



United States Copyright Office

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July 11, 2017

Jennette Wiser
Epstein Drangel LLP
60 East 42nd Street, Suite 2520
New York, NY 10165

**Re: Second Request for Reconsideration for Refusal to Register Pizza Slice Pool Float;
Correspondence ID 1-1G9VCEW; SR# 1-2650731257**

Dear Ms. Wiser:

The Review Board of the United States Copyright Office (“Board”) has considered BigMouth, Inc.’s (“BigMouth”) second request for reconsideration of the Registration Program’s refusal to register a sculpture claim in the work titled “Pizza Slice Pool Float” (“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 triangle-shaped pool float with applied artwork resembling a slice of pepperoni pizza. The applied artwork includes a brown-colored crust with some darker accent coloring, an uneven red-colored line resembling pizza sauce directly under the crust, four uneven dark red circles resembling pepperoni slices with some lighter and darker accent coloring, and light-yellow-colored cheese covering remainder of the Work’s surface. The sculptural aspects of the Work include a raised portion where the crust is positioned as well as twenty-four circular indentations arranged in eight horizontal lines across the Work.

A photographic reproduction of the Work is set forth below.



II. ADMINISTRATIVE RECORD

On August 18, 2015, BigMouth filed an application to register a copyright claim in the Work. In a September 8, 2015 letter, a Copyright Office registration specialist refused to register the claim, finding that the Work lacked “the authorship necessary to support [a] copyright claim[.]” Letter from Adrienne Brown, Registration Specialist, to Kelly Slattery, BigMouth, Inc. (Sept. 8, 2015).

In a letter dated October 6, 2015, BigMouth requested that the Office reconsider its initial refusal to register the Work. Letter from Jennette Wiser, Epstein Drangel LLP, to U.S. Copyright Office (Oct. 6, 2015) (“First Request”). After reviewing the Work in light of the points raised in the First Request, the Office re-evaluated the claims and concluded that the Work is a “useful article that does not contain any authorship that is both separable and copyrightable.” While the Office did determine that the two-dimensional pizza artwork applied to the float is conceptually separable, it concluded that the Work did not contain the requisite amount of creativity to warrant copyright registration, finding that “[t]he depiction of features on the pizza, as well as their placement and arrangement, is standard and together represent an expected and garden-variety depiction of a slice of pepperoni pizza.” Letter from Jaylen S. Johnson, Attorney-Advisor, to Jennette Wiser, Epstein Drangel LLP (Feb, 25, 2016).

In a letter dated May 24, 2016, BigMouth 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 Jennette Wiser, Epstein Drangel LLP, to U.S. Copyright Office (May 24, 2016) (“Second Request”). In that letter, BigMouth’s discussion focused on the 2-D artwork and argued that BigMouth was not claiming copyright protection in the separate uncopyrightable individual elements of the Work, but rather “the author’s artistic selection, coordination and arrangement of the Work’s distinct elements contained in the Pizza Artwork.” *Id.* at 8. BigMouth maintained that although the Work “in its entirety is a familiar representation of a slice of pepperoni pizza, the . . . specific expression of a pizza slice is original and possesses, at the very least, some creative spark to sustain a copyright.” *Id.* at 7.

III. DISCUSSION

A. *The Legal Framework*

1) *Useful Articles and Separability*

Copyright does not protect useful articles as such, which are defined in the Copyright Act 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. Importantly, however, artistic features applied on or incorporated into a useful article may be eligible for copyright protection if they constitute pictorial, graphic, or sculptural works under sections 101 and 102(a)(5) of the Copyright Act. This protection is limited to the “‘pictorial, graphic, or sculptural features’ [that] ‘can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.’” *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1007 (2017) (quoting 17 U.S.C. § 101).

To assess whether an artistic feature incorporated into the design of a useful article is protected by copyright, the Office examines whether the feature “(1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated.” *Id.* at 1007; *see also* COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 924 (3d ed. 2017) (“COMPENDIUM (THIRD)”). This analysis focuses on “the extracted feature and not on any aspects of the useful article that remain after the imaginary extraction [because the] statute does not require the decisionmaker to imagine a fully functioning useful article without the artistic feature.” *Star Athletica*, 137 S. Ct. at 1013. Put another way, while useful articles as such are not copyrightable, if an artistic feature “would have been copyrightable as a standalone pictorial, graphic, or sculptural work, it is copyrightable if created first as part of a useful article.” *Star Athletica*, 137 S. Ct. at 1011; 17 U.S.C. § 113(a) (“[T]he exclusive right to reproduce a copyrighted pictorial, graphic, or sculptural work in copies under section 106 includes the right to reproduce the work in or on any kind of article, whether useful or otherwise.”); *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”).

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 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, 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.

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 requisite separable creative authorship necessary to sustain a claim to copyright.

It is undisputed that the Work, a pool float, is a useful article. 17 U.S.C. § 101; Second Request at 2. Thus, for there to be any consideration of the Work’s design features, these features must be separable from the Work’s utilitarian function as a pool float. *See Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1007 (2017). The Office and BigMouth agree that the imprinted two-dimensional artwork is separable. *See* Second Request at 1 (agreeing with the Office’s identification of the design as conceptually separable from the utilitarian aspect of the Work).¹ Although BigMouth filed a claim in “sculpture,” its Second Request indicates that the focus of BigMouth’s copyright claim is the two-dimensional artwork imprinted on the float rather than on the three-dimensional shape of the float.

Still, for a work to be eligible for copyright protection, it must “possess more than a *de minimis* quantum of creativity.” *Feist*, 499 U.S. 340, 363. Neither the Work’s constituent elements nor the compilation of those elements meet this low threshold. The individual elements—the overall triangular shape, a straight “crust” line at the top, and four “pepperoni” circles—are all merely common and familiar uncopyrightable shapes. *See* 37 C.F.R. 202.1(a); Second Request at 8 (acknowledging that copyright does not protect familiar symbols or designs and clarifying that BigMouth is not seeking copyright protection in the Work’s individual elements).

The Board recognizes that although the individual components of a given work may not be copyrightable, these components may be protectable if selected or combined “in a distinctive manner indicating some ingenuity.” *Atari Games Corp.*, 888 F.2d at 883. Here, though, the Board finds that the selection, combination, and arrangement of the Work’s design elements, noted above, is not sufficient to render the Work original. These few and unprotectable elements are combined in an entirely standard and commonplace representation of a slice of pepperoni pizza.²

¹ Although the recent Supreme Court decision in *Star Athletica* dispenses with the idea of physical separability as a distinct test, stating that “separability is a conceptual undertaking,” *see Star Athletica*, 137 S. Ct. at 1014, this change does not affect the outcome of the Board’s decision on separability.

² Additionally, in some cases there may be only one way or only a limited number of ways to express a particular idea, and in those cases, extending copyright protection to the expression would essentially grant copyright protection to the idea. *See Ellison Educ. Equip., Inc. v. Tekservices, Inc.*, 903 F. Supp. 1350, 1360 (D. Neb. 1995) (finding that plaintiff’s candy cane design was not entitled to copyright protection because “[t]here are extremely limited ways in which to depict a candy cane and still be able to express the idea. Therefore, an attempt to copyright the expression of a candy cane is essentially an attempt to copyright the idea”).

While it is conceivable that some two-dimensional artwork of a pepperoni pizza slice could be copyrightable, in this case, the depiction is a very common version – triangle slice, yellow cheese, brown crust, red sauce, and circular red pepperonis. *See Oriental Art Printing, Inc. v. Goldstar Printing Corp.*, 175 F. Supp. 2d 542, 546 (S.D.N.Y. 2001) (determining that plaintiff’s menu photographs of Chinese food dishes “are direct depictions of the most common Chinese food dishes as they appear on plates served to customers at restaurants” and therefore “lack any artistic quality”). The garden-variety representation of a pizza slice in the Work does not raise the amount of creative expression to a level warranting copyright registration. *See Feist*, 499 U.S. at 359.

Additionally, BigMouth’s Second Request provides pictorial examples of other manufacturers’ pepperoni pizza slice floats to assert “the fact that there are a countless number of ways to portray a slice of pepperoni pizza shows that the Applicant has made independent and artistic choices . . . and ‘contributed something more than a merely trivial variation[.]’” Second Request at 8 (quoting *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102-03 (2d Cir. 1951)). A comparison of the Work with the alternative pool floats does not persuade the Board that the Work contains a sufficient amount of creative authorship. First, the fact that other manufacturers create and sell pepperoni pizza pool floats does not mean that any of those works contain copyrightable authorship. The Board only reviews the work at issue, in this case BigMouth’s Pizza Slice Pool Float. Any determination of the other works’ copyrightability or comparison to the Work is unwarranted. Second, the fact that BigMouth had many stylistic choices and design alternatives open to it does not factor into the calculus of originality. It is not the variety of choices available to the author that must be evaluated, but the actual work. *See COMPENDIUM (THIRD) § 310.8.*

BigMouth further argues that the Work is similar to four other copyrightable works at issue in judicial decisions. First, BigMouth’s reference to *I.C. ex. rel. Solovsky v. Delta Galil USA*, 135 F. Supp. 3d 196 (S.D.N.Y. 2015) is misplaced. In that decision, which concerned a t-shirt design with a smiley face and “Hi” on the front and a frowning face and “bye” on the back, the court determined that while the individual elements comprising the Hi/Bye design (“the words ‘Hi’ and ‘bye,’ as well as familiar smiley and frowning faces”) were not entitled to copyright protection, the court could not determine as a matter of law that the selection and arrangement of these elements, was insufficiently creative to grant defendants’ motion to dismiss. *Id.* at 214-15. The Copyright Office, which denied registration to the t-shirt prior to the litigation, has filed a Statement of Interest with the court in this case, explaining that the overall “Hi/Bye” design at issue lacks “even the low quantum of creativity necessary to merit copyright protection.” Statement of Interest of U.S. Copyright Office at 18, *I.C. ex. rel. Solovsky v. Delta Galil USA*, No. 1:14-cv-07289-GHW (S.D.N.Y. Jul. 5, 2016). Specifically, the “Hi/Bye” design fails to select, coordinate, or arrange its unprotectable shapes, letters, and symbols in more than a simplistic manner. *Id.* The Statement of Interest maintains that the court should give this conclusion deference because it is both reasonable and persuasive. *Id.* at 15. Additionally, the Office notes that the standard to survive a motion to dismiss, as was the posture in *I.C. ex. rel. Solovsky*, is lower than that to establish copyright infringement, which includes proving ownership of a valid copyright, and is not analogous to a final judicial determination on the merits. *See Feist*, 499 U.S. at 361.

Second, BigMouth’s discussion of *Blehem v. Jacobs*, 792 F.3d 1193 (10th Cir. 2012) is also unconvincing. While validity of the stick figure drawings’ copyrights was not disputed, the Tenth Circuit analyzed which aspects of the works were copyrightable and which were not. *Id.* It pointed out that although the idea of a cartoon figure performing certain actions or the figure’s common anatomical features were not protectable, plaintiff’s drawings were “more nuanced than a child’s rudimentary doodling” noting the “rounded, half-moon smile that takes up a substantial portion of the face,” the omission of “any other facial features,” “detached head, hovering above the body,” head and feet that are disproportional to the body, among several other “particular stylistic choices.” *Id.* at 1204–05. The Board fails to see similar “unique expression” in the Work. *Id.* Furthermore, the distinctive stick figures at issue in *Blehem* were arranged in a variety of positions, such as holding a birthday cake, catching a Frisbee, and skateboarding, while the Work is the most basic portrayal of a slice of pepperoni pizza viewed from the top. *Id.* at 1204.

Third, BigMouth cites *Baby Buddies, Inc. v. Toys R Us, Inc.*, 611 F.3d 1308 (11th Cir. 2010) for the premise that while depictions of certain items, such as the teddy bear figurine attached to a pacifier at issue in the case, share the same unprotectable general features, “copyright protection extends to the author’s particularized expression” of those features. Second Request at 6. While copyrightability was not at issue in *Baby Buddies*, the Court’s copyright infringement examination focused on the “particular ways in which [the] general features or ideas [were] expressed” in the two works. *Baby Buddies, Inc.*, 611 F.3d at 1315, 1318. As discussed above, the Board’s examination of the particular ways in which the general features of a slice of pepperoni pizza are expressed in the Work only lead it to see a standard and commonplace depiction of pizza. Similarly to the unprotectable bow attached to the teddy bear figurine in *Baby Buddies*, the Work “is very simple . . . commonplace and not original” to BigMouth. *Id.* at 1319–20. Again, it is conceivable that a 2-D depiction of pizza can be copyrightable, but that level of creativity is not found in the Work.

Fourth, BigMouth cites *Stockart.com, LLC v. Caraustar Custom Packaging Grp.*, 240 F.R.D. 195 (D. Md. 2006) for the mere fact that the work at issue, an image of a pizza man holding a hot pizza, was a registered work. *See id.* at 197 n.1. Copyrightability was not at issue in the case, and there was no analysis of the work. As discussed below, the Office does not compare works that have been previously registered.

Finally, regarding BigMouth’s argument that the Office has registered works similar to the one in contention, the Office has a policy of not comparing works that have been previously registered or refused registration. BigMouth’s reference to the Office’s registration of Giant-Sized Fun in the Sun Beach Blanket: Pizza Blanket (VA0001995170), Giant-Sized Fun in the Sun Beach Blanket: Burger (VA0001995169), The Gigantic Donut Pool Float (VA 1-931-220), Giant Popcorn Pool Float (VA0001997462), and Pass the Pizza Flying Food (VA0002000102) (“Prior Registrations”) does not compel the Board to register this Work. Each claim to copyright is examined on its own merits, with the Office applying uniform standards of copyrightability throughout the examination process. Because copyrightability involves a mixed question of law and fact, differences between any two works can lead to different results. Thus, the fact that an individual registration specialist previously registered an arguably similar work does not bar the Board from reaching an independent judgment regarding the creativity of the Work at issue. *See*

COMPENDIUM (THIRD) § 602.4(C) (“When examining a claim to copyright, the U.S. Copyright Office generally does not compare deposit[s] to determine whether the work for which registration is sought is substantially similar to another work.”); *see also Homer Laughlin China Co. v. Oman*, No. 90-3160, 1991 WL 154540, at *2 (D.D.C. July 30, 1991) (stating that court was not aware of “any authority which provides that the Register must compare works when determining whether a submission is copyrightable.”); *accord, Coach, Inc. v. Peters*, 386 F. Supp.2d 495, 499 (S.D.N.Y. 2005) (indicating the Office “does not compare works that have gone through the registration process”). However, upon review of BigMouth’s argument and its findings regarding the Work discussed above, the Board is referring three of the Prior Registrations, specifically Giant-Sized Fun in the Sun Beach Blanket: Pizza Blanket (VA0001995170), The Gigantic Donut Pool Float (VA 1-931-220), and Pass the Pizza Flying Food (VA0002000102), to the Copyright Office’s Registration program to review for consistency with the Board’s current decision. The Registration Program will be in contact regarding the results of that referral.

Overall, the Board finds that the Work is not copyrightable. The level of creative authorship involved in its configuration of elements is, at best, *de minimis*, and too trivial to enable copyright registration. *See* COMPENDIUM (THIRD § 313.4(B)).

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:



Chris Weston
Copyright Office Review Board