



United States Copyright Office

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June 27, 2016

Daniel Bliss
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450 West Fourth Street
Royal Oak, MI 48067-2557

**Re: Second Request for Reconsideration for Refusal to Register Q Family;
Correspondence ID: 1-V3XJLO**

Dear Mr. Bliss:

The Review Board of the United States Copyright Office ("Board") has examined Humanetics Innovative Solutions, Inc.'s ("Humanetics") second request for reconsideration of the Registration Program's refusals to register a claim in the collection of works entitled "Q Family" ("Work"). After reviewing the application, deposit copy, and 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.

I. DESCRIPTION OF THE WORK

Q Family is a collection of four different crash test dummy specimens: one adult-sized, two juvenile-sized, and one toddler-sized. Each specimen consists of a cloth-covered torso and bottom, with attached articulated legs and arms, and a head. The head, arms, hands, legs and feet are all made of smooth composite material and are flesh-toned in color. The specimens' heads are oblong spherical shapes, with only a suggestion of the normal features of a human head.

A photographic reproduction of the Work is included below:



II. ADMINISTRATIVE RECORD

On March 21, 2014, Humanetics filed an application to register a copyright claim in a collection of three dimensional works entitled “Q Family.” Specifically, Humanetics asserted a claim to copyright in “Collection of Sculptures.” In a letter dated April 17, 2014, a Copyright Office registration specialist refused to register the Work, finding that it is a collection of useful articles that does not contain “any separable authorship needed to sustain a claim to copyright.” Letter from Allan Runge, Registration Specialist, to Daniel Bliss, Howard & Howard Attorneys PLLC (Apr. 17, 2014).

In a letter dated July 11, 2014, Humanetics requested that the Office reconsider its initial refusal to register the Work. Letter from Daniel Bliss, Howard & Howard Attorneys PLLC, to U.S. Copyright Office (July 11, 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 consists of a collection of useful articles that do not contain any authorship that is both separable and copyrightable. Letter from Stephanie Mason, Attorney-Advisor, to Daniel Bliss, Howard & Howard Attorneys PLLC (Nov. 6, 2014).

In a letter dated February 5, 2015, Humanetics 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 Daniel Bliss, Howard & Howard Attorneys PLLC, to U.S. Copyright Office (Feb. 5, 2015) (“Second Request”). In its Second Request, Humanetics disagreed with the Office’s conclusion that the Work does not include the minimum amount of separable, creative authorship required to support registration under the Copyright Act. Specifically, Humanetics claimed that the aesthetic appearances of the Work’s specimens are conceptually separable from the functional aspects of a crash test dummy and that these separable sculpted forms contain sufficient authorship to be eligible for copyright registration. *Id.* at 2.

III. DISCUSSION

A. *The Legal Framework*

1) *Useful Articles and Separability*

The copyright law does not protect useful articles, which are defined as “article[s] having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.” 17 U.S.C. § 101. Works of artistic craftsmanship that have been incorporated into a useful article may be eligible for copyright protection if they constitute pictorial, graphic, or sculptural works pursuant to 17 U.S.C. § 102(a)(5). The protection for such works is limited, however, in that it extends only “insofar as [the works’] form but not their mechanical or utilitarian aspects are concerned.” *Id.* at 101. In other words, a design incorporated into a useful article is only eligible for copyright protection to the extent that the design includes “pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.” *Id.*; see also *Esquire, Inc. v. Ringer*, 591 F.2d 796, 800 (D.C. Cir. 1978) (holding that copyright protection is not available for the “overall shape or configuration of a utilitarian article, no matter how aesthetically pleasing that shape . . . may be”).

The Office employs two tests to assess separability: (1) a test for physical separability; and (2) a test for conceptual separability. See COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 924.2 (3d ed. 2014) (“COMPENDIUM (THIRD)”); see also *Inhale, Inc. v. Starbuzz Tobacco, Inc.*, 755 F.3d 1038, 1041 n.2 (9th Cir. 2014) (finding that the Office’s interpretation of conceptual separability is entitled to deference); *Custom Chrome, Inc. v. Ringer*, 35 U.S.P.Q.2d 1714 (D.D.C. 1995) (finding that the Office’s tests for physical and conceptual separability are “a reasonable construction of the copyright statute[]” consistent with the words of the statute, existing law, and the legislature’s declared intent in enacting the statute).

To satisfy the test for physical separability, a useful article must contain pictorial, graphic, or sculptural features that can be physically separated from the article by ordinary means. See COMPENDIUM (THIRD) § 924.2(A); see also *Mazer v. Stein*, 347 U.S. 201 (1954) (sculpture of Balinese dancer eligible for copyright protection even though intended for use as lamp base); *Ted Arnold, Ltd. v. Silvercraft Co.*, 259 F. Supp. 733 (S.D.N.Y. 1966) (pencil sharpener casing shaped like a telephone was physically separable from the article’s utilitarian function).

To satisfy the test for conceptual separability, a useful article must contain pictorial, graphic, or sculptural features that can be visualized—either on paper or as a free-standing sculpture—as a work of authorship that is separate and independent from the utilitarian aspects of the article and the overall shape of the article. In other words,

... the feature must be [able to be] imagined separately and independently from the useful article without destroying the basic shape of that article. A pictorial, graphic, or sculptural feature satisfies this requirement only if the artistic feature and the useful article could both exist side by side and be perceived as fully realized, separate works—one an artistic work and the other a useful article.

COMPENDIUM (THIRD) § 924.2(B). If the feature is an integral part of the overall shape or contour of the useful article, that feature cannot be considered conceptually separable because removing it would destroy the basic shape of the article. See *id.*; see also H.R. REP. NO. 94-1476, at 55 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5668 (citing a carving on the back of a chair and a floral relief design on silver flatware as examples of conceptually separable design features).

If the useful article does not contain any features that can be physically or conceptually separated from its utilitarian function, the Office will refuse to register the claim because Congress has made it clear that copyright protection does not extend to any aspect of a useful article that cannot be separated from its functional elements. If the Office determines that the work contains one or more features that can be separated from its functional elements, the Office will examine those features to determine if they contain a sufficient amount of original authorship to warrant registration.

2) 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 a 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 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 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* 17 U.S.C. § 102(b); *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903). Thus, the fact that a work

required effort to create, or has commercial or aesthetic appeal, does not necessarily mean that the work 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 is a collection of useful articles that do not contain the requisite separable authorship necessary to sustain a claim to copyright.

A “useful article” is defined by statute as an article having “an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.” 17 U.S.C. § 101. The Board accepts the general principle that design features incorporated into utilitarian articles are not, *per se*, disqualified from copyright registration. However, as discussed above, the law and Office practices require that, to be eligible for registration, such design features must be either physically or conceptually separable from the utilitarian aspects of the article. *See* COMPENDIUM (THIRD) § 924.2.

Here, it is undisputed that the Work, a set of crash test dummies, is a collection of articles used to test passenger safety in moving vehicles. Thus, for there to be any consideration of the Work’s design features, the features must be either physically or conceptually separable from the dummies’ utilitarian functions. *See Norris Indus., Inc. v. Int’l Tel. & Tel. Corp.*, 696 F.2d 918, 922 (11th Cir. 2011); *see also Esquire*, 591 F.2d at 800.

In its Second Request, Humanetics argued that the Work’s overall aesthetic appearances are conceptually separable from the utilitarian functions of a crash test dummy. Second Request at 1-2. We find this argument to be unpersuasive. First, we find it impossible to imagine a way to conceptually separate the design features from the Work’s dummies without destroying their shape and configuration as human-based testing devices. In order for the dummies to be useful as human-based crash test dummies, the dummies *necessarily* need to be designed in the basic image of a human. In other words, attempting to conceptually separate the “aesthetic appearance” of the dummies from the dummies themselves leaves one with no underlying work to examine. As a result, the “aesthetic appearance” of the dummies cannot exist side by side with the utilitarian aspects of the dummies “and be perceived as fully realized, separate works—one an artistic work and the other a useful article.” COMPENDIUM (THIRD) § 924.2(B). Second, it is well settled that copyright protection is not available based on the “overall shape or configuration” of a utilitarian article “no matter how aesthetically pleasing that shape or configuration might be.” *See Esquire*, 591 F.2d at 800. To argue that the dummies’ aesthetic appearances are separable from the useful articles that embody these designs is to claim that the dummies’ overall shapes and forms are distinguishable from their intended function. We do not agree. In this regard, we note the fact that a useful article could have been designed differently or that a particular aesthetic feature was not required does not alter this analysis. *See* COMPENDIUM (THIRD) § 924.2(B).

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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 on this matter.

BY:



Chris Weston
Copyright Office Review Board