United States Copyright Office
Library of Congress · 101 Independence Avenue SE · Washington, DC 20559-6000 · www.copyright.gov

September 27, 2016

Wesley Scott Ashton
8549 Blackfoot Court
Lorton, VA 22079

Re: Second Request for Reconsideration for Refusal to Register People Pleaser; Correspondence ID: 1-IQP1Y7

Dear Mr. Ashton:

The Review Board of the United States Copyright Office ("Board") has considered your second request for reconsideration of the Registration Program's refusal to register a text claim in the work titled "People Pleaser" ("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 in the text of the Work.

Although the Work is not copyrightable as a literary work, the two-dimensional artwork elements of the Work remain copyrightable. A certificate of registration for People Pleaser as a work of two-dimensional artwork will be mailed to you separately.

I. DESCRIPTION OF THE WORK

The Work consists of various words and images that have been applied to the surface of a mug. The words "People Pleaser in Recovery" appear on the exterior surface of the mug in red print. This exterior surface also contains four drawings: A yellow flower with twelve irregularly-shaped petals and three butterflies with yellow wings. An uneven and lopsided red stripe has been applied to the lip of the mug. On the handle there is a red stick-figure drawing that appears to be a lizard. The word "Refill" appears on the interior bottom surface of the mug. The exterior bottom of the mug features a drawing of a human hand with the middle finger extended.

Reproductions of the Work are included as Appendix A.

II. ADMINISTRATIVE RECORD

On March 19, 2012, you filed an application to register a copyright claim in the Work. The application claimed copyright registration as two-dimensional artwork and as text but did not claim a copyright interest in the compilation of text and artwork. In a July 3,

2013 letter, a Copyright Office registration refused to register the claim, finding that "it lacks the authorship necessary to support a copyright claim." Letter from Beth Garner, Registration Specialist, to Wesley Scott Ashton (July 3, 2013). The letter explained that you had been informed that the Work could be registered if you agreed to remove the claim for copyright in the text. After you declined to remove this portion from the claim, the Office issued a letter rejecting the claim completely. *Id.*

In a letter dated September 20, 2013, you requested that the Office reconsider its initial refusal to register the Work. Letter from Wesley Scott Ashton to U.S. Copyright Office (Sept. 20, 2013) ("First Request"). After reviewing the Work in light of the points raised in the First Request, the Office reevaluated the claims and offered to register a claim in "2-D artwork," but again refused to register a copyright claim in the text because it "does not contain a sufficient amount of original and creative authorship to support a copyright registration." Letter from Stephanie Mason, Attorney-Advisor, to Wesley Scott Ashton (January 9, 2014).

In a letter dated April 4, 2014 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 Wesley Scott Ashton to Copyright Office (Apr. 4, 2014) ("Second Request"). In that letter, you contended that the textual elements of the work consist of the phrase "People Pleaser in Recovery," a pictogram of a human hand with the middle finger extended, and the word "Refill." Taken together, you argued, these elements constitute a three line poem that "manifests substantially more than the requisite amount of creativity to merit copyright protection as text." *Id.* at 5. You further contended that the physical arrangement of these elements on the mug—with the phrase "People Pleaser in Recovery" placed on the side, the hand illustration placed on the bottom, and the word "Refill" placed inside the cup—is "highly original" and "possesses the necessary requisite degree of creativity to render the text copyrightable." *Id.* at 7. You concluded your letter with a request that the Office register the Work both as a literary work and as a work of two-dimensional art. *Id.* at 8.

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, 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. *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, e.g.*, *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

B. *Analysis of the Work*

Because you seek to register the Work both as a literary work and as a work of two-dimensional art, *see* Second Request, at 8, the Board has evaluated both aspects of the Work. You did not apply for the Work to be registered as a compilation of text and pictorial elements, so the Board did not evaluate it as such. When the Office initially informed you that it could register the Work only if you disclaimed the uncopyrightable text, you declined, leaving the Office with no option but to refuse the entire Work. *See* Letter from Beth Garner, Registration Specialist, to Wesley Scott Ashton (July 3, 2013). Your Second Request, despite its arguments being aimed exclusively at the copyrightability of the text in the Work, concludes with a request that the Office "grant registration of copyright in both the artwork and text of the People Pleaser work." Second Request, at 8. Your Second Request does not insist, as you did earlier, in an "all or nothing" registration, so the Board has determined to register the two-dimensional artwork but not the text in the Work.

After carefully examining the Work and applying the legal standards discussed above, the Board finds that the individual textual elements of the Work and the selection, coordination, and arrangement of those elements fail to satisfy the requirement of creative authorship necessary to sustain a claim to copyright in text.

1. The Board finds that none of the Work's constituent textual elements, considered individually, is sufficiently creative to warrant protection. As noted above, the Office's regulations establish that elements such as "[w]ords and short phrases" and "familiar symbols" are not copyrightable. 37 C.F.R. § 202.1(a). "Refill" is merely a single word, "People Pleaser in Recovery" is merely a short declarative phrase, and the lettering of these elements is merely a variation of typographic ornamentation.

As for the pictogram that appears on the outside bottom of the mug, your argument that it constitutes a literary work, even if correct, does not persuade the Board that it is individually copyrightable. To the degree the pictogram is considered an expressive symbol, and thus a literary work, *see* Second Request, at 3, the content of the expression is certainly *de minimis*. Thus, the Board concludes that none of these constituent elements qualify for registration under the Copyright Act.

2. You have further contended that these three elements form a literary work consisting of the phrase "People Pleaser in Recovery. [PICTOGRAM.] Refill." Second Request, at 5. The Copyright Act defines a literary work as a work "expressed in words, numbers or other verbal or numerical symbols or indicia." 17 U.S.C. § 101. The Board finds that, even assuming these three elements could qualify as a literary work—which is doubtful—taken a whole they fail to meet the creativity threshold set forth in *Feist* for a work of authorship of any kind, literary or otherwise. *See* 499 U.S. at 359.

As discussed above, a combination of unprotectable elements may be eligible for copyright protection if the elements are "selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." 17 U.S.C. § 101. The textual elements identified in the Second Request do not meet this requirement. You locate the creativity of this arrangement in the reaction of an observer to being "flashed" the middle finger, and the juxtaposition of this symbol with the phrase "People Pleaser in Recovery." Second Request, at 6-7. There is, of course, nothing inherently original about placing text or symbols on a mug, and the simplistic relation of the elements to one another in the Work does not transform this arrangement into something copyrightable. Moreover, any effect that these elements are intended to create or actually do create in an observer is wholly irrelevant to the intrinsic creativity of the Work itself. Crediting such an effect as an element in the copyrightability of the Work would require the Board to undertake the sort of aesthetic evaluation that is outside of the proper criteria for determining originality. *See* COMPENDIUM (THIRD) § 310.2.

3. The two-dimensional artwork elements of the Work, however, do constitute copyrightable authorship, and may be registered. This registration encompasses the yellow flower with twelve irregularly-shaped petals and three butterflies with yellow wings, as well as the illustration of an extended middle finger which, regardless of its status as a literary work, is self-evidently a work of two-dimensional artwork.

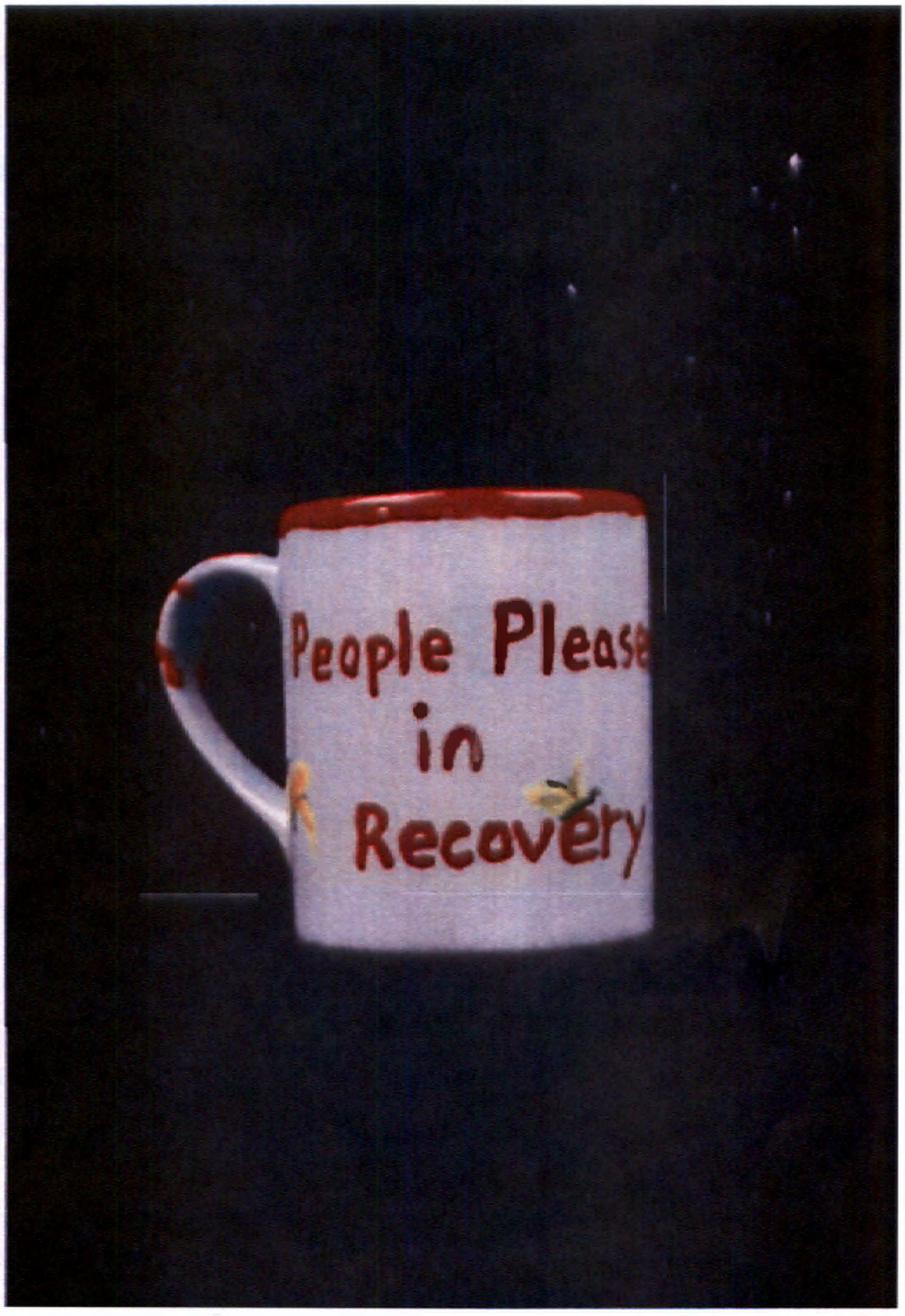
IV. CONCLUSION

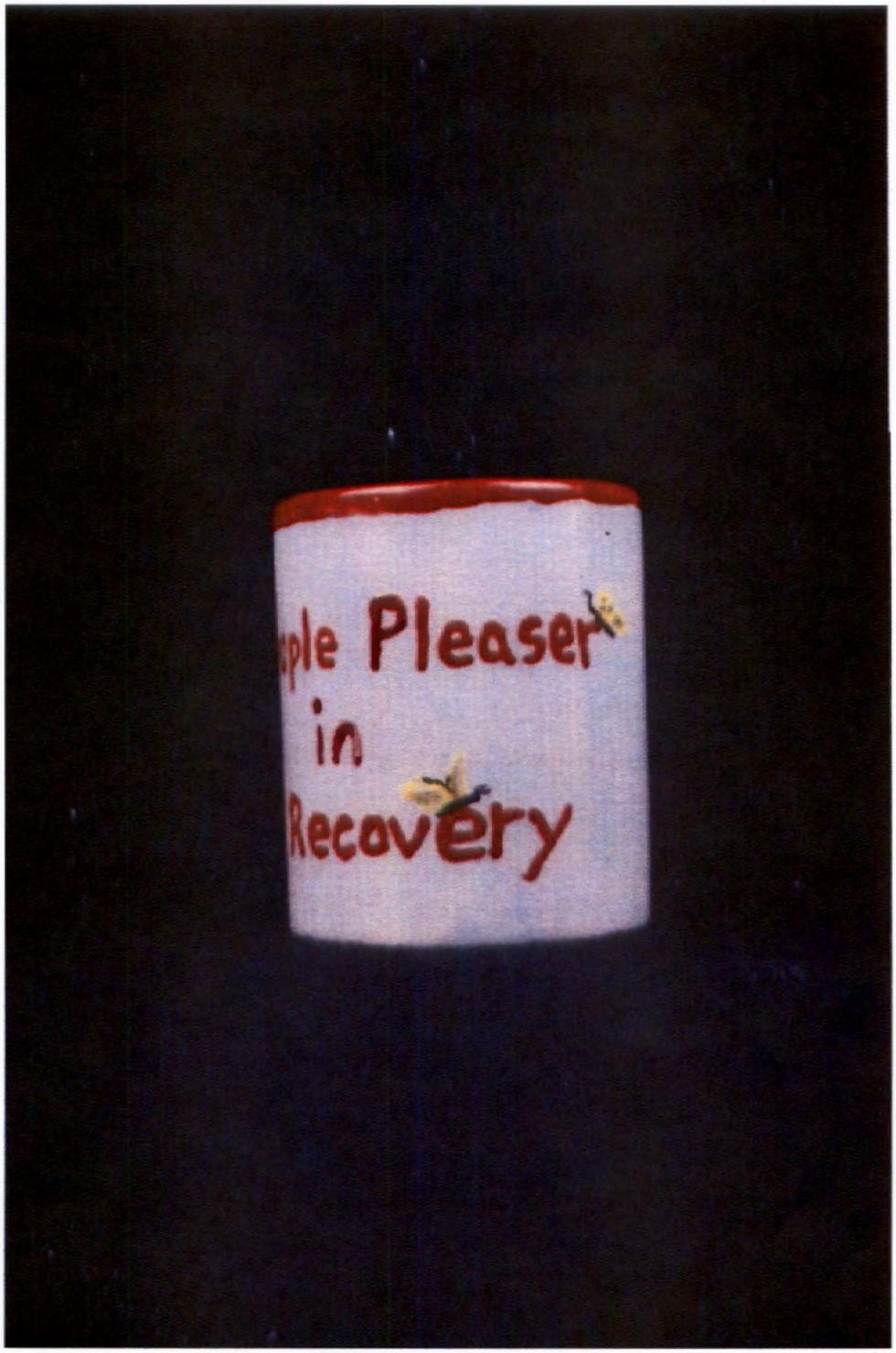
For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the copyright claim in the text depicted in the Work. The two-dimensional artwork depicted in the Work is, however, registrable. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action in this matter.

BY: _____

Chris Weston
Copyright Office Review Board

APPENDIX A

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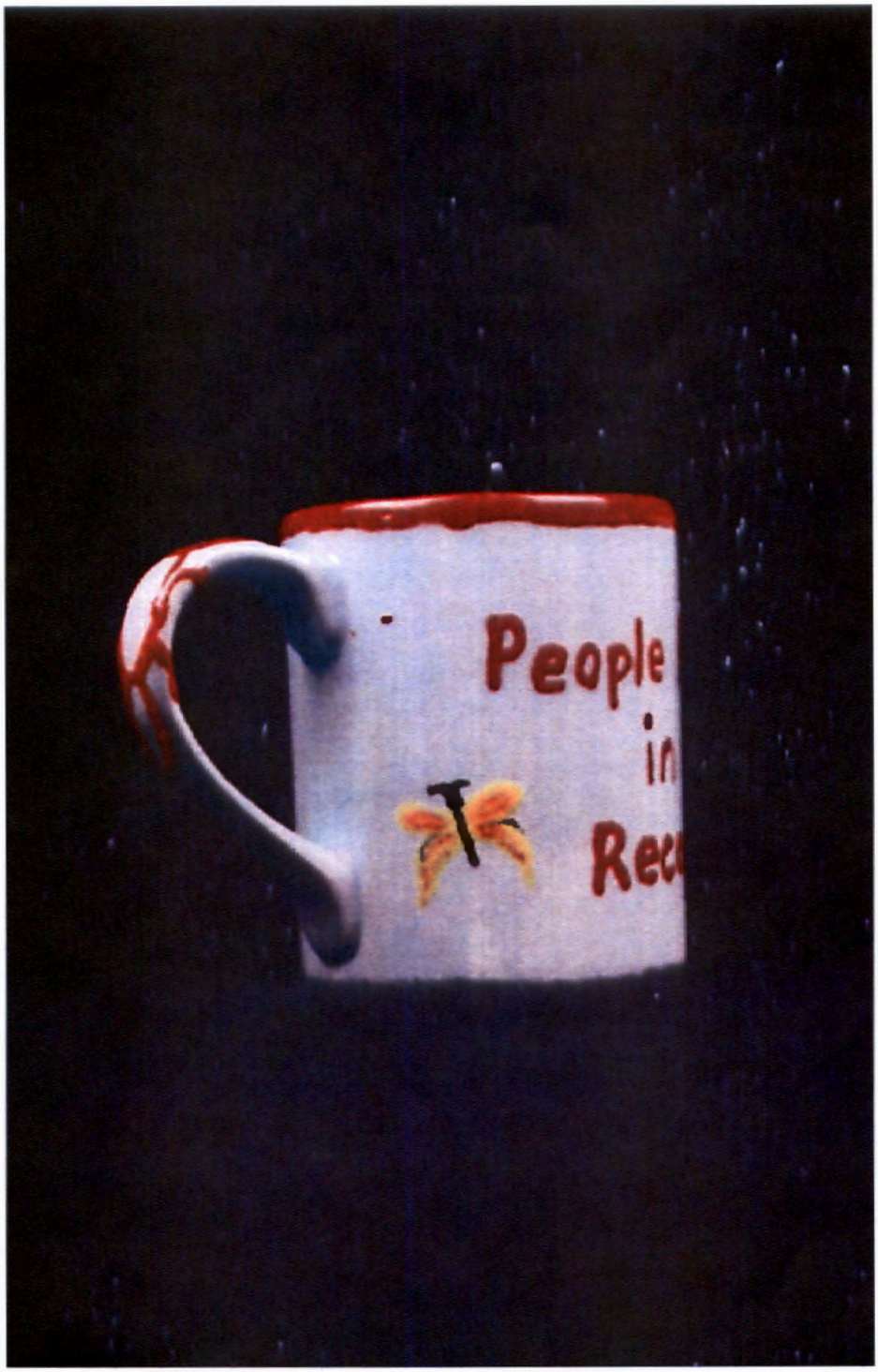
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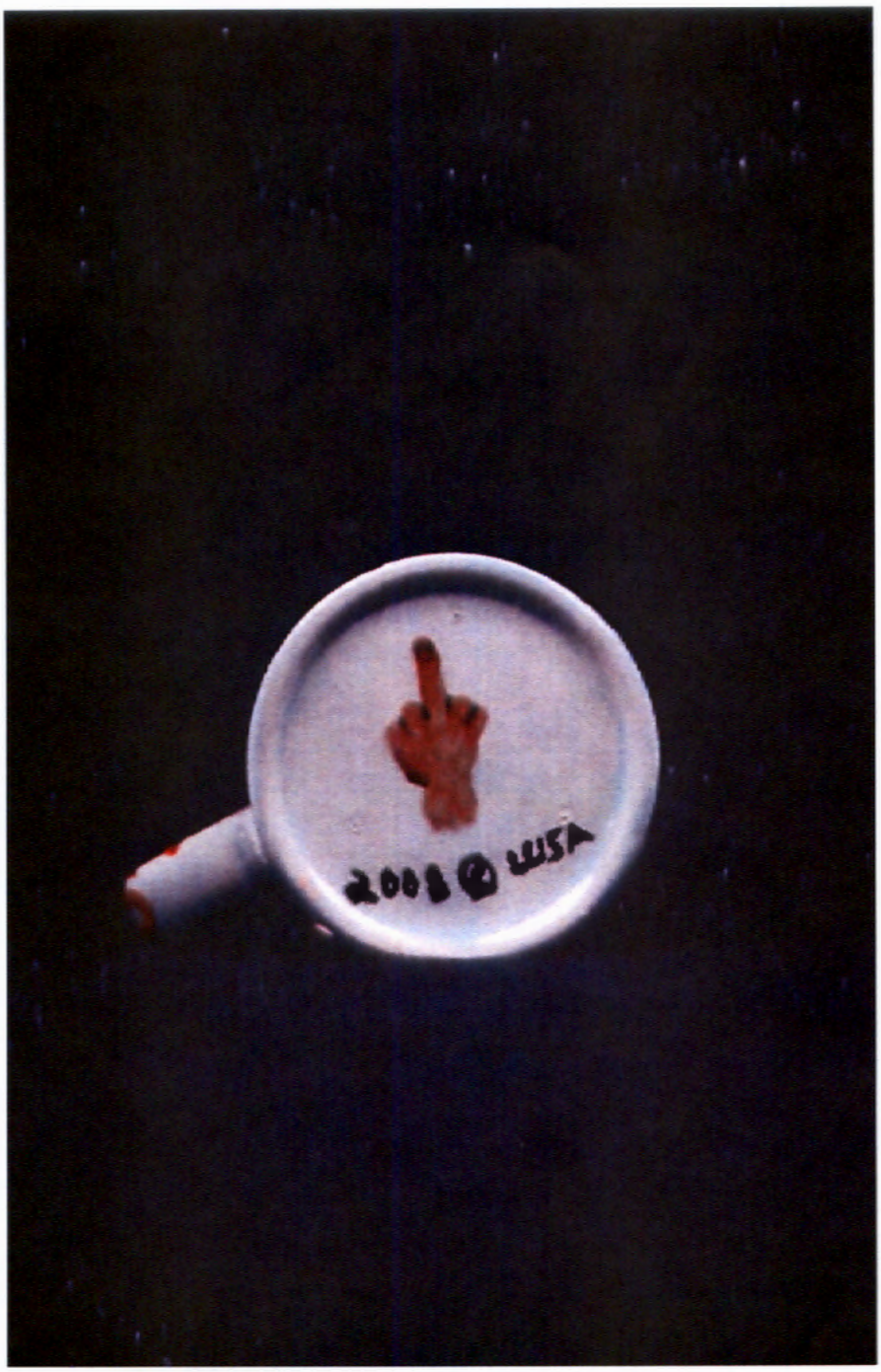
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