United States Copyright Office
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July 19, 2013

Levy & Grandinetti
Attn: Rebecca Stempien
P.O. Box 18385
Washington, DC 20036-8385

Re: The Disapproving Tampon
Correspondence ID: 1-76OORP

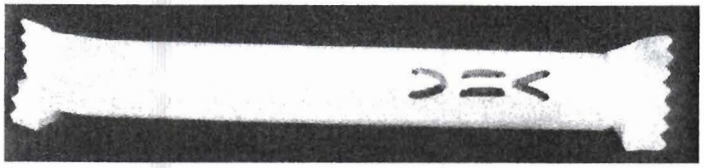
Dear Ms. Stempien:

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: *The Disapproving Tampon* (the "Work"). You submitted this request on behalf of your client, The Stupidity Factory, LLC (the "Applicant"), on April 12, 2011. I apologize for the 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 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

The Work consists of a "V" shape, a "||" shape, and an upside down "U" shape. The three shapes are stacked vertically so that the "V" shape is on top, followed by the "||" shape, followed by the upside down "U" shape. The below image is a photographic reproduction of the Work from the deposit materials:



II. ADMINISTRATIVE RECORD

On June 28, 2010, the Copyright Office (the "Office") issued a letter notifying you that it had refused registration of the above mentioned Work. *Letter from Registration Specialist Joy Burns to Rebecca Stempien* (June 28, 2010). In its letter, the Office indicated that it could not register the Work because it "lacks the authorship necessary to support a copyright claim." *Id.*

In a letter dated September 24, 2010, you requested that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusal to register the Work. *Letter from Rebecca Stempien to Copyright RAC Division* (September 24, 2010). Your letter set forth the reasons you believed the Office improperly refused registration. *Id.* 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 authorship in either the treatment or arrangement of its elements to support a copyright registration" and again refused registration. *Letter from Attorney-Advisor Virginia Giroux-Rollow to Rebecca Stempien* (January 12, 2011) at 1 (emphasis in original).

Finally, in a letter dated April 12, 2011, 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 Rebecca Stempien to Copyright RAC Division* (April 12, 2011) ("Second Request").

In arguing that the Office improperly refused registration, you claim the Work, as a whole, 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 1-2. In support of this argument, you claim that the Applicant carefully selected and combined the individual elements that comprise the Work to give the Work a meaning that is not present when the elements are evaluated independently. Specifically, you assert that the Applicant's claim of copyright is directed to the unique arrangement of the simple shapes to form "what can be characterized as a disapproving face" designed specifically for placement on "the wrapper of a tampon." *Id.* at 2.

In addition to *Feist*, your argument references the following cases: *Thomas Wilson & Co. v. Irving J. Dorfman Co.*, 433 F.2d 409 (2d Cir. 1970); *Reader's Digest Assoc. v. Conservative Digest*, 821 F.2d 800 (D.C. Cir. 1987); *Amplex Mfg. Co. v. A.B.C. Plastic Fabricators*, 184 F. Supp. 285 (E.D. Pa. 1960); *Daeser & Blair, Inc. v. Merchants' Ass'n*, 64 F.2d 575 (6th Cir. 1933); *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970); and *Atari Games Corp. v. Oman*, 888 F.2d 878 (D. D.C. 1989). "*Second Request*".

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.*, 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 the Work fails to satisfy the requirement of creativity.

The Board accepts the principle that combinations of geometric shapes may be eligible for copyright protection. However, in order to be accepted for registration, 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." *Feist,* 499 U.S at 359; *see also Atari Games,* 888 F.2d at 883. Here, the Work consists of a simple combination of a common "V" shape, a common "||" shape, and a common upside down "U" shape. All three of these shapes, individually, are ineligible for copyright protection. *See* 37 C.F.R. § 202.1(a). The Applicant has stacked these shapes vertically so that the "V" shape appears on top, followed by the "||" shape, followed by the upside down "U" shape. This basic pairing of three common, unprotectable elements is, at best, *de minimis*, and lacks the requisite "creative spark" for copyrightability. *See Feist*, 499 U.S. at 359; *see also* 37 C.F.R. §§ 202.1(a), 202.10(a). Accordingly, we find that that the Work, as a whole, is not sufficiently creative to warrant registration.

Finally, your assertion that the Applicant's arrangement of the three common shapes represents "what can be categorized as a 'disapproving face'" does not add to your claim of sufficient creativity. *Second Request* at 2. Nor does your claim that the Applicant designed the Work specifically for placement on "the wrapper of a tampon." *Id.* As discussed above, the Board does not assess the attractiveness of a design, the espoused intentions of the author, the design's uniqueness, its visual effect or appearance, or its symbolism in determining whether a work contains the requisite minimal amount of original authorship necessary for registration. Thus, even if accurate, the mere fact that the Work represents a "disapproving face" designed for placement on "the wrapper of a tampon," would not qualify the Work, as a whole, as copyrightable.

In sum, the Board finds that the Applicant's selection and arrangement of a basic "V" shape, a basic "||" shape, and a basic upside down "U" shape lacks a sufficient level of creativity to make the Work registerable 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: *The Disapproving Tampon.* 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