



June 14, 2021

Zachary C. Garthe, Esq.
Cambridge Law
4610 S. Ulster Street, Suite 150
Denver, Colorado 80237

**Re: Second Request for Reconsideration for Refusal to Register Wave Form
(Correspondence ID 1-3XCO9GJ; SR# 1-7918356331)**

Dear Mr. Garthe:

The Review Board of the United States Copyright Office (“Board”) has considered Kizingo LLC’s (“Kizingo’s”) second request for reconsideration of the Registration Program’s refusal to register a sculpture claim in the work titled “Wave Form” (“Work”). After reviewing the application, identifying material, 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 spoon. The bowl portion of the spoon is an oval shape. The handle of the spoon curves upward and then downward to mimic a wave design. From an aerial view, the Work forms a “C” shape. The identifying material displays the spoon in various solid colors. The Work is depicted as follows:



II. ADMINISTRATIVE RECORD

On July 26, 2019, Kizingo filed an application to register the Work. A Copyright Office Registration Specialist refused to register the claim for the Work, finding that it “lacks the authorship necessary to support a copyright claim.” Initial Letter Refusing Registration from U.S. Copyright Office to Zac Garthe, Cambridge Law (July 29, 2019).

Kizingo subsequently requested that the Office reconsider its initial refusal to register the Work. Letter from Zachary C. Garthe, Cambridge Law, to U.S. Copyright Office (Sept. 16, 2019) (“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 is “a useful article that does not contain any separable non-functional features.” Refusal of First Request for Reconsideration from U.S. Copyright Office to Zachary C. Garthe, at 1 (Feb. 14, 2020) (“First Request Refusal”).

In response, Kizingo 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 Zachary C. Garthe to U.S. Copyright Office (May 14, 2020) (“Second Request”). Kizingo contends that “as ‘applied art,’ the work is copyrightable even if it has a primarily utilitarian function” and identifies four creative elements that, in combination, warrant protection: (1) the “elongated” spoon bowl and neck; (2) “the base of the handle [that] flares to form a rounded whale-tail shape;” (3) “the unequal-lancet-arch structure;” and (4) the “smoothly taper[ed]” structure “from the handle into the bowl.” *Id.* at 6–7.

III. DISCUSSION

A. *The Legal Framework*

1) *Useful Articles and Separability*

Copyright does not protect useful articles as such, which are defined in the Copyright Act as “article[s] having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.” 17 U.S.C. § 101. Importantly, however, artistic features applied on or incorporated into a useful article may be eligible for copyright protection if they constitute pictorial, graphic, or sculptural works under sections 101 and 102(a)(5) of the Copyright Act. This protection is limited to the “‘pictorial, graphic, or sculptural features’ [that] ‘can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.’” *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1007 (2017) (quoting 17 U.S.C. § 101).

To assess whether an artistic feature incorporated into the design of a useful article is protected by copyright, the Office examines whether the feature “(1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which

it is incorporated.” *Id.* at 1007; *see also* COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 924 (3d ed. 2021) (“COMPENDIUM (THIRD)”). This analysis focuses on “the extracted feature and not on any aspects of the useful article that remain after the imaginary extraction [because the] statute does not require the decisionmaker to imagine a fully functioning useful article without the artistic feature.” *Star Athletica*, 137 S. Ct. at 1013. Put another way, while useful articles as such are not copyrightable, if an artistic feature “would have been copyrightable as a standalone pictorial, graphic, or sculptural work, it is copyrightable if created first as part of a useful article.” *Star Athletica*, 137 S. Ct. at 1011; 17 U.S.C. § 113(a) (“[T]he exclusive right to reproduce a copyrighted pictorial, graphic, or sculptural work in copies under section 106 includes the right to reproduce the work in or on any kind of article, whether useful or otherwise.”); *see also Esquire, Inc. v. Ringer*, 591 F.2d 796, 800 (D.C. Cir. 1978) (holding that copyright protection is not available for the “overall shape or configuration of a utilitarian article, no matter how aesthetically pleasing that shape . . . may be”).

2) 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).

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 (THIRD) § 906.1; *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.

B. Analysis of the Work

After carefully examining the Work and applying the legal standards discussed above, the Board finds that the Work is a useful article that does not contain the requisite separable creative authorship necessary to sustain a claim to copyright.

Kizingo appears to challenge whether the Work is a useful article. Although Kizingo concedes that the author "intended this work . . . to be used (and sold) as a children's spoon," and acknowledges that the Work "was first created as part of a useful article," Kizingo contends that "an author's intent and the work's marketability are irrelevant considerations" in determining whether a work is a useful article. Second Request at 1–2. Suggesting that the Board should examine the Work as a sculpture alone, Kizingo asserts that because "most people do not recognize [the Work] as a spoon," it "applied for a copyright only as a sculptural work" and not "as a useful article" *Id.* at 2, 5 n.2.

Focusing solely on the Work itself and applying purely objective criteria, however, the Board finds that the Work is plainly a useful article. In determining whether a Work is a useful

article, Kizingo is correct that the Office will not consider the “subjective intent or subjective reaction of any person in relation to that article.” COMPENDIUM (THIRD) § 924.1. Nor will it consider the “marketability or commercial value of the article.” *Id.* Rather, the Office considers the “inherent, undeniable qualities” of the article to assess whether the article has an “intrinsic utilitarian function.” 17. U.S.C. § 101 (defining “useful article”); COMPENDIUM (THIRD) § 924.1. Here, the Work has an intrinsic utilitarian function as a spoon for small children. Indeed, its utilitarian function as a utensil for eating is “objectively observable . . . from the appearance of the item,” in particular the Work’s shallow bowl and handle. COMPENDIUM (THIRD) § 924.1. That Kizingo sought to only claim “sculpture” does not impact the Board’s finding.

Because the Work is a useful article, the question is thus whether there is any separable original authorship. In *Star Athletica*, the Supreme Court held that such an analysis requires consideration of whether there are features that “(1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated.” *Star Athletica*, 137 S. Ct. at 1007.

Under the first prong, the Board finds that the Work lacks separable features entitled to copyright protection. By its own admission, Kizingo identifies four design features that serve utilitarian functions: (1) the “shallow bowl,” which “signals appropriate portion size bites and supports proper lip closure;” (2) the “thumb depression,” which “encourages tripod grip development and provides stability;” (3) the “short wide handle,” which “brings the bowl closer to [a child’s] hands for better control;” and (4) the “dip & curve,” which “bring[s] food into the position [the child] need[s].” Second Request at 8. These features, put together, make up the entire Work and are not significantly different from the features that Kizingo argues are separable. *See id.* at 6–7 (arguing that the separable features include the following: (1) the “elongated” spoon bowl and neck; (2) “the base of the handle [that] flares to form a rounded whale-tail shape;” (3) “the unequal-lancet-arch structure;” and (4) the “smoothly taper[ed]” structure “from the handle into the bowl”). None of these features can be visualized as a work of authorship separate and independent from the Work’s utility assisting small children to feed themselves. *See Star Athletica*, 137 S. Ct. at 1013 (the identified feature must “qualify as a nonuseful pictorial, graphic, or sculptural work.”).

Kizingo contends that the Work’s “unique look is separable from the concept of a basic spoon,” noting that “[t]o spot the conceptually separable artistic feature of [the Work], all one must do is imagine flattening out the bowl.” Second Request at 9. This position ignores Kizingo’s own description of how the Work’s design features and overall shape were dictated by non-creative and utilitarian considerations. *See id.* at 8. Moreover, no matter how pleasing or attractive a work may be, “copyright law does not protect the overall form, shape, or configuration of the useful article itself.” COMPENDIUM (THIRD) § 924.3(F); *see Star Athletica*, 137 S. Ct. at 1010 (recognizing that a design feature cannot “be a useful article” in and of itself or “[a]n article that is normally part of a useful article”); *id.* at 1014 (stating that “some aspects of the useful article” must be “left behind” once the artistic feature has been “conceptually removed” from that article); H.R. REP. NO. 94-1476, at 55 (noting that copyright protection does

“not cover the over-all configuration of the utilitarian article as such”), *reprinted in 1976 U.S.C.C.A.N. at 5668.*

Because the Work does not contain any features that can be identified separately from, or any features that are capable of existing independently of, the utilitarian aspects of the spoon, it is not entitled to copyright protection.

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

Regan A. Smith, General Counsel and

Associate Register of Copyrights

Catherine Zaller Rowland, Associate Register of

Copyrights and Director, Public Information and
Education

Kimberley Isbell, Deputy Director of Policy and
International Affairs