



**United States Copyright Office**

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**Re: Second Request for Reconsideration for Refusal to Register Bulletproof shot glass with bullet; Correspondence ID: 1-2U9R26U; SR # 1-5337567465**

Dear Mr. Omanski:

The Review Board of the United States Copyright Office (“Board”) has considered BenShot LLC’s (“BenShot”) second request for reconsideration of the Registration Program’s refusal to register a sculpture claim in the work titled “Bulletproof shot glass with bullet” (“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 shot glass embedded with a .308 caliber bullet. The shot glass is a standard shaped clear glass receptacle. The bullet is positioned within a cavity of warped glass in the outer surface of the shot glass. A reproduction of the Work is set forth below.



## II. ADMINISTRATIVE RECORD

On July 3, 2017, BenShot filed an application to register a copyright claim in the Work. In a July 5, 2017 letter, a Copyright Office registration specialist refused to register the claim, because it was a useful article lacking any copyrightable authorship. Letter from B. Garner, Registration Specialist, to John Omanski (July 5, 2017).

In a letter dated August 1, 2017, BenShot requested that the Office reconsider its initial refusal to register the Work. Letter from John Omanski to U.S. Copyright Office (August 1, 2017) (“First Request”). Specifically, BenShot argued the “bullet and external altered glass medium immediately surrounding the bullet serve no utilitarian function” and that “[t]hese features purely serve artistic and creative purposes.” *Id.* at 2. BenShot also stated that “these ornamental features can be readily perceived, or imagined, separately and independently from the useful article.” *Id.* After reviewing the Work in light of these points raised, the Office again concluded that the Work was not copyrightable because it was a useful article that contained no separable, copyrightable features. Letter from Stephanie Mason, Attorney-Advisor, to John Omanski (January 9, 2018). The letter explained that while the bullet and the altered glass “could be identified separately from” and were “capable of existing independently of the utilitarian aspects of the shot glass,” these features nonetheless did not constitute “copyrightable subject matter.” *Id.* at 4. The Office specified that the separable features did not “contain more than a *de minimis* amount of creative expression.” *Id.*

In a letter dated March 12, 2018 BenShot requested that the Office reconsider for a second time its refusal to register the Work. Letter from John Omanski, to U.S. Copyright Office (March 12, 2018) (“Second Request”). In its request, BenShot cited to the “extremely low” standard for creativity set by the Supreme Court in *Feist*. *Id.* at 6 (citing *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991)). BenShot stated that “the glass cavity is a complex, unique, and creative form, and the combination of such cavity and a bullet shape are combined in [a] way to meet the required minimum threshold of creativity.” Second Request at 6. While BenShot asserted that the number of competitors copying the Work was indicative of its copyrightability, BenShot also stated that it “is *one of the first* to do such designs.” *Id.* at 6-7 (emphasis added).

### III. DISCUSSION

#### A. *The Legal Framework*

##### 1) *Distinction Between Ideas and Expression*

Section 102(b) of the Copyright Act provides that copyright protection for expressive works does not extend to “any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” 17 U.S.C. § 102(b). Section 102(b) codifies the longstanding principle, known as the idea-expression dichotomy, that copyright law protects the original expression of ideas, but not the underlying ideas themselves. The Supreme Court in 1879 held that the copyright in a book describing a bookkeeping system, with blank forms and ruled lines and headings, did not give the copyright owner the right to prevent others from using the bookkeeping system described nor “the exclusive right to make, sell, and use account-books prepared upon the plan set forth in such book.” *Baker v. Selden*, 101 U.S. 99, 102–04 (1879).

Though the Office is permitted to register a sufficiently original artistic description, explanation, or illustration of an idea, procedure, process, system, method of operation, concept, principle, or discovery, *see* H.R. Rep. No. 94–1476, at 56 (1976), “the registration would be limited to the copyrightable literary, musical, graphic, or artistic aspects of the work . . .” COMPENDIUM (THIRD) § 313.3(A). This principle is manifested in the Office’s regulations, which bar copyright protection for “[i]deas, plans, methods, systems, or devices, as distinguished from the particular manner in which they are expressed or described in a writing.” 37 C.F.R. § 202.1(b). Originality springs from independent creation, not from discovering a yet-unknown principle. *See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347 (1991) (“[O]ne who discovers a fact is not its maker or originator. The discoverer merely finds and records.”).

Copyright’s merger doctrine, which states that idea and expression merge together when the expression cannot be separated from the idea, is a closely related principle that bars copyrightability of certain works. *See Baker*, 101 U.S. at 103 (explaining that if the “art” that a book “teaches cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the public”); *CCC Info. Servs., Inc. v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61, 68 (2d Cir. 1994) (“[W]hen the expression is essential to the statement of the idea, the expression also will be unprotected, so as to insure free public access to the discussion of the idea.”).

##### 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, Copyright Office registration specialists (and the Board) 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); *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 necessarily mean that the work, as a whole, constitutes a copyrightable work of art.

### ***B. Analysis of the Work***

After careful examination, the Board finds that the Work does not contain the authorship necessary to sustain a claim for copyright.

Here, BenShot asserts a copyright claim in a shot glass crafted to look as though a bullet was shot at the glass, but was unable to pierce its side. The Board agrees with the Registration Specialist that while, overall, the shot glass is a useful article, there are separable ornamental features of the Work, namely, the bullet and the warped glass into which the bullet is placed.

These separable features, however, do not rise to the level of creativity necessary for copyright registration. To begin with, copyright protection does not extend to any idea or concept “regardless of the form in which it is... illustrated, or embodied in [a] work.” 17 U.S.C. § 102(b). While the Work reflects what some might understand to be a clever visual pun—a “shot” glass being “shot” by a bullet—the fact that the glass may reflect a pun is not in and of itself copyrightable. The Office accordingly does not consider the pun when assessing the Work’s creativity. Moreover, there appear to be a limited number of ways to express the visual pun—the bullet necessarily needs to be placed on the outside surface of the glass, and the glass needs to be deformed in a manner that holds the bullet while retaining its utility as a shot glass—in which case principles of merger would limit the ability to claim copyright protection. *See Yankee Candle Co. v. The Bridgewater Candle Co.*, 259 F.3d 25 (1st Cir. 2001).<sup>1</sup>

Separate and apart from merger considerations, however, the Office concludes that the separable ornamental features identified by BenShot are not sufficiently creative to warrant copyright protection. *See Feist Publ’ns*, 499 U.S. at 345. BenShot notes that the cavity opening in the glass has an “asymmetrical overall shape, multiple asymmetries with respect [to] the opening, and off center extension shape origination and orientation.” Second Request at 4. BenShot further states that the cavity does not simply conform to the contours of the bullet, but rather the cavity is more “bulbous” than the bullet, and when the bullet is placed in the cavity there remain significant “airgaps” between the bullet and the glass. Second Request at 4.

Notably, BenShot states that the bullet itself is a standard .308 caliber bullet (First Request at 2), a common, uncopyrightable shape. Moreover, the Board finds that neither the expression found in the warping of the glass, nor the placement of the bullet in the cavity rises to the modicum of creativity necessary for copyrightable expression. *See Feist*, 499 U.S. at 362. The shape of the cavity, though not perfectly symmetrical, essentially follows the shape of the bullet. And while the bullet is placed at an angle, the authorial discretion there is so minor that

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<sup>1</sup> BenShot’s claim that the Work “has also been extensively pirated by competitors” is irrelevant to the copyrightability question. Second Request at 6. Alleged or actual copying is not evidence of copyrightability, and of course, anyone is free to copy an unprotectable idea. Indeed, the number of independent manufacturers creating shot glasses that appear nearly identical to the Work suggests that the features of the work are largely dictated by the idea of a shot glass that was shot with a bullet. A cursory Google search revealed no substantial variations on this idea.

the “creative spark is utterly lacking or trivial,” *Feist*, 499 U.S. at 359. The Office accordingly concludes that the arrangement of the Work’s separable features fails to meet the minimum standard of creativity. The Office finds that the creative authorship in this configuration of separable elements is *de minimis* and, thus, too trivial to allow for copyright registration.

#### 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.



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**U.S. Copyright Office Review Board**

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and Director, U.S. Copyright Office

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