



United States Copyright Office

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**Re: Second Request for Reconsideration for Refusal to Register *Gavel Bat*
Correspondence ID: 1-3DL3KPB; SR # 1-5891217361**

Dear Mr. Noonan:

The Review Board of the United States Copyright Office (“Board”) has considered Narendra Anthony Narine’s (“Narine’s”) second request for reconsideration of the Registration Program’s refusal to register a sculpture claim in the work titled “Gavel Bat” (“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 three-dimensional sculpture with the head of a gavel attached to the body of a miniature baseball bat. The Work is set forth below:



II. ADMINISTRATIVE RECORD

On October 9, 2017, Narine filed an application to register a copyright claim in the Work. In an April 26, 2018 letter, a Copyright Office registration specialist refused to register the claim, finding that the Work was a useful article that did not contain any non-useful design elements that could be registered. Letter from L.M., Registration Specialist, to Narendra Anthony Narine (Apr. 26, 2018).

On June 3, 2018, Narine requested that the Office reconsider its initial refusal to register the Work. Letter from Narendra Anthony Narine, to U.S. Copyright Office (Jun. 3, 2018) (“First Request”). In that letter, Narine asserted that the Work served no utilitarian function and emphasized that “the article is ornamental and exists strictly for the sake of imagination.” *Id.* at 1. After reviewing the Work in light of the points raised in the First Request, the Office re-evaluated the claims and concluded that the Work was not a useful article; but found that it lacked a sufficient amount of original and creative authorship to support a copyright registration. Letter from Stephanie Mason, Attorney-Advisor, to Anthony Narine (Jan. 23, 2019).

On April 22, 2019, Narine 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 Anthony J. Noonan, Esq., to U.S. Copyright Office (Apr. 22, 2019) (“Second Request”). In that letter, Narine asserted that the Work merits copyright protection, because it “is comprised of an entirely unique and creative design, demonstrating original authorship, and should demonstrate that the *Gavel Bat* meets the *de minimis* quantum of creativity test.” *Id.* at 2. To support this conclusion, Narine makes three arguments. First, Narine argues that the gavel head is custom-designed, rather than taken from a pre-made gavel, thus meeting the *de minimis* quantum of creativity test. *Id.* Second, Narine asserts that it was not obvious to incorporate a bat into a gavel because a combination of the two lacks utility. *Id.* Finally, Narine suggests that the Work is not a “simple” combination of two components, but rather a “unique minimalistic design” using shapes that are neither common nor familiar. *Id.* at 2–3.

III. DISCUSSION

A. *The Legal Framework*

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 Publications, Inc. v. Rural Telephone Service 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).

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.” COMPENDIUM OF THE 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.

Finally, Copyright Office registration specialists (and the Board) do not make aesthetic judgments in evaluating the copyrightability of particular works. *See id.e* § 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 carefully examining the Work and applying the legal standards discussed above, the Board finds that the Work does not contain the requisite authorship necessary to sustain a claim to copyright.

In determining copyrightability, the Copyright Office evaluates both a work’s individual elements and the work as a whole. COMPENDIUM (THIRD) § 309. Here, the individual elements of the Work—a traditional gavel head and baseball bat handle—are uncopyrightable as familiar designs. 37 C.F.R. § 202.1(a) (stating that “familiar symbols or designs” are not registerable); COMPENDIUM (THIRD) § 906.2 (stating that “copyright law does not protect mere variations on a familiar symbol or design, either in two or three-dimensional form”). Narine claims that the modifications made to the standard designs are sufficiently creative. He points to the custom-designed gavel head and the baseball bat that “has been machined and . . . altered in order to effectively join the unique gavel head.” Second Request at 3. He asserts that “at the very least, the gavel head portion . . . is comprised of an entirely unique and creative design, demonstrating original authorship.” *Id.* at 2. These arguments are not compelling. The standard gavel design is familiar to anyone in the legal profession, as is a baseball bat, including a mini or novelty bat to any baseball fans. Indeed, even using a baseball bat as a gavel is not itself novel.¹ Creative contributions to the standard gavel head design, if any, are *de minimis*, and do not rise to the necessary level of protectable expression to be registered. COMPENDIUM (THIRD) § 313.4(B). Similarly, the baseball bat, even if a smaller scale, does not change its nature as a common and familiar design. As individual elements, the gavel head and baseball bat elements are not original, and therefore, not registerable.

In evaluating the combination of the gavel head and baseball bat, Narine does not fare any better. As the *Compendium* notes, “the Office cannot register a simple combination of a few familiar shapes or designs with minor linear or spatial variations, either in two-dimensional or three-dimensional form.” *Id.* § 313.4(J). Narine attempts to categorize his Work as sufficiently creative because the entire baseball bat is not used, and, in short, no one would think to combine a baseball bat and a gavel head. But it is axiomatic that copyright only protects expression, not ideas. *Id.* § 313.3(A) (stating that “the Copyright Act expressly excludes copyright protection

¹ *See, e.g., An Eye for an Eye*, IMDB, <https://www.imdb.com/title/tt0401930/> (last visited July 1, 2019) (database entry for a 2003–11 television series featuring a fictional judge using a baseball bat as a gavel and the quote, “Today justice is a baseball bat.”).

for ‘any idea.’”); *see also* 17 U.S.C. § 102(b). Further, the fact that an entire baseball bat was not used is irrelevant. In evaluating the Work, the Office does not look at what is not there.

Moreover, merely combining two elements is not a sufficient amount of creative expression where the combination is simplistic. *See, e.g., M & D International Corp. v. Chan*, 901 F. Supp. 1502, 1511–12 (D. Haw. 1995) (holding that sculptures that “trimmed and glued together” from readily available stock pieces from a catalogue demonstrated “[o]nly a trivial degree of originality and creativity” and thus did not qualify for copyright protection). Narine asserts that, “since gavels and baseball bats are used in entirely differing fields, and since the shape of a baseball bat is not conducive to the normal function of a gavel, a person constructing a gavel would neither be inclined to incorporate a baseball bat into a gavel nor would it have been obvious to do so.” Second Request at 2–3. The fact that a work may be novel, distinctive, innovative, or unique, however, is not relevant to the inquiry of copyright protection. COMPENDIUM (THIRD) § 310.1. In its entirety, the Work remains an uncopyrightable combination of two common and familiar shapes.

Narine correctly quotes *Feist* stating that “the requisite level of creativity is extremely low; even a slight amount will suffice.” Second Request at 3 (citing *Feist*, 499 U.S. at 345). But as *Feist* continues, “there remains a narrow category of works in which the creative spark is utterly lacking or so trivial so as to be virtually nonexistent. . . . Such works are incapable of sustaining a valid copyright.” *Feist*, 499 U.S. at 358–59 (citations omitted). This Work does not have the requisite level of creativity to support a copyright 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.



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