship in the application.” COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 504.2 (3d ed. 2014) (“COMPENDIUM (THIRD)”). Therefore, the Board considers only the work displayed in the deposit copy.

The Work as depicted in the deposit is as follows:



II. ADMINISTRATIVE RECORD

On March 27, 2013, KONG filed an application to register a copyright claim in the Work. In a July 29, 2014 letter, a Copyright Office registration specialist refused to register the claim, finding that it “lack[s] the authorship necessary to support copyright claims.” Letter from Wilbur King, Registration Specialist, to Brent Johnson, Sheridan Ross PC, at 1 (July 29, 2014).

In a letter dated October 21, 2014, KONG requested that the Office reconsider its initial refusal to register the Work. Letter from Brent P. Johnson, Sheridan Ross PC, to U.S. Copyright Office (Oct. 21, 2014) (“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 sculptural authorship to support a copyright registration.” Letter from Stephanie Mason, Attorney-Advisor, to Brent Johnson, Sheridan Ross PC, at 1 (Mar. 12, 2015).

In a letter dated June 3, 2015, KONG requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Work. *See* Second Request. KONG disagreed with the Office’s conclusion that the Work, as a whole, did not include the minimum amount of creativity required to support registration under the Copyright Act. Specifically, KONG claimed that the Work “is not comprised of three compressed spheres such that the actual appearance of the work, as a whole, is not a common geometric shape,” and that “any familiar shapes present in the work have been sufficiently manipulated to go beyond the mere display of common geometric shapes such that the work comprises a new original and creative shape.” *Id.* at 2.

Additionally, in a related matter, KONG previously applied to register a claim in copyright for a strikingly similar design. The Copyright Office rejected that application, and refused both first and second requests for reconsideration. Specifically, in 2013, the Review Board found that the earlier-filed

design (which similarly consisted of red, compressed spheres) was not sufficiently creative to warrant registration. The deposit in that matter was as follows:



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 longstanding 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.

Finally, Copyright Office registration specialists (and the Board) do not make aesthetic judgments in evaluating the copyrightability of particular works. See COMPENDIUM (THIRD) § 310.2. The attractiveness of a design, the espoused intentions of the author, the design's visual effect or appearance, its symbolism, the time and effort it took to create, or the design's commercial success in the marketplace are not factors in determining whether a design is copyrightable. See, e.g., *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

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 separable authorship necessary to sustain a claim to copyright.

First, the Board finds that the Work consists of a single shape that is not sufficiently creative to warrant copyright protection. As noted, 37 C.F.R. § 202.1(a) identifies certain elements that are not copyrightable, including "[w]ords and short phrases such as names, titles, and slogans; familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering or coloring . . ." Here, the Work is comprised of a single piece that is shaped so that it appears to have three spherical sections and a cup-type cap. KONG's description of the Work as a "depiction of a bulbous volcano" or "an animal, such as a penguin or red squirrel," Second Request at 6, does not alter this fact; the Work remains a *de minimis*

variation of familiar, public domain shapes that is not protectable under the Copyright Act and thus consistent with the above regulations, not registrable.

Even if the Board agreed with the characterization of the Work as a combination of “multiple shapes, in various sizes, and degrees of curvature that have been manipulated into a final single shape that is not preordained or an obvious arrangement of shapes,” Second Request at 5, it still fails to meet the creativity threshold set forth in *Feist*. The Board agrees with the principle that combinations of unprotectable elements may be eligible for copyright registration. To satisfy the creativity requirement, however, 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 virtually nonexistent.” *Feist*, 499 U.S. at 359; *see also Atari Games*, 888 F.2d at 883 (finding that 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). Here, even under an extremely liberal viewing, the Work, as a whole, consists of the simple arrangement of three spherical shapes, stacked atop each other from largest to smallest, capped with a cup-type attachment. Such a basic arrangement of unprotectable spherical shapes to form an ordinary design is, at best, *de minimis*, and fails to meet the threshold for copyrightable authorship. Accordingly, the Work, as a whole, lacks the requisite “creative spark” necessary for registration. *Feist*, 499 U.S. at 359; *Satava*, 323 F.3d at 811.

Additionally, the Board rejects KONG’s argument that the four sections making up the Work are not common geometric shapes, and that when combined they “create a shape that is not in the public domain.” Second Request at 4. Trivial variations on subject matter in the public domain simply do not render a work copyrightable. *See L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 487-88 (2d Cir. 1976) (affirming district court holding that there was little probability that a copyright in a plastic bank would be found valid where the plastic bank contained merely trivial variations on a cast iron bank in the public domain). Although the three balls making up the Work are not perfectly spherical, they are trivial variations on perfect spheres, and are copyrightable neither individually nor in the combination of three progressively smaller balls stacked one upon another. The cup-type attachment is also a common shape that would not be independently copyrightable.

In sum, the Board finds that both the individual elements that comprise the Work, as well as KONG’s selection, organization, and arrangement of those elements, lack the sufficient level of creativity to make them 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 copyright claim in the Work. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action in this matter.

BY: Catherine Rowland
Catherine Rowland
Copyright Office Review Board