United States Copyright Office
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July 26, 2013

Munck Carter, LLP
Attn: Dyan House
600 Banner Place Tower
12770 Coit Road
Dallas, TX 75251

RE: Friction Slide Elevator (for doll house)
Correspondence ID: 1-7NCT73

Dear Ms. House:

The Review Board of the United States Copyright Office (the "Board") is in receipt of your second appeal of the decision of the United States Copyright Office (the "Office") to refuse registration of the work entitled *Friction Slide Elevator* (the "Work") submitted on June 11, 2009 on behalf of KidKraft, LP. I apologize for the lengthy delay in the issuance of this determination. After periods of inaction, staff departures, and budgetary restrictions, the Register of Copyrights has appointed a new Board and we are proceeding with second appeals of registration refusals as expeditiously as possible.

The Board has carefully examined the application, the identifying deposit, and all the correspondence in this case. After careful consideration of the arguments in your letter, the Board affirms the denial of registration of this copyright claim because the Work does not contain a sufficient amount of original and creative sculptural authorship. This decision constitutes final agency action in this matter.

I. DESCRIPTION OF THE WORK

The subject matter of this appeal is a toy elevator incorporated into a doll house. The sculptural elements consist of circular shapes making up the floor and ceiling of the toy elevator, connected to vertical rectangular side panels with rounded edges. A small, rectangular extension protrudes from the side of one panel to allow a child to manually move the elevator up and down in the doll house. An image of the Work from the deposit material is depicted below:

II. THE ADMINISTRATIVE RECORD

By letter dated August 2, 2010, the Copyright Office refused registration of the Work, determining that it was a useful article under section 101 of the Copyright Act, title 17 of the U.S. Code, that did not contain any separable authorship that presented copyrightable material. *Letter from Registration Specialist, Elizabeth Stringer, to Dyan House* (Aug. 2, 2010) at 1. You requested reconsideration of that decision by letter dated November 1, 2010, as required by 37 C.F.R. § 202.5(c), setting forth your reasons as to why the work was copyrightable and should be registered.

In a letter dated February 25, 2011, Attorney Advisor, Virginia Giroux-Rollow, upheld the refusal to register the claim. *Letter from Attorney Advisor, Virginia Giroux-Rollow, to Dyan House* (Feb. 25, 201) at 1. Ms. Giroux-Rollow acknowledged that the Work was a toy, and not a useful article, and agreed that it must be evaluated according to the standards applicable to pictorial, graphic, and sculptural works. *Id.* Nevertheless, she concluded that the Work's basic design elements did not rise to the level of copyrightable authorship because they consisted of only two public domain shapes sculpted into a simple configuration. *Id.* at 2.

In a letter dated May 24, 2011, you requested that the Office reconsider for a second time its refusal to register a copyright claim in the Work. *Letter from Dyan House to Copyright R&P Division* (May 24, 2011) at 1. You argue that the Work contains "an original and unique combination of shapes that forms the toy elevator," and cite *Atari Games Corp. v. Oman*, 888 F.2d 878 (D.C. Cir. 1989); *Tennessee Fabricating Co. v. Moultrie Mfg. Co.*, 421 F.2d 279 (5th Cir.), *cert. denied*, 398 U.S. 928 (1980); *Concord Fabrics, Inc. v. Marcus Bros. Textile Corp.*, 409 F.2d 1315 (2d Cir. 1969); and *In Design v. Lynch Knitting Mills, Inc.*, 689 F. Supp. 176 (S.D.N.Y.), *aff'd*, 863 F.2d 45 (2d Cir. 1988), as supportive of a registration. Finally, you argue that "the design of the *Friction Slide Elevator*, however minimalistic, reflects a unique, modern design for a doll house," and the "combination, proportion, and treatment of the shapes in relation to one another form a unique and creative toy that is entitled to copyright protection." *Id.* at 3.

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. *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. Second, the work must possess sufficient creativity. While only a modicum of creativity is necessary to establish such creativity, the Supreme Court has ruled that some works (such as a telephone directory at issue in the case) fail to meet the standard. The Court observed that "[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimus* quantum of creativity." *Id.* at 363. 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; *see, also* 37 C.F.R. § 202.10(a) ("In order to be acceptable as a

pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form.").

The Office's regulations implement the long-standing requirements of originality and creativity set forth in the law and, subsequently, the *Feist* decision. The regulations prevent 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" 37 C.F.R. § 202.1(a). Of course, some combinations of common or standard design elements may contain sufficient creativity with respect to how they are combined or arranged to support a copyright. *See, Feist,* 499 U.S. at 358 (the Copyright Act "implies that some 'ways' [of selecting, coordinating, or arranging uncopyrightable material] will trigger copyright, but that others will not." The determination of copyrightability rests on whether the selection, coordination, or arrangement was done in "such a way" as to result in copyrightable authorship). However, not every combination or arrangement will be sufficient to meet this grade. 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. *John Muller & Co. v. New York Arrows Soccer Team*, 802 F.2d 989 (8th Cir. 1986). *See also, Satava v. Lowry*, 323 F.2d 805, 811 (9th Cir. 2003)("It is true, or course, that a *combination* of unprotectible elements may qualify for copyright protection. But, it is not true that any combination of unprotectible elements automatically qualifies for copyright protection. Our case law suggests, and we hold today, that a combination of unprotectible 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.")(citations omitted)(emphasis in original).

Copyright Office Registration Specialists (and the Board, as well) do not make aesthetic judgments in evaluating the copyrightability of particular works. Likewise, they are not influenced by the attractiveness of a design, it uniqueness, its visual effect or appearance, its symbolism, the time and effort it took to create, or its commercial success in the marketplace. 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

Toys may be registerable under the 17 U.S.C. §102 subject matter category of pictorial, graphic or sculptural works. *See, Gay Toys, Inc. v. Buddy L Corp.*, 703 F.2d 970, 973 (6th Cir. 1983). However, they must possess sufficient originality and creativity in their appearance to be copyrightable. *Feist*, 499 U.S. at 345. The required amount of sculptural authorship necessary for registration is based upon the manner in which the work is fashioned or formed. Registration cannot be made for standard designs or shapes because they lack originality. Common geometric shapes or figures, such as circles, spheres, and rectangles, are not copyrightable. 37 C.F.R. § 202.1(a). Combinations of but a few familiar shapes or designs, while they may be unique or distinctive, likewise cannot support a claim to registration. *See, Satava*, 323 F.2d at 811.

When determining whether a work possesses sufficient creativity, the Board does not look at the possibility of choices an author had to work with but rather whether the particular resulting

expression contains copyrightable authorship. In the present case, the Work consists of a combination of unprotectible elements: circular shapes that function as the floor and ceiling of the elevator, rectangular side panels with rounded edges that connect the circular floor panel to the ceiling panel, and a rectangular handle extension. The combination of these basic shapes is dictated by their need to function as a manually operated elevator for dolls, thereby limiting their arrangement and configuration. There are no embellishments of the design, intricacies, or complexities to the combination of basic geometric shapes. As a result, the Work lacks a sufficient amount of creative expression that would entitle it to a copyright registration.

The cases that you have cited in support of a registration for the Work are distinguishable and unavailing. *Atari Games Corp.* concerned an audiovisual work – a video game – which was far more complex that the very limited and static sculptural shapes of the toy elevator involved here. The design cases, *Tennessee Fabricating Co., Concord Fabrics, Inc, In Design*, and *Soptra Fabrics Corp. v. Stafford Knitting Mills, Inc.*, 490 F.2d 1092 (2d Cir. 1974) are clearly distinguishable because they did not concern sculptural works or toys. Those cases involving toys, such as *Gay Toys, Inc.* (toy airplanes)*; Hasbro Bradley, Inc. v. Sparkle Toys, Inc.*, 780 F.2d 189 (2d Cir. 1985); and *Spinmaster, Ltd. v. Overbreak LLC*, 404 F. Supp. 2d 1097 (N.D. Ill. 2005)(flying saucer toy); all involved toys that contained more numerous and complex sculptural features than *Friction Slide Elevator.*

IV. CONCLUSION

For the reasons stated above, the Review Board of the United States Copyright Office affirms the refusal to register the Work entitled *Friction Slide Elevator*. This decision constitutes final agency action in this matter. 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

BY: _____

William J. Roberts, Jr.
Member of the Review Board