



United States Copyright Office

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August 23, 2016

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365 Bridge Street, #3-PRO
Brooklyn, NY 11201

**Re: Second Request for Reconsideration for Refusal to Register “Fuck” Snow Globe;
Correspondence ID: 1-19YM0KE**

Dear Mr. Gentlesk:

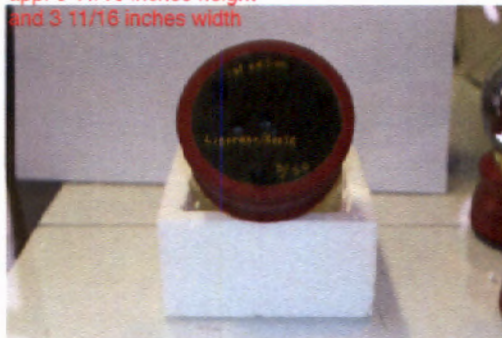
The Review Board of the United States Copyright Office (“Board”) has considered Nora Ligorano and Marshall Reese’s (“Ligorano Reese’s”) second request for reconsideration of the Registration Program’s refusal to register a sculpture claim in the work titled “Fuck” Snow Globe (the “Work”). After reviewing 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 is a snow globe with the red, printed word “Fuck” suspended on a clear stick, such that it appears to be floating. The Work is depicted below:



“Fuck” snow globe
app. 5 11/16 inches height
and 3 11/16 inches width



II. ADMINISTRATIVE RECORD

On February 13, 2015, Ligorano Reese filed an application to register a copyright claim in the Work. In a April 14, 2015, letter, a Copyright Office registration specialist refused to register the claim, finding that it “lacks the authorship necessary to support a copyright claim.” Letter from Sandra Ware, Registration Specialist, to Michael L. Gentlesk (Apr. 14, 2015).

In a letter dated July 10, 2015, Ligorano Reese requested that the Office reconsider their initial refusal to register the Work. Letter from Michael L. Gentlesk to U.S. Copyright Office (July 10, 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 is uncopyrightable because as a whole the “features are not combined in any way that differentiates them from their basic shape and design components, and so they cannot rise to the level of creativity necessary for copyright registration.” Letter from Stephanie Mason, Attorney-Advisor, to Michael L. Gentlesk. (Oct. 9, 2015).

In a letter dated January 7, 2016, Ligorano Reese requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time their refusal to register the Work. Letter from Michael L. Gentlesk, to U.S. Copyright Office (Jan. 7, 2016) (“Second Request”). In that letter, Ligorano Reese asserted, *inter alia*, that the Office should register a copyright claim in the Work because the creative decisions employed resulted in a protectable combination of common elements, because the unexpected addition of the word “FUCK” in bright red letters distinguished the Work from the “natural flow of [other] snow globes,” and because registering the claim would further the purpose of the Copyright Act in promoting science and the useful arts. Second Request at 4, 5, 7, and 8.

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).

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 careful examination, the Board finds that the Work fails to satisfy the requirement of creative authorship and thus is not copyrightable.

Here, Ligarno Reese admits that the Work’s constituent elements—a snow globe, the word “Fuck,” and the color red—are not individually subject to copyright protection. Second Request at 6-7. *See* 37 C.F.R. 202.1(a) (prohibiting registration of “[w]ords and short phrases . . . familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring.”); *see also* COMPENDIUM (THIRD) § 906.1-4 (uncopyrightable material includes common geometrical shapes such as “spheres,” “mere coloration,” and “lettering”) *id.* at § 313.4(C) (words and short phrases contain a *de minimis* amount of authorship); § 313.4(J)-(K) (discussing familiar symbols and designs and color as uncopyrightable material). The question then is whether the combination of elements is protectable under the legal standards described above.

The Board finds that, viewed as a whole, the selection, coordination, and arrangement of the red-lettered word "Fuck" in a snow globe is not sufficient to render the Work original. Creative authorship sufficient to sustain a copyright claim based on "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." *Satava*, 323 F.3d at 811. Here, the Board finds that "relatively few separate elements have been brought together" and as a result, the Work lacks sufficient creative authorship. See H.R. REP. NO. 94-1476, at 122 (1976), reprinted in U.S.C.C.A.N. at 5737 (providing examples of unprotectable combinations of elements); *Feist*, 499 U.S. at 358 (explaining that not every arrangement of elements will "trigger" copyright); COMPENDIUM (THIRD) § 312 (outlining standards for copyrightable compilations). Although the Board appreciates Ligorano Reese's statement that it is atypical for snow globes to feature provocative words such as "Fuck," it finds that this simple combination of a few basic elements is not protectable under copyright. See Second Request at 5-6.

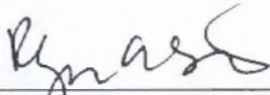
The cases Ligorano Reese cites do not suggest a different conclusion. *Enterprise Management* concerned the copyrightability of two diagrams, similar to PowerPoint slides, which each grouped 12 words or phrases using a variety of symbols in order to demonstrate the relationship between these words or phrases. *Enterprise Mgmt., Ltd., Inc. v. Warrick*, 717 F.3d 1112, 1119 (10th Cir. 2013). Similarly, *Tetris Holding* considered whether copyright protection in a video game extended to the "style, design, shape, and movement" of seven multi-colored game pieces considered in connection with the playing field itself, the use of "ghost" pieces, display of "garbage lines," changing colors, and a "game over" screen. *Tetris Holding, LLC v. Xio Interactive, Inc.*, 863 F. Supp. 2d 394, 411-13 (D.N.J. 2012). In both cases, the works at issue involved a larger amount of creative expression than the applied-for Work.

Finally, Ligorano Reese argue that registering the Work would further the Constitutional mandate to promote the "progress of science and the useful arts." U.S. Const. art. I, § 8, cl. 8. In analyzing this mandate, however, the Supreme Court has made clear that "originality is a constitutionally mandated prerequisite for copyright protection." *Feist*, 499 U.S. at 351. For the reasons explained above, the Board finds that granting registration to the Work would be inconsistent with that mandate.

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