United States Copyright Office
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September 20, 2013

Sheridan Ross P.C.
Attn: Brent P. Johnson
1560 Broadway, Suite 1200
Denver, CO 80202-5141

Re: Kong Design
Correspondence ID: 1-EHBRLD

Dear Mr. Johnson:

The Review Board of the United States Copyright Office (the "Board") is in receipt of your second request for reconsideration of the Registration Program's refusal to register the work entitled: *Kong Design*. You submitted this request on behalf of your client, The KONG Company, LLC, on April 8, 2013.

The Board has examined the application, the deposit copies, and all of the correspondence in this case. After careful consideration of the arguments in your second request for reconsideration, the Board affirms the Registration Program's denial of registration of this copyright claim. The Board's reasoning is set forth below. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action on this matter.

I. DESCRIPTION OF THE WORK

Kong Design (the "Work") is a dog toy that consists of a single piece of rubber. The rubber is shaped so that it resembles three spherical shapes of different sizes stacked on top of one another in a large, medium, small ascending size order. A circular, hollow opening runs through the center of the Work. The below image is a photographic reproduction of the Work from the deposit materials:

II. ADMINISTRATIVE RECORD

On June 4, 2012, the United States Copyright Office (the "Office") issued a letter notifying The KONG Company, LLC (the "Applicant") that it had refused registration of the above mentioned Work. *Letter from Registration Specialist, Beth Garner, to Brent Johnson* (June 4, 2012). In its letter, the Office stated that it could not register the Work because it lacks the authorship necessary to support a copyright claim. *Id.*

In a letter dated August 31, 2012, you requested that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusal to register the Work. *Letter from Brent Johnson to Copyright RAC Division* (August 31, 2012) ("First Request"). Upon reviewing the Work in light of the points raised in your letter, the Office concluded that the Work "does not contain a sufficient amount of original and creative artistic or sculptural authorship upon which to support a copyright" and again refused registration. *Letter from Attorney-Advisor, Stephanie Mason, to Brent Johnson* (January 10, 2013).

Finally, in a letter dated April 4, 2013, you 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 Brent Johnson to Copyright R&P Division* (April 4, 2013) ("Second Request"). In arguing that the Office improperly refused registration, you claim the Work consists of a "newly created shape" and includes at least the minimum amount of creativity required to support registration under the standard for originality set forth in *Feist Publications v. Rural Telephone Service Co*, 499 U.S. 340 (1991). *Second Request* at 2-3. Specifically, you claim that the Work, as a whole, possesses a sufficient amount of creative authorship to warrant registration under the Copyright Act. *Id.* at 3-4. In addition to *Feist*, your argument references several cases that demonstrate works comprised of otherwise unprotectable elements are acceptable for copyright protection if the selection and arrangement of their elements, considered as a whole, satisfies the requisite level of creative authorship. *Id.* at 3-5.

III. DECISION

A. *The Legal Framework*

All copyrightable works must qualify as "original works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a). As used with respect to copyright, the term "original" consists of two components: independent creation and sufficient creativity. *See Feist*, 499 U.S. at 345. 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.* While only a modicum of creativity is necessary to establish the requisite level, the Supreme Court has ruled that some works (such as the telephone directory at issue in *Feist*) fail to meet this 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 nonexistent." *Id.* at 359.

The Office's regulations implement the long-standing requirements of originality and creativity set forth in the law and, subsequently, the *Feist* decision. *See* 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"); *see also* 37 C.F.R. § 202.10(a) (stating "[i]n order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form").

Of course, 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 grade. *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"). Ultimately, the determination of copyrightability in the combination of standard design elements rests 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. D.C. 1989).

To be clear, the mere simplistic arrangement of unprotectable elements does not automatically establish the level of creativity necessary to warrant protection. For example, the Eighth Circuit upheld the Copyright Office's refusal to register a simple logo consisting of four angled lines which formed an arrow and the word "Arrows" in a cursive script below the arrow. *See John Muller & Co., Inc. v. NY Arrows Soccer Team, Inc. et. al.*, 802 F.2d 989 (8th Cir. 1986). Likewise, the Ninth Circuit held that a glass sculpture of a jellyfish that consisted of elements including clear glass, an oblong shroud, bright colors, proportion, 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 court's language in *Satava* is particularly instructional:

> [i]t 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) (emphasis in original).

Finally, Copyright Office Registration Specialists (and the Board, as well) do not make aesthetic judgments in evaluating the copyrightability of particular works. They are not influenced by the attractiveness of a design, the espoused intentions of the author, the design's uniqueness, its visual effect or appearance, its symbolism, the time and effort it took to create, or its commercial success in the marketplace. *See* 17 U.S.C. § 102(b); *see also Bleistein v. Donaldson*, 188 U.S. 239 (1903). The fact that a work consists of a unique or distinctive shape

or style for purposes of aesthetic appeal does not automatically mean that the work, as a whole, 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 *Kong Design* fails to satisfy the requirement of creative authorship.

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. These elements include: "[w]ords and short phrases such as names, titles, slogans; familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering, or coloring." *Id.* Here, the Applicant's Work is comprised of a single piece of rubber that is shaped so that it appears to have three spherical sections. Whether described as a bell-shaped column, a snowman, a beehive, stacked spheres or some other characterization, the fact remains that the shape embodied in the Work is a trivial variation of a familiar, public domain shape that is prohibited from registration under the Copyright Act. The mere fact that the Work has a tunnel running through its center is not sufficient to make the work eligible for copyright protection. *See Feist*, 499 U.S. at 359 (holding works of *de minimis* authorship are not eligible for copyright protection). Thus, consistent with the above regulations, we conclude the Work is unregisterable.

Second, even if the Board were to agree with your characterization of the Work as a combination of shapes and elements, we would find that, considered as a whole, it fails to meet the creativity threshold set forth in *Feist*. 499 U.S. at 359. As explained, the Board accepts the principle that combinations of unprotectable elements may be eligible for copyright registration. However, in order to be accepted, 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 nonexistent." *Id.*; *see also Atari Games,* 888 F.2d at 883 (finding 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 a three spherical shapes, stacked atop each other from smallest to largest, with a tunnel carved through their center. Such a basic arrangement of unprotectable sphere shapes to form an ordinary design is, at best, *de minimis*, and fails to meet the threshold for copyrightable authorship. *Feist,* 499 U.S. at 359; *see also Atari Games,* 888 F.2d at 883. Accordingly, even if we were to consider the Work as a combination of individual elements, we would conclude that 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.

Finally, your argument that the Work is a newly created shape does not add to your claim of sufficient creativity. Nor do your exhibits identifying the Work as "the world's most famous dog toy." *Second Request* at Exhibit 5. As discussed above, the Board does not assess novelty, uniqueness, or commercial success in the marketplace in determining whether a work contains the requisite minimal amount of original authorship necessary for registration. *See* 17 U.S.C. § 102(b); *see also Bleistein*, 188 U.S. 239. Thus, even if accurate, the fact that the

Work's shape is unique in its specific dimensions and that the Work is a highly successful dog toy design would not qualify it as copyrightable.

In sum, the Board finds that both the individual elements that comprise the Work, as well as the Applicant'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 work entitled: *Kong Design*. This decision constitutes final agency action on this matter. 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

BY: _____
William J. Roberts, Jr.
Copyright Office Review Board