



January 19, 2020

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**Re: Second Request for Reconsideration for Refusal to Register Core Kitchen
(Correspondence ID 1-3FRN0PY; SR# 1-6822248641)**

Dear Mr. Miro:

The Review Board of the United States Copyright Office (“Board”) has considered Brumis Imports, Inc.” (“Brumis’s”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork clam in the work titled “Core Kitchen” (“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 two-dimensional graphical design consisting of the words “core kitchen,” with the “O” in “core” shaped into a simple abstraction of a spoon. The letters and spoon are black. The work is depicted as follows:



II. ADMINISTRATIVE RECORD

On August 1, 2018, Brumis filed an application to register the Work. A Copyright Office Registration Specialist refused to register the claim for the Work, finding that it “lacks the authorship necessary to support a copyright claim.” Initial Letter Refusing Registration from U.S. Copyright Office to Douglas A. Miro, Amster, Rothstein & Ebenstein LLP (Mar.7, 2019).

Brumis subsequently requested that the Office reconsider its initial refusal to register the Work. Letter from Douglas A. Miro to U.S. Copyright Office (June 6, 2019) (“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 “coordination and arrangement of the component elements in the Work [are] insufficiently creative to support a claim in copyright.” Refusal of First Request for Reconsideration from U.S. Copyright Office to Douglas A. Miro, at 3 (Oct. 25, 2019) (“First Request Refusal”).

In response, Brumis 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 Douglas A. Miro, to U.S. Copyright Office (Jan. 21, 2020) (“Second Request”). Brumis contends that “the words CORE KITCHEN in combination with a stylized spoon replacing the ‘O’ in CORE (especially when the shape of the O/Spoon was altered from the standard) is [sic] clearly sufficiently original to meet the low threshold for copyright protection.” *Id.* at 3.

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, “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 Copyright 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).

Similarly, 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." U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 906.1 (3d ed. 2017) ("COMPENDIUM (THIRD)"); *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 careful examination and analysis, the Board finds that the Work does not contain the necessary authorship to sustain a claim to copyright.

Both the Work's individual elements and the Work as a whole fail to demonstrate copyrightable authorship. The Work consists of a short phrase and a common, familiar shape (the spoon). Neither element is protectable by copyright. 37 C.F.R. § 202.1(a) (noting that copyright registration cannot be obtained for "[w]ords and short phrases such as names, titles, and slogans; familiar symbols or designs; [or] mere variations of typographic ornamentation, lettering or coloring"); COMPENDIUM (THIRD) § 906.2. While copyright law can protect creative designs on flatware in some cases, *see Godinger Silver Art Co. v. Int'l Silver Co.*, No. 95 Civ. 9199 (LMM), 1995 U.S. Dist. LEXIS 17696, at *8 (S.D.N.Y. 1995), the spoon here has no designs or flourishes attributable to the author. Common and familiar designs, such as a spoon,

are available for all designers to use, and thus not copyrightable. Therefore, the Board finds that the component parts of the Work are not sufficiently creative to support registration.

Additionally, viewed as a whole, the Board finds that the selection, coordination, and arrangement of the elements are insufficient to render the Work eligible for copyright protection. Merely combining two independently un-protectable ingredients—the phrase “core kitchen” and a spoon—does not establish creativity if the combination is “simplistic, obvious and expected.” COMPENDIUM (THIRD) § 905. Positioning familiar designs within a larger common shape, without even minor linear or spatial variations, is a basic, garden-variety configuration. Further, using a spoon in place of an “O” does not elevate an otherwise common design to the level of creativity required for registration. *See id.* §§ 913.1, 1006.2.

Brumis cites four unrelated district court decisions to support its claim for copyrightability. Second Request at 2-3. The Office, however, considers each work submitted for copyright registration on its own merits in accordance with the statute and relevant legal principles as cited above. Differences between any two works thus can lead to different results. *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 Civ. 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 (indicating the Office “does not compare works that have gone through the registration process”).

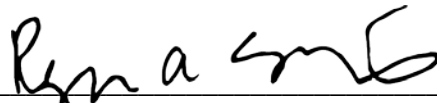
In any event, each of the works in Brumis’s cited cases is distinguishable from the Work here. In *Odegard, Inc. v. Costikyan Classic Carpets, Inc.*, the court analyzed a fabric design of “free-form, eight-pointed motifs” arranged “so as to leave considerable negative space,” a design very different than the Work. 963 F. Supp. 1328, 1335 (S.D.N.Y. 1997). The works in other cited cases also are significantly different than the Work.¹ *Fischer v. Forrest*, 2017 U.S. Dist. LEXIS 109682 (S.D.N.Y. July 14, 2017) (assessing a brochure with five questions and additional artwork and text such as “Are you tired of your spouse making you sleep in the garage after using Butyric Anhydride?”); *Prince Group, Inc. v. MTS Prods.*, 967 F. Supp. 121 (S.D.N.Y. 1997) (involving a design with polka dots that were “irregularly shaped,” shaded with “a crescent of white around half of the perimeter of each of the dots which is different from the standard uniformly colored polka dot, and they consist of several different colors,” and arranged in “imperfect and conflicting diagonal lines at varying distances from each other giving the appearance of randomness.”).

¹ Brumis also cites *Solovsky v. Delta Galil USA*, 135 F. Supp. 3d 196 (S.D.N.Y. 2015) (involving a hand-drawn smiley face and the word ‘hi’ on the front of a shirt, and a hand-drawn frowning face and the word ‘bye’ on the back), but the Copyright Office does not agree that the design at issue in that case is in fact creative. The Copyright Office refused to register the work and has intervened to contest the sufficiency of its creativity. *See* Statement of Interest on Behalf of the U.S. Copyright Office at 11–16, *I.C. ex rel. Solovsky v. Delta Galil USA*, No. 14-cv-07289, ECF No. 101 (S.D.N.Y. July 5, 2016).

The Work, in sum, is a simple word with one simple shape as a substitute for the letter “o.” There is no artwork, additional shapes, or other elements that could elevate the Work over the creativity threshold. The Work, therefore, does not have sufficient creativity to warrant 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.



U.S. Copyright Office Review Board

Regan A. Smith, General Counsel and

Associate Register of Copyrights

Catherine Zaller Rowland, Associate Register of

Copyrights and Director, Public Information and

Education

Kimberley Isbell, Deputy Director of Policy and

International Affairs