United States Copyright Office
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Re: Second Request for Reconsideration for Refusal to Register Chatsworth 2-Tier Solar Fountain; Correspondence ID: 1-21E7HNI; SR 1-4389105810

Dear Mr. Moran:

The Review Board of the United States Copyright Office ("Board") has considered Smart Solar Inc.'s ("Smart Solar") second request for reconsideration of the Registration Program's refusal to register a sculpture claim in the work titled "Chatsworth 2-Tier Solar Fountain" ("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 black decorative multi-level fountain. The three-dimensional sculptural work consists of two bowls (one smaller than the other) sitting atop a column that is attached to a stepped, square-shaped pedestal or base. The smaller bowl supports a solar panel. Smart Solar also identifies a number of what it describes as four "ridging" details. The Work is depicted as follows:

II. ADMINISTRATIVE RECORD

On January 31, 2017, Smart Solar filed an application to register a copyright claim in the Work. In a February 14, 2017 letter, a Copyright Office registration specialist refused to register the claim, finding that it "lacks the authorship necessary to support a copyright claim." Letter from Sandra Ware, Registration Specialist, to Jim Bologeorges, at 1 (Feb. 14, 2017).

Smart Solar disputed this refusal and requested that the Office reconsider its initial refusal to register the Work. Letter from Eric Moran to U.S. Copyright Office (Mar. 29, 2017) ("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 Work "does not contain a sufficient amount of original and creative sculptural authorship to support a copyright registration." Letter from Stephanie Mason, Attorney-Advisor, to Eric Moran, at 1 (June 15, 2017). The Office continued, "[t]he simple circular basin, column, and square base that make up this fountain are common and familiar shapes. . . . [C]ommon and familiar shapes, or any minor variation thereof, are not copyrightable." *Id.* at 2.

Smart Solar then 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 Eric Moran, to U.S. Copyright Office (Sept. 7, 2017) ("Second Request"). Smart Solar asserted that the Work is sufficiently creative, because "[a]dding . . . decorative steps to a pedestal, decorative ridging to a column, large bowl, and small bowl; selection of the dimensions of the materials and selection of degrees of curvature of the bowls . . . are creative choices that exceed the low threshold of creativity required for originality." *Id.* at 4. Smart Solar urged that the Board's decision to register other, allegedly similar sculptures demonstrates that the Work is protectable.[1]

III. DISCUSSION

A. The Legal Framework

1) 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,*

[1] Smart Solar also filed a federal lawsuit for copyright infringement, trade dress infringement, patent infringement, false advertising, and unfair competition involving its designs for lanterns, fountains, and bird baths, including the Work; the lawsuit's claims regarding the Work, however, are founded only on allegations of trade dress infringement, not copyright infringement. *See* First Am. Compl., *Smart Solar, Inc. v. Sky Billiards, Inc.*, No. 1:17-cv-04211 (N.D. Ill. Sept. 29, 2017). The Board takes no position on the pending litigation in the Northern District of Illinois, because it does not involve an analysis of the copyrightability of the Work; instead, trade dress law employs different legal standards and is beyond the scope of Copyright Office review.

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 and practices 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"); 37 C.F.R. § 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"); U.S. COPYRIGHT OFFICE, COMPENDIUM OF THE U.S. COPYRIGHT OFFICE PRACTICES § 313.4(J) (3 ed.2017) (stating "[f]amiliar symbols and designs are not copyrightable and cannot be registered with the U.S. Copyright Office, either in two-dimensional or three-dimensional 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"). For example, a mere simplistic arrangement of non-protectable elements does not demonstrate the level of creativity necessary to warrant protection. *See Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 496 (S.D.N.Y. 2005); *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003); COMPENDIUM (THIRD) § 313.4(J) ("[T]he Office cannot register a work consisting of a simple combination of a few familiar symbols or designs with minor linear or spatial variations, either in two-dimensional or three-dimensional form."). 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. COMPENDIUM (THIRD) § 313.4(J); *see also Atari Games Corp. v. Oman*, 888 F.2d 878 (D.C. Cir. 1989).

This analysis applies to all types of works, including three-dimensional works such as sculptures. In connection with three-dimensional works, the Office's *Compendium* explains, by way of example, that "[c]ommon architecture moldings, such as the volute used to decorate Ionic and Corinthian columns" are familiar shapes or designs. COMPENDIUM (THIRD) § 313.4(J); *see also* COMPENDIUM (THIRD) § 906.2 (explaining that copyright registration may be denied where an artist submits a sketch of the standard fleur de lys design). Such standard designs lack the necessary originality for copyrightability. This comports with the Supreme Court's observations

in *Feist* that copyright law does not protect works that do not exhibit some, albeit small, amount of creativity. *See Feist*, 499 U.S. at 359.

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 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

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

The crux of Smart Solar's claim is that the Work was created based on a number of decorative choices, including a tiered overall appearance, four ridging details, and a stepped pedestal that render the overall design copyrightable. The Board, however, does not find that the Work is sufficiently creative and instead determines that the Work is merely the result of standard fountain design. The overall tiered design style referenced by Smart Solar has been popular for years. *See, e.g.*, Water Fountains, THE HOME DEPOT, https://www.homedepot.com/b/Outdoors-Garden-Center-Outdoor-Decor-Fountains/N-5yc1vZc6nl (last visited May 15, 2018) ("Formal tiered fountains have a classic look . . . ."); Tiered Garden Fountains, LANDSCAPING NETWORK, https://www.landscapingnetwork.com/fountains/tiered.html (last visited May 15, 2018) ("Tiered fountains have been popular additions to private and public gardens for years. They can be spotted in courtyards and plazas throughout Mediterranean countries such as Italy and Spain."). Indeed, the Board finds that there is an almost endless supply of tiered fountains that are comprised of the same elements as the Work. *See* Tiered, GARDEN FOUNTAINS & HOME DÉCOR, https://www.garden-fountains.com/tiered-fountains/ (last visited May 15, 2018). The Work, in fact, is a stripped down version of a standard tiered, stepped fountain. Thus, just as a typical Ionic or Corinthian column cannot be registered, nor can the tiered fountain. The classic shape and style of a tiered fountain—a mainstay in gardens for years—amounts to a standard design that is not copyrightable.

Moreover, the additional elements of the fountain, either alone or in combination with the work as a whole, are standard. The ridging details are common, found in innumerable fountains. *See, e.g.*, Pedestal Garden Fountains, KINETIC FOUNTAINS, https://www.kineticfountains.com/pedestal- garden- fountains (last visited May 15, 2018). And tiered fountains typically contain some amount of ornamental detailing, such as exteriors with nature-inspired reliefs, basins with scalloped edges, and pedestals of specific dimensions to fit a particular landscape. *See* 19 Brilliant Tiered Fountain Design to Enhance the Look of Your Courtyard, ARCHITECTURE ART DESIGNS, http://www.architectureartdesigns.com/ 19-brilliant-tiered-fountain-design-to-enhance-

the-look-of-your-courtyard/ (last visited May 15, 2018). Therefore, Smart Solar's contention that the Work should be granted copyright protection based on the "decorative steps" and "decorative ridging" is not persuasive. Second Request at 4. Such *de minimis* elements do not save the Work from its categorization as an uncopyrightable familiar design.

Recognizing the Work as a copyrightable design would, in contradiction to copyright law's constitutional purpose of promoting the progress of sciences, result in an unfair monopoly, preventing others from creating other standard fountain designs.

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
Karyn A. Temple, Acting Register of Copyrights and Director, U.S. Copyright Office
Sarang Vijay Damle, General Counsel and Associate Register of Copyrights
Catherine Zaller Rowland, Associate Register of Copyrights and Director, Public Information and Education