**United States Copyright Office**
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November 28, 2017

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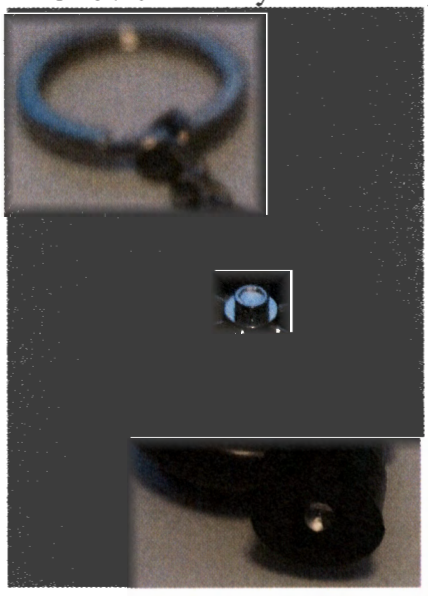
**Re: Second Request for Reconsideration for Refusal to Register Turbo Keychain Attachment; Correspondence ID: 1-20OF3JK; SR 1-3095605421**

Dear Mr. Hyra:

The Review Board of the United States Copyright Office ("Board") has considered Boostnatics, LLC ("Boostnatics") second request for reconsideration of the Registration Program's refusal to register a sculpture claim in the work titled "Turbo Keychain Attachment" ("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, depicted below, is a miniature toy version of an exhaust-driven air pump, known as a turbocharger, attached to a keyring. The turbocharger is generally made of black metal, with a silver-colored metal wheel in its center. The air outlet has an LED light in its center, and an "On/Off" button, which causes the toy to emit a "spool up" sound when turned on.



## II. Administrative Record

On February 17, 2016, Boostnatics submitted a copyright registration with claims in "sculpture, photograph" for the Work. That same day, the Office informed Boostnatics that it could register the claim in photograph, but not the sculpture claim, because "[t]he sculptural work is a useful article that is not protected by copyright law." Email from Rebecca Barker, Registration Specialist, to Clifford Hyra (Feb. 17, 2016). Boostnatics responded that the Work was not a useful article but instead "a toy model that attaches to a keychain," Email from Clifford Hyra to Rebecca Barker (Feb. 17, 2016), and specifically, "a model of a turbocharger for an automobile," Email from Clifford Hyra to Rebecca Barker (Feb. 19, 2016). The Registration Program eventually refused registration on the grounds that the Work "lack[ed] the authorship necessary to support a copyright claim" because "[t]he shrinking of the turbocharger shape to a smaller size is not enough to warrant a registration." Letter from Rebecca Barker to Clifford Hyra (Feb. 26, 2016).

Boostnatics asked the Office to reconsider its refusal to register the Work, arguing that the Work is not "a reduced-size copy of an existing object" but "[r]ather [a] toy model turbo charger design" that was sufficiently creative under the law. Letter from Clifford Hyra to U.S. Copyright Office ("First Request") (May 26, 2016) (citing *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991)). 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 is "a basic rendition of a turbo charger" and "does not contain a sufficient amount of original and creative sculptural authorship to support a copyright registration." Letter from Stephanie Mason, Attorney Advisor, to Clifford Hyra (Jan. 31, 2017).

In a letter dated April 30, 2017, Boostnatics argued that the Work is "a detailed, original turbo charger toy," that toys are copyrightable, and that "[t]he mere fact that a real-life analogue for a toy exists does not preclude registrability." Letter from Clifford Hyra to U.S. Copyright Office, 4 (Apr. 30, 2017).

## 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).

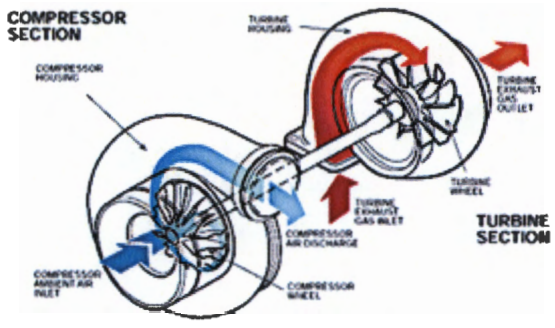
Similarly, while the Office may register a work that consists of geometric shapes, for such a work to be registrable, the "author's use of those shapes [must] result[] in a work that, as a whole, is sufficiently creative." U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 906.1 (3d ed. 2014) ("COMPENDIUM (THIRD)"); *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 reviewing the application, deposit copy, and relevant correspondence, along with the arguments in the second request for reconsideration, the Board finds that the Work fails to satisfy the requirement of creative authorship necessary to sustain a claim to copyright in sculpture.

To be sure, the fact that the Work is "a model of a turbocharger for an automobile" does not preclude it from copyright protection. Email from Clifford Hyra, to Rebecca Barker (Feb. 19, 2016); *see* Letter from Rebecca Barker, to Clifford Hyra (Feb. 26, 2016). It is well-established that toys can be eligible for copyright protection, even if they represent miniature versions of useful articles. *See* .S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 903.1 (3d ed. 2017) ("COMPENDIUM (THIRD)") (listing models and toys as types of pictorial, graphic and sculptural works eligible for copyright protection); *see also Gay Toys, Inc. v. Buddy L. Corp.*, 703 F.2d 970 (6th Cir. 1983) (finding a model toy airplane copyrightable as a sculptural work); *Lanard Toys, Ltd. v. Novelty, Inc.*, 375 Fed.Appx. 705, 710 (9th Cir. 2010) (finding "miniature, fanciful renderings of helicopters" and a toy airplane copyrightable as sculptural works).

In order to merit registration, however, a toy, like other works, must possess a sufficient amount of creativity to warrant registration. As copyright will not protect the idea of a turbocharger keychain, the Board must examine the work itself for protectable creative expression. *See* 17 U.S.C. 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, [or] concept."). Though Boostnatics alleges that the Work is "a detailed, original turbo charger toy," it does not explain how the Work is more than an uncopyrightable, slavish copy of the necessary compressor-section components of actual turbocharger. Specifically, the compressor section of an actual turbocharger includes an air inlet leading to a visible wheel, circular housing, and an air outlet surrounded by a diffusor, as depicted below[1]:




**Inside a turbocharger**

The visible elements of the Work are the same: an air inlet leading to a metal wheel, circular housing, and an air outlet with a plastic ridge that contains an LED light in the center, all

[1] *See Karim Nice, How Turbochargers Work,* https://auto.howstuffworks.com/turbo2.htm (last visited November 20, 2017).

attached to a metal keyring. Except for the addition of other functional elements (a LED light, a keyring attachment, and an On/Off switch), the Work incorporates only what is necessary to evoke this portion of an actual turbocharger.

Simply put, the Work lacks the added dash of creative authorship necessary to obtain copyright, and instead incorporates only the minimum basic elements necessary to replicate a miniature turbocharger. *See, e.g., Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258, 1261, 1270 (10th Cir. 2008) (Gorsuch, J.) (finding "completely unadorned digital replicas of Toyota vehicles in a two-dimensional space" not copyrightable because "the models . . . 'express,' no more than the depiction of the vehicles *as* vehicles" adding that "[i]f the basic design reflected in a work of art does not owe its origin to the putative copyright holder, then that person must add something original to that design, and then only the original addition may be copyrighted."); *George S. Chen, Corp. v. Cadona Intern., Inc.*, 266 Fed.Appx. 523, 524 (9th Cir. 2008) (finding uncopyrightable a dolphin wind chime ornament whose "features necessarily follow[ed] from the idea of a swimming dolphin" and where the plaintiff had not "made choices that contributed a non-trivial, original feature."); *ATC Distribution Group, Inc. v. Whatever It Takes. . .*, 402 F.3d 700, 712 (6th Cir. 2005) (finding "hand-drawn sketches of transmission parts, copied from photographs" not copyrightable because "the illustrations were intended to be as accurate as possible in reproducing parts shown in the photographs . . . a form of slavish copying that is the antithesis of originality."). In creating a miniature toy turbocharger, Boostnatics has added no elements beyond the predictable incorporation of stock features that are standard to depict turbochargers, which cannot support a copyright registration. *See Alpi International, Ltd. v. Anga Supply, LLC*, 2015 WL 2170040, *1, 4 (N.D. Cal. May 8,2015) (finding uncopyrightable animal-shaped stress reliever toys and that plaintiff "failed to identify any elements in its designs beyond the stock features that are standard to the representation of animals"); COMPENDIUM (THIRD) § 313.4(A)(stating "[a] work that is a mere copy of another work of authorship is not copyrightable," giving as an illustration "a toy model that is an exact replica of an automobile, airplane, train, or other useful article where no creative expression has been added to the existing design.").

Further, the addition of the LED light, keyring attachment, and On/Off switch do not alter the Board's opinion. Such mechanical elements are not individually protected by copyright. *See* 17 U.S.C. 101 (stating that the "mechanical" elements of a pictorial, graphic or sculptural work are not copyrightable); 2 Patry on Copyrights § 3:149 ("There is no question that mechanical functional elements [of toys] are not protected by copyright."). Moreover, "[a] claim to register a derivative work that adds only non-copyrightable elements to a prior product is not entitled to copyright registration." *Boyds Collection, Ltd. v. Bearington Collection, Inc.*, 360 F. Supp. 2d 655, 661 (M.D. Pa. 2005) (evaluating whether teddy bears wearing clothing were protectable derivative works from original teddy bears). Here, those elements are combined only as necessary to achieve a keychain that lights up and plays a "spool up" sound. Such combination is "so mechanical or routine as to require no creativity whatsoever." *Feist Publications, Inc.*, 499 U.S. at 362.

## 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 A. Smith
Copyright Office Review Board