United States Copyright Office
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June 8, 2015

Tredecim, LLC
Attn: Sean Sweeney
91-J Auburn Street #1133
Portland, ME 04103

Re: FOOTBALL TROPHY
Correspondence ID: 1-GQ98T7

Dear Mr. Sweeney:

The Review Board of the United States Copyright Office (the "Board") has examined New England Castings, LLC's ("New England Castings") second request for reconsideration of the Registration Program's refusals to register three dimensional artwork copyright claims in the work, entitled "Football Trophy." After reviewing the application, deposit copies, and relevant correspondence in the case, along with the arguments in the 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

Football Trophy consists of a wood and metal football with a mirrored exterior bisected by a wood line inlayed along the location of a standard football's horizontal seam. The football is fixed atop a wooden quadrilateral base with such base having concave vertical sides and a contour on its top conforming to the bottom of the football.

The below image is a photographic reproduction of Football Trophy from the deposit materials:



II. ADMINISTRATIVE RECORD

On May 1, 2013, the United States Copyright Office (the "Office") issued a letter notifying New England Castings that it had refused registration of Football Trophy. Letter from Registration Specialist Allan Runge to Sean Sweeney (May 1, 2013). In its letter, the Office indicated that it could not register Football Trophy because it lacked the authorship necessary to support a copyright claim. *Id.*

In a letter dated July 2, 2013, New England Castings requested that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusal to register Football Trophy. *Letter from Sean Sweeney to Copyright RAC Division* (July 2, 2013) ("First Request"). New England Castings' letter set forth the reasons it believed the Office improperly refused registration. *Id.* Upon reviewing Football Trophy in light of the points raised in New England Castings' letter, the Office concluded that Football Trophy "does not contain a sufficient amount of original and creative sculptural authorship" and again refused registration. Letter from Attorney-Advisor Stephanie Mason to Sean Sweeney (Oct. 23, 2013).

In a letter dated January 22, 2014, New England Castings requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register Football Trophy. Letter from Sean Sweeney to Copyright R&P Division (Jan. 22, 2014) ("Second Request"). In arguing that the Office improperly refused registration, New England Castings claimed Football Trophy includes at least the minimum amount of creativity required to support registration under the standard for originality set forth in *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991). *Second Request* at 1-2. In support of this argument, New England Castings claimed that it made "creative decisions" which render Football Trophy a copyrightable abstraction of a football. *Id.* at 3. Specifically, New England Castings argument cites *Atari Games Corp. v. Oman*, 979 F.2d 242, 246-47 (D.C. Cir. 1992) in an effort to portray Football Trophy as a creative abstraction. Additionally, New England Castings argued that the shape of Football Trophy's base and arrangement of the football atop the base serve to raise it above the level of an uncopyrightable combination of generic shapes. *Id.*

New England Castings' argument also referenced *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) as an example of "thin" copyright in which some creative elements of a work may still receive protection even if most of the work does not. *Id.* at 2-3.

Finally, New England Castings maintained that the Office improperly assessed the work by failing to address the Lombardi Trophy at issue in *Titlecraft v. NFL*, 97 U.S.P.Q.2d 1315, 1315 (D. Minn. 2010). *Id.*

III. DECISION

A. *The Legal Framework*

A work may be registered if it qualifies as an "original works 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 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.* While only a modicum of creativity is necessary, the Supreme Court has ruled that some works (such as the 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 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"); 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").

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.C. Cir. 1989).

To be clear, a mere simplistic arrangement of non-protectable elements does not automatically demonstrate 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 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) (emphasis in original).

Finally, Copyright Office registration specialists (and the Board) 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); *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 Football Trophy*

After carefully examining Football Trophy and applying the legal standards discussed above, the Board finds Football Trophy does not contain the requisite authorship necessary to sustain a claim to copyright.

Football Trophy consists of generic shapes combined into a form that does not show sufficient creativity to merit copyright protection. *See, Feist*, 499 U.S. at 358. New England Castings maintains that its "creative decisions" make the football on the trophy an abstraction worthy of a copyright similar to *Atari*. *Second Request* at 3. This argument is unpersuasive. In *Atari*, the copyrighted videogame created an abstraction of a brick wall, paddle, and ball by combining multi-colored rectangular shapes, a dynamic shrinking rectangular paddle, and a square "ball" that "doesn't operate in any standard way." *Atari*, 979 F.2d at 246. These fundamental changes led the court to decide that this abstraction was not mechanical, ordinary, or garden-variety. *Id.* at 246-47 (citing *Feist*, 499 U.S. at 111). The changes made in Football Trophy are much more trivial. A football with smooth sides is a common fixture on football trophies, including the Lombardi Trophy discussed in *Titlecraft*. The football is also not an abstraction worthy of copyright protection merely because it failed to include laces and placed the wood inlay along the sides flush with the surface of the football rather than slightly recessed "like true football seams." *Second Response* at 3. Originality, as interpreted by the courts, means the authorship must constitute more than a trivial variation of public domain elements. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951). The changes made to the football do not meet this standard.

The wood inlay itself is not sufficiently original to warrant even "thin" copyright protection. *Satava*, 323 F.3d at 812-13. Unlike the protected elements of the jellyfish sculptures in *Satava*, the wood inlay does not have sufficient creativity to satisfy the *Feist* originality requirement. The wood inlay is a straight line and its placement mimics the inherent structure of a football and its seams.

While New England Castings made a decision to present the football shape and rectangular base "without any additional adornments," a conscious decision to not make creative changes to a generic shape does not make a generic shape copyrightable. *Second Request* at 3. The fact that there may have been other ways in which the elements of the design, their shape, size, positioning, orientation, configuration and number could have been chosen is not

determinative. Rather, eligibility for registration turns on whether the resulting expression contains copyrightable authorship.

The wooden base does not have sufficient originality to satisfy the requirement established by *Feist* that "a work that possess more than a *de minimis* quantum of creativity." *Feist*, 499 U.S. at 363. New England Castings stated that the base is not a basic geometric shape but rather "decorative" with an "aesthetically pleasing design." *Second Request* at 3. 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, its symbolism, the time and effort it took to create, or its commercial success in the marketplace in determining whether a work contains the requisite minimal amount of original authorship necessary for registration. Thus, even if accurate, the mere fact that Football Trophy is unique and aesthetically appealing does not qualify it, as a whole, as copyrightable. New England Castings argued the wooden base is not a rectangle as it features tapered edges and "pleasing concave curves." *Second Request* at 3. A rectangle with tapered edges is a trapezoid or, if no sides are parallel, a trapezium quadrilateral, both of which are common geometric shapes. The concave sides are merely a trivial variation. *See Titlecraft*, 97 U.S.P.Q.2d at 1315-18 (stating "a three sided base with concave sides, which taper (get smaller) as they rise" is "a tetrahedron, a common geometric shape"). The base of Football Trophy is therefore a common geometric shape and is not copyrightable.

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*, 979 F.2d at 246-47. Here, Football Trophy consists of the simple combination of a common football shape with a common rectangular shaped wood based with functional contours used to cradle the football. New England Castings has arranged these shapes so that the rectangle shape is centered directly below the football shape, with the football shape positioned in a downward angle. Placing a football atop a base at an angle similar to this is common among football trophies. This basic pairing of two common shapes in a common manner lacks the requisite "creative spark" for copyrightability and is therefore not registrable. *See Feist*, 499 U.S. at 359; *see also* 37 C.F.R. §§ 202.1(a), 202.10(a).

Finally, the Lombardi Trophy or its treatment in *Titlecraft* does not affect this decision. In that case, the ownership of a valid copyright was not in dispute or otherwise at issue before the court. *See Titlecraft*, 97 U.S.P.Q.2d at 1318 (stating "Titlecraft does not dispute the NFL's ownership of a valid copyright … nor does it dispute that it had access to the Vince Lombardi Trophy …. The only issue, therefore, is substantial similarity"). Additionally, the Board does not compare works under consideration with works that have already been registered or refused for registration.

In sum, the Board finds that the Applicant's selection and arrangement of the common football and rectangle shapes lack a sufficient level of creativity to make Football Trophy 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 Football Trophy. This decision constitutes final agency action on this matter. 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

BY: _____
Stephen Ruwe
Copyright Office Review Board