United States Copyright Office
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August 27, 2013

K&L Gates, LLP
Attn: James Kyper
K&L Gates Center/ 210 Sixth Avenue
Pittsburgh, PA 15222

RE: KEEPON
Control No. 1-18KMH3

Dear Mr. Kyper:

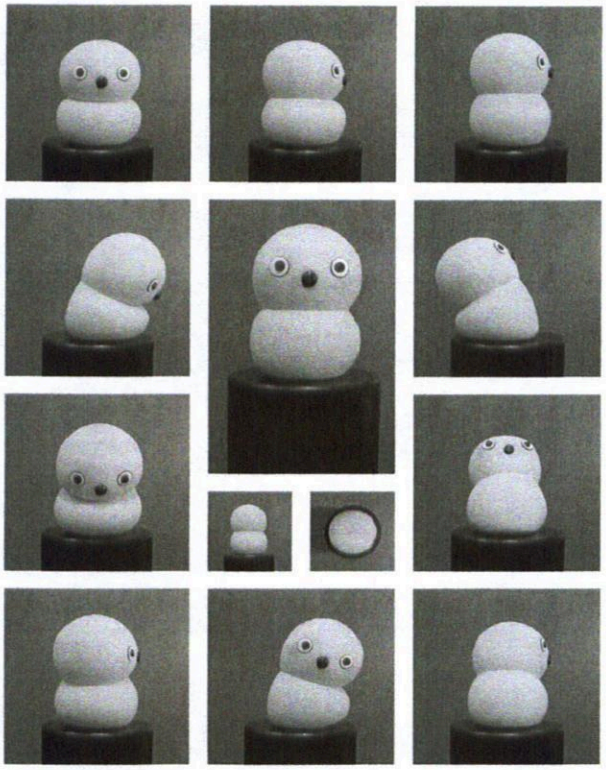
The Review Board of the United States Copyright Office (the "Board") has considered your second request for reconsideration, including recent supplemental briefing, regarding the Registration Program's refusal to register a copyright claim to the work entitled *Keepon* (the "Work"). The application for registration was submitted on behalf of BeatBots, LLC (the "Applicant"). I apologize for the lengthy delay in the issuance of this determination. After periods of inaction, staff departures, and budgetary restrictions, the Register of Copyrights has appointed a new Board and we are proceeding with second appeals of registration refusals as expeditiously as possible. Thank you for your patience, and for the supplemental briefing that you have supplied in support of your appeal.

The Review Board has carefully examined the application, the identifying deposit, and all of the correspondence and briefing in this case. After careful consideration of the arguments made, the Board affirms the denial of registration of this copyright claim because the Work does not contain a sufficient amount of original and creative sculptural authorship to support a copyright registration. This decision constitutes final agency action in this matter. 37 C.F.R. § 202.5(g).

I. DESCRIPTION OF THE WORK

The Work is a three-dimensional robotic character. It is approximately four and three-quarters inches high and a little more than three inches wide and sits atop a rounded support base that contains the mechanical parts that extend up inside the Work to make it move. It can turn left and right, lean in all directions and move vertically up and down. The Work consists of two yellow-colored symmetrical spherical shapes sitting atop one another, made of a pliant material to permit the movement created by the internal mechanism. The top sphere contains a "face," which consists of two white circles with black circular centers that represent eyes, and a black circular-shaped "button nose." There is no mouth, or any

other features in evidence. The overall appearance of the Work suggests the basic configuration of a two-tiered snowman. Images of the Work are reproduced below from the deposit materials.



II. THE ADMINISTRATIVE RECORD

An application for registration of the Work was received by the United States Copyright Office (the "Copyright Office" or "Office") on April 15, 2008, and in a letter dated July 8, 2008, the Registration Program refused registration. *Letter to Marek Michalowski* (July, 8, 2008) at 1. In a letter dated October 8, 2008, Christine W. Trebilcock requested reconsideration of the Office's refusal to register the Work, as required by 37 C.F.R. § 202.5(c), setting forth her reasons as to why the Work was copyrightable and should be registered.

In a letter dated November 25, 2008, Attorney Advisor, Virginia Giroux-Rollow, upheld the refusal to register the Work on the grounds that it did not contain a sufficient amount of original and creative authorship in its shape or in the treatment and arrangement of its surface elements. *Letter from Virginia Giroux-Rollow to Christine W. Trebilcock* (Nov. 25, 2008) at 1.

In a letter dated February 25, 2009, Alicia M. Passerin requested that the Office reconsider for a second time its refusal to register the claim in the Work. Ms. Passerin argued that independent selection and arrangement of circles representing the eyes and nose, combined with the two spherical portions comprising the body of the Work, displayed the requisite level of creativity. *Letter from Alicia M. Passerin to Copyright RAC Division* of (Feb. 25, 2009) at 4. She cited, for comparison purposes, registrations made by the Copyright Office for Frosty the Snowman, Mr. Potato Head, and Lil' Peeps Characters, among others. Ms. Passerin disputed Ms. Giroux-Rollow's interpretation and application of *Alfred Bell & Co., Ltd. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951); *Atari Games Corp. v. Oman*, 888 F.2d 878 (D.C. Cir. 1989); *Lucky Break Wishbone Corp. v. Sears, Roebuck & Co.*, 528 F. Supp. 2d 1106 (W.D. Wash. 2007); *Rachel v. Banana Republic, Inc.*, 831 F.2d 1503 (9th Cir. 1987); and § 2.01[B] of *Nimmer on Copyright*.

With the passage of time and change in legal representation, the Board granted your request to supplement the argument in support of the second reconsideration. You submit that *Denenberg v. LED Technologies LLC*, 104 U.S.P.Q. 2d 1484 (D. Col. 2012), *Enter. Mgmt. Ltd. v. Warrick*, 106 U.S.P.Q. 2d 1777, *Proline Concrete Took, Inc. v. Dennis*, 103 U.S.P.Q. 2d 1678 (S.D. Cal. 2012), and *Olem Shoe Corp. v. Washington Shoe Co.*, 101 U.S.P.Q. 2d 1462 (S.D. Fla. 2011) favor a registration, and challenge the Registration Program's approach to analyzing works of the visual arts, concluding that it is "an automatic, indeed preordained and arbitrary, decision driven by the mere fact that the work is a work of visual art, or a sculpture, that appears to be relatively simple or involves a combination of standard elements." *Letter from James R. Kyper to RAC Division* of (July 25, 2013) at 5.

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. *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. Second, the work must possess sufficient creativity. While only a modicum of creativity is necessary to establish such creativity, the Supreme Court has ruled that some works (such as a telephone directory at issue in the case) fail to meet the standard. 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. 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; *see, also* 37 C.F.R. § 202.10(a) ("In order to be acceptable as a

pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form.").

The Copyright Office's regulations implement the long-standing requirements of originality and creativity set forth in the law and, subsequently, the *Feist* decision. The regulations prevent 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. § 202.1(a). Of course, some combinations of common or standard design elements may contain sufficient creativity with respect to how they are combined or arranged to support a copyright. *See Feist,* 499 U.S. at 358 (the Copyright Act "implies that some 'ways' [of selecting, coordinating, or arranging uncopyrightable material] will trigger copyright, but that others will not." The determination of copyrightability rests on whether the selection, coordination, or arrangement was done in "such a way" as to result in copyrightable authorship). However, not every combination or arrangement will be sufficient to meet this grade. 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. *John Muller & Co. v. N. Y. Arrows Soccer Team*, 802 F.2d 989 (8th Cir. 1986). *See also, Satava v. Lowry*, 323 F.2d 805, 811 (9th Cir. 2003)("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.")(citations omitted)(emphasis in original).

Copyright Office Registration Specialists (and the Board, as well) do not make aesthetic judgments in evaluating the copyrightability of particular works. Likewise, they are not influenced by the attractiveness of a design, it 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 Keepon

After carefully examining the Work and applying the legal standards discussed above, the Board determines that it fails to satisfy the requirement of sufficient creativity.[1]

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[1] The requirement of originality, as discussed above, necessitates that a work be the product of independent creation, *i.e.*, that it not be copied from somewhere else. The second reconsideration request

(continued...)

We begin our analysis with an examination of the constituent elements that comprise the Work. These are the two, yellow-colored spheres that comprise the body of the work, the attached circles in black and white that comprise the eyes of the character, and the attached black circle that comprises the nose. There is also a round, cylindrical-shaped base to which the character is attached that contains the robotic mechanism. All of these elements are basic, geometric shapes that are themselves not capable of copyright protection. 37 C.F.R. § 202.1(a).

Although the elements that comprise the Work lack sufficient creativity to produce a copyrightable sculptural work, the Board readily acknowledges that a creative selection, arrangement or coordination of such elements can support a registration. *Feist*, 499 U.S. at 358. Contrary to the assertions made in the second appeal, we do find creative selection and arrangement of two spherical shapes stacked on top of one another (the two-segmented body), the selection of the basic black circles within white circles to form the eyes and their arrangement on one side of the upper sphere (the "face"), and the selection of a dark circle (a "button nose") and its arrangement below the eyes to form the "face." These selections and arrangements, however, create a most simplistic, garden-variety form that lacks the necessary "creative spark." *Situation Mgmt. Sys., Inc. v. ASP Consulting LLC*, 560 F.3d 53, 60 (1st Cir. 2009). The Board is unable to recognize any contribution to the work that is more than merely trivial or *de minimus*. We have also considered the Work as a whole, and determine that the overall visual expression that results from the selection and arrangement of the elements is lacking in sufficient creativity. *Atari Games Corp.*, 888 F.2d at 883.

The second request for reconsideration compares the Work favorably to other sculptural characters that have received registrations from the Copyright Office, including "Frost the Snowman," Lil' Peeps Characters," and "Mr. Potato Head." The Copyright Office does not compare works that have been registered or refused registration. Each work is examined independently and on its own merits. The Office is not required to make comparisons of copyright deposits to determine whether or not a similar work has been registered. *See Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q.2d (BNA) 1074, 1076 (D.D.C. 1991)(where the court stated that it was not aware of "any authority which provides that the Register must compare works when determining whether a submission is copyrightable"); *accord, Coach, Inc. v Peters*, 386 F. Supp. 2d 495, 499 (S.D.N.Y. 2005)(identifying that the Office "does not compare works that have gone through the registration process").

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[1](...continued)
asserts that the creator of the Work, Hedeki Kozima, did not copy a preexisting work and designed it "to facilitate the exchange of attention and emotion with people – especially babies and toddlers – in simple and comprehensive ways." *Letter of Alicia M. Passerin*, at 4 n.2. The Board is troubled by the claim of originality for the Work because it is designed, consciously or unconsciously, in the appearance of a two-segmented snowman, a figure that is certainly a public domain figure. Nevertheless, the Board accepts for purposes of this appeal that the Work is the product of independent creation by Mr. Kozima.

The cases cited in the second request for reconsideration, and your permitted supplemental briefing, do not support a claim for registration. *Rachel v. Banana Republic, Inc.* involved synthetic animal heads sold as display pieces for commercial establishments. The Court found there to be "no dispute" that the animal heads were copyrightable, and described them as "realistic reproductions of jungle animals." 831 F.2d at 1504, 1507. Significant creativity and detail must have been evident in those works for the Court to make such observations; a level of creativity and detail that is fully absent from the Work. *Lucky Break Wishbone Corp. v. Sears, Roebuck & Co.*, involved a mass-produced plastic breakable turkey wishbone. The production model of the wishbone was registered with the Copyright Office, but the prototype model was not, causing the Court to analyze it for copyrightability. In conclusory fashion, the court determined that the prototype wishbone met the standard for minimum creativity, but then evaluated the work for authorship under the legal standards applicable to useful articles. The creativity determination is neither instructive nor helpful to the present case, and the useful article analysis is irrelevant as the Work is a toy sculpture and not a useful article.

Likewise, *Denenberg v. LED Technolgies, LLC* does not auger for registration of the Work. *Denenberg* involved "before and after" photographs taken by a plastic surgeon and posted on his website. In responding to the defendent's argument that Dr. Denenberg merely performed a mechanical function by operating the camera to take the photographs, and did not contribute any creativity to the photographs, the Court assumed that "Dr. Denenburg had to make creative decisions, no matter how 'crude, humble, or obvious' they may have been." 2012 U.S. Dist. LEXIS 140513, at *5.[2] Such assumptions, without analysis , are not supportable. In *Oriental Art Printing, Inc. v. Goldstar Printing Corp.*, 175 F. Supp. 2d 542 (S.D.N.Y. 2001), the Court did analyze the alleged creativity of the photographs involved in the case, concluding that they "lack[ed] any artistic quality, and neither the nature and content of such photographs, nor plaintiffs' description of their preparation, give the Court any reason to believe that any 'creative spark' was required to produce them." 175 F. Supp. 2d at 546. Critical analysis of a work's component elements, and their combination as a whole, is what is required, and the Board's analysis of the Work does not support a registration.

Finally, you argue in your supplemental brief that *Proline Concrete Tools, Inc. v. Dennis*, and *Olem Shoe Corp. v. Washington Shoe Corp.*, support the position that new and unique combinations of familiar symbols and designs are copyrightable, thereby requiring registration of what you claim are the wholly new and unique combinations present in the Work. In *Proline*, the Court did not find the Register of Copyright's rejection of stone sculptures in error because they were "unique" or "new," but rather because the of "a clear misunderstanding on the part of the Register that confused [her] analysis and led [her] to

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[2] The court also found the arrangement of the photographs on Dr. Denenberg's website to evince creativity, a matter not present in the examination of the Work in this case.

conclude that the sculptures are slavish copies of natural objects." 2012 U.S. Dist LEXIS 97662, at *5. *Olem Shoe* involved polka-dot design patterns applied to boots wherein the Copyright Office made registrations of the designs with one exception.[3] The Court, in grappling with the originality requirement of the law, considered expert testimony as to whether the polka dot designs were preexisting, and concluded that the evidence was insufficient to demonstrate that they were. As discussed above, the Copyright Office does not undertake to determine if the precise combination of elements present in a work submitted for registration is already identifiable in the public domain, or attributable to another source. Works are examined to determine if, as a whole, or in constituent parts, they contain the requisite amounts of creativity to warrant a copyright registration. The Work, in this case, does not.

IV. CONCLUSION

For the reasons stated above, the United States Copyright Office Review Board affirms the refusal to register the Work entitled *Keepon*. This decision constitutes final agency action in this matter. 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

BY: [redacted]
Andrea Zizzi
Member of the Review Board

[3] The exception was the rejection of a design entitled Zebra Supreme, which was based upon a work previously registered by the Office entitled Rose Zebra Supreme. 2011 U.S. Dist. LEXIS 138285, at *9.