United States Copyright Office
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July 16, 2013

Roper, Majeski, Kohn, Bentley
Attn: Arnold Sklar
515 South Flower Street, Ste. 1100
Los Angeles, CA 90071-2213

Re: SUN-STACHES (WHISKERS AND WALRUS)
Correspondence ID: 1-DJ4IG0

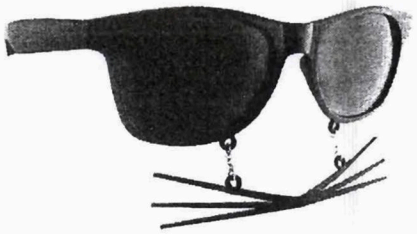
Dear Mr. Sklar:

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 works entitled: *Whiskers* and *Walrus* (the "Works"). You submitted this request on behalf of your client, Worldwide Dynasty, Inc., on November 2, 2012. I apologize for the delay in the issuance of this determination.

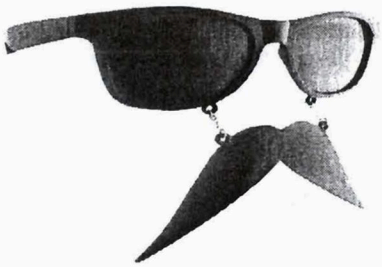
The Board has examined the application, the deposit copies, and all of the correspondence in this case. After careful consideration of the arguments in your second request for reconsideration, the Board affirms the Registration Program's denial of registration of these copyright claims. The Board's reasoning 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 WORKS

The Works consist of a basic pair of sunglasses to which your client has attached "ornaments" that depict renderings of either: (1) a cluster of straight lines arranged to resemble whiskers (the "Whiskers" element); or, (2) a simple, symmetric placement of two familiar shapes arranged to resemble a thick mustache (the "Walrus" element). The "ornaments" are attached to the bottom of the sunglasses' eye pieces by means of two short metal chains. Both the sunglasses' frames and the attached ornaments appear to be made of the same black plastic material. The below images are photographic reproductions of the Works from the deposit material:



"Whisker"



"Walrus"

II. ADMINISTRATIVE RECORD

On April 3, 2012, the United States Copyright Office (the "Office") issued a letter notifying Worldwide Dynasty, Inc. (the "Applicant") that it had refused registration of the above mentioned Works. *Letter from Registration Specialist Kathryn Sukites to David Levich* (April 3, 2012). In its letter, the Office indicated that it could not register the Works because they "lack the authorship necessary to support a copyright claim." *Id.*

In a letter dated May 8, 2012, you requested that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusal to register the Works. *Letter from Arnold Sklar to Copyright RAC Division* (May 8, 2012). Your letter set forth the reasons you believed the Office improperly refused registration. *Id.* Upon reviewing the Works in light of the points raised in your letter, the Office concluded that the Works "do not contain a sufficient amount of original and creative sculptural authorship in either the treatment or arrangement of their elements to support a copyright registration" and again refused registration. *Letter from Attorney-Advisor Stephanie Mason to Arnold Sklar* (September 4, 2012).

Finally, in a letter dated November 2, 2012, you requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Works. *Letter from Arnold Sklar to Copyright RAC Division* (November 2, 2012). In arguing that the Works should be registered, you claim the Works include 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). *Letter from Arnold Sklar to Office (November 2, 2012)*. You maintain that the Applicant carefully selected and combined the individual elements that comprise the Works to give the Works a meaning that "may not" be present when the elements are evaluated independently. Specifically, you state that the individual "Whiskers" and "Walrus" elements are "creative, uncommon" shapes that are not ordinarily combined with eye glasses' frames. *Id.* To support this assertion, you provide two exhibits. "Exhibit A" is a picture of just the "Whiskers" element, which you characterize as a "cluster of straight lines, not recognizable as anything, let alone common whiskers." *Id. at* Exhibit A. "Exhibit B" is a picture of just the "Walrus" element, which you state "is not a common mustache –it might just as well be stylized bird wings or part of a Rorschach test." *Id. at* Exhibit B. You also claim that "if [the Works] did not have at least minimal creativity, [they] would have been created by others long ago" and that "[a]dding [the Whiskers and Walrus elements] as a decorative element to a glasses frame is not a long-standing practice." *Id. at* 1-2.

In addition to *Feist*, your argument references the following cases: *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003); *Atari Games Corp. v. Oman*, 888 F.2d 878 (D. D.C. 1989); and *Lamps Plus, Inc. v. Seattle Lighting Fixture Co.*, 345 F.3d 1140, 1147 (9th Cir. 2003). *Letter from Arnold Sklar to Office (November 2, 2012)*.

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 minimus* 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. *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"). However, not every combination or arrangement will be sufficient to meet this grade. Ultimately, the determination of copyrightability in the combination of standard design elements rests on whether the selection, coordination, or arrangement was done in such a way as to result in copyrightable authorship. *See* 37 C.F.R. §§ 202.1(a), 202.10(a).

To be clear, the mere simplistic arrangement of non-protectable 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*, 323 F.3d at 811. 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 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. 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 Works and applying the legal standards discussed above, the Board finds that the Works fail 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 Applicant's Works consist of, at best, simple variations of common shapes that lack the requisite creative spark for copyrightability. *See Feist*, 499 U.S. at 359; *see also Satava*, 323 F.3d at 811.

Your argument that the combination of a basic pair of sunglasses with either: (1) a simple cluster of straight lines "not recognizable as anything"; or, (2) a symmetric placement of familiar, geometric shapes that resemble "a common mustache, stylized bird wings, or part of a Rorschach test" meets the threshold of minimum creativity is unpersuasive. As noted, common shapes and designs do not warrant copyright protection, nor does their arrangement into familiar patterns. *See Satava*, 323 F.3d at 811; *see also* 37 C.F.R. §§ 202.1(a), 202.10(a).

Furthermore, your assertions that adding the aforementioned elements to glasses is not a "long-standing practice," and that the combination would have been "created by others long ago" if it did not have at least minimal creativity, does not add to your claim of sufficient creativity. *See Letter from Arnold Sklar to Office (November 2, 2012) at* 1-2. As discussed above, the Board does not assess aesthetic merit, commercial appeal, or symbolic value in determining whether a work contains the requisite minimal amount of original sculptural authorship necessary for registration. Even if accurate, the mere fact that the Applicant's Works consist of unique or distinctive shapes or styles for purposes of aesthetic or commercial appeal would not qualify the Works, as a whole, as copyrightable.

In sum, the Board finds that the combination of the "Whiskers" and "Walrus" elements with a basic pair of glasses frames, as well as their selection and arrangement, lack a sufficient level of creativity to make them registerable under the Copyright Act.

IV. CONCLUSION

For the reasons stated herein, the United States Copyright Office Review Board affirms the refusal to register the works entitled, *Whiskers* and *Walrus*. 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