



January 26, 2024

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Re: Second Requests for Reconsideration of Refusals to Register Spindrift Spiked Sparkling Water Half Tea & Half Lemon Can, Spindrift Spiked Sparkling Water Lime Can, Spindrift Spiked Sparkling Water Mango Can, Spindrift Spiked Sparkling Water Pineapple Can (SR # 1-10574176509, 1-10574176461, 1-10574138383, 1-10574138101; Correspondence ID: 1-56NWVZX, 1-56NSIUO, 1-56NSJ1G, 1-56NSIOK)

Dear Ms. Wallach:

The Review Board of the United States Copyright Office (“Board”) has considered Spindrift Beverage Co., Inc.’s (“Spindrift”) second requests for reconsideration of the Registration Program’s refusals to register compilation claims in the following four works: (1) “Spindrift Spiked Sparkling Water Half Tea & Half Lemon Can,” (2) “Spindrift Spiked Sparkling Water Lime Can,” (3) “Spindrift Spiked Sparkling Water Mango Can,” and (4) “Spindrift Spiked Sparkling Water Pineapple Can” (together, the “Works”). After reviewing the applications, deposit copies, and relevant correspondence, along with the arguments in the second requests for reconsideration, the Board affirms the Registration Program’s denials of registration.

I. DESCRIPTION OF THE WORKS

The Works are four label designs for cans of sparkling water containing alcohol. Each design is the same except for colors and text describing the flavor. The design for the Works is featured across an entire can and consists of the word “spindrift” atop the short phrases “spiked sparkling water,” “real squeezed [name of fruit]” (for example, “real squeezed lime”), and “YUP, THAT’S IT” in a colored and stylized font. The graphic elements are colored rectangles containing white text describing the flavor, the word “SPIKED,” and the phrase “this one has alcohol ;-),” in which a semi-colon, dash, and single parenthesis depict an emoticon of a winking face.

For deposits, Spindrift provided two images: a picture of the can bearing a portion of the design and an image of the full artwork design copy, detailing dimensions and colors. An example of the deposits for Spindrift Spiked Sparkling Water Lime Can is on the next page:



II. ADMINISTRATIVE RECORD

On June 17, 2021, Spindrift filed four applications to register copyright claims in the artwork, text, and compilation in the Works. In three largely identical letters, a Copyright Office registration specialist refused to register the claims for Spindrift Spiked Sparkling Water Half Tea & Half Lemon Can, Spindrift Spiked Sparkling Water Lime Can, and Spindrift Spiked Sparkling Water Mango Can after determining that these three Works lacked the minimum amount of creativity required for copyright protection.¹ In a fourth letter, a Copyright Office registration specialist refused to register the claim for Spindrift Spiked Sparkling Water Pineapple Can on similar grounds.²

Spindrift subsequently requested that the Office reconsider its initial refusals to register the Works, arguing that the text, artwork, and compilation of text and artwork on the Works possessed the level of creativity required for copyright protection.³ After reviewing the Works in

¹ Initial Letter Refusing Registration of Spindrift Spiked Sparkling Water Half Tea & Half Lemon Can from U.S. Copyright Office to Margarita Wallach (Aug. 4, 2021); Initial Letter Refusing Registration of Spindrift Spiked Sparkling Water Lime Can from U.S. Copyright Office to Margarita Wallach (Aug. 4, 2021); Initial Letter Refusing Registration of Spindrift Spiked Sparkling Water Mango Can from U.S. Copyright Office to Margarita Wallach (Aug. 4, 2021).

² Initial Letter Refusing Registration for Spindrift Spiked Sparkling Water Pineapple Can from U.S. Copyright Office to Margarita Wallach at 1 (Sept. 8, 2021). In that letter, the Office found the text in the work sufficiently creative to be registered, but it found the artwork and compilation authorship unprotectable. *Id.* Because Spindrift refused to consent to amending the application to exclude the artwork and compilation authorship, the Office denied the application as submitted. As discussed further below, on reconsideration the Office found the text of Spindrift Spiked Sparkling Water Pineapple Can unprotectable.

³ Letter from Margarita Wallach re: Spindrift Spiked Sparkling Water Half Tea & Half Lemon Can to U.S. Copyright Office (Nov. 4, 2021); Letter from Margarita Wallach re: Spindrift Spiked Sparkling Water Lime Can to U.S. Copyright Office (Nov. 4, 2021); Letter from Margarita Wallach re: Spindrift Spiked Sparkling Water Mango

light of the points raised in the First Requests, the Office reevaluated the claims and again concluded that the Works could not be registered.⁴ The Office explained that each Work consists of textual and graphic elements, including words, short phrases, basic geometric shapes, stylized fonts or lettering, and a familiar design in the form of a simple “winky face” emoticon, which are not protected by copyright. *See* Second Refusals at 3. The Office also concluded that the combination of *de minimis* text and graphic elements was “no more than a commonplace selection and arrangement of the content.” *See, e.g.,* Spiked Sparkling Water Lime Can Second Refusal at 4.

In four largely identical letters, Spindrift requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusals to register the Works.⁵ Spindrift asserted that each Work features creative textual and visual expressions in the form of varying capitalization of some text, the breaking ocean wave emulating the period in the letter “i,” and the winking face emoticon featured in a colored rectangle with the short phrase “this one has alcohol.” *See, e.g.,* Spiked Sparkling Water Lime Can Second Request at 5–6. It also cited eight previous registrations to support its arguments for sufficiently creative text and artwork. *Id.* at 3–4. Separately, Spindrift asserted that the compilation of text and artwork portrays a “deeper meaning behind each choice” and similarly conveys a unique expression not considering the format or layout. *Id.* at 6.

III. DISCUSSION

A work may be registered for copyright if it is an “original work[] of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102(a). In the copyright 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.* 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.* at 358–59. 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 held that there can be no

Can to U.S. Copyright Office (Nov. 4, 2021); Letter from Margarita Wallach re: Spindrift Spiked Sparkling Water Pineapple Can to U.S. Copyright Office (Dec. 8, 2021) (together, the “First Requests”).

⁴ Refusal of First Request for Reconsideration of Spindrift Spiked Sparkling Water Half Tea & Half Lemon Can from U.S. Copyright Office to Margarita Wallach (Mar. 31, 2022); Refusal of First Request for Reconsideration of Spindrift Spiked Sparkling Water Lime Can from U.S. Copyright Office to Margarita Wallach (Mar. 31, 2022) (“Spiked Sparkling Water Lime Can Second Refusal”); Refusal of First Request for Reconsideration of Spindrift Spiked Sparkling Water Mango Can from U.S. Copyright Office to Margarita Wallach (Mar. 31, 2022); Refusal of First Request for Reconsideration of Spindrift Spiked Sparkling Water Pineapple Can from U.S. Copyright Office to Margarita Wallach (Mar. 31, 2022) (together, the “Second Refusals”).

⁵ Letter from Margarita Wallach re: Spindrift Spiked Sparkling Water Half Tea & Half Lemon Can to U.S. Copyright Office (June 30, 2022); Letter from Margarita Wallach re: Spindrift Spiked Sparkling Water Lime Can to U.S. Copyright Office (June 30, 2022) (“Spiked Sparkling Water Lime Can Second Request”); Letter from Margarita Wallach re: Spindrift Spiked Sparkling Water Mango Can to U.S. Copyright Office (June 30, 2022); Letter from Margarita Wallach re: Spindrift Spiked Sparkling Water Pineapple Can to U.S. Copyright Office (June 30, 2022) (together, the “Second Requests”).

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 explained in *Feist*. See, e.g., 37 C.F.R. § 202.1(a) (prohibiting registration of “[w]ords and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; [and] mere listing of ingredients or content.”); *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 claim. 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, 883 (D.C. Cir. 1989); *Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 498–99 (S.D.N.Y. 2005).

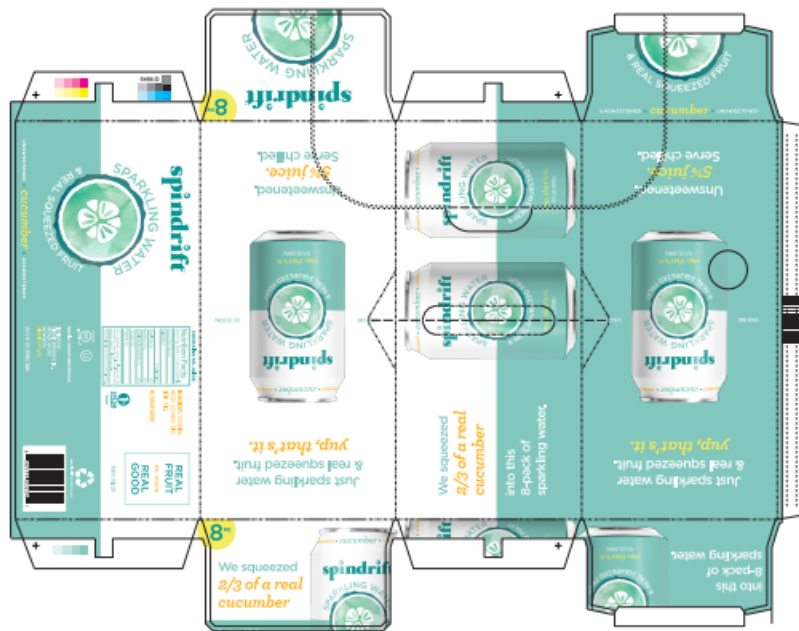
After carefully examining the Works and applying the legal standards discussed above, the Board finds that the Works are not sufficiently creative to receive copyright protection. The individual elements of each Work fall short of the standard articulated in *Feist*. Words, short phrases, geometric shapes, and familiar designs are insufficiently creative to warrant copyright protection. Words and short phrases are not copyrightable. See 37 C.F.R. § 202.1(a); U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.4(C) (3d ed. 2021) (“COMPENDIUM (THIRD)”) (using examples of a business name or product name as not copyrightable). The colors, fonts, and sizes of text on the Works are “mere variations of typographic ornamentation [and] lettering” that are not protected by copyright law. COMPENDIUM (THIRD) § 313.3(D). Moreover, the placement of text within a colored rectangle does not materially add to the creativity of any of the Works. See 37 C.F.R. § 202.1(a); COMPENDIUM (THIRD) § 313.4(K). Additionally, copyright does not protect the winking face emoticon because it is a familiar symbol. See 37 C.F.R. § 202.1(a); COMPENDIUM (THIRD) § 313.4(J) (noting that “well-known and commonly used symbols that contain a *de minimis* amount of expression or that are in the public domain, [including] simple emoticons such as the typical smiley face (☺)” are not protectable).

The combination of these unprotectable elements in each Work is likewise insufficiently creative to support a copyright claim. Where a design combines uncopyrightable elements, it is protected only when the “elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.” *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003). The Works do not contain a sufficiently original composition to constitute an original work of authorship. See *id.* Commercial labels frequently depict a brand name positioned directly above words and short phrases that describe the contents of the product, such as its flavor and alcohol content. The use of colored rectangles containing white text is similarly obvious and expected. See COMPENDIUM (THIRD) § 914.1 (stating that the

Office will typically refuse to register trademarks, logos, or labels that consist only of “mere spatial placement or format of trademark, logo, or label elements”).⁶

In support of its position that the Works are entitled to copyright protection, Spindrift argues it would be inconsistent for the Office to deny each Work a registration when it has previously granted Spindrift registrations for similar works. Second Requests at 4. The Board disagrees. As an initial matter, the Office makes determinations of copyrightability on a “case-by-case basis” and “[a] decision to register a particular work has no precedential value.” COMPENDIUM (THIRD) § 309.3. Moreover, the Works differ significantly from the previous registrations Spindrift has identified:

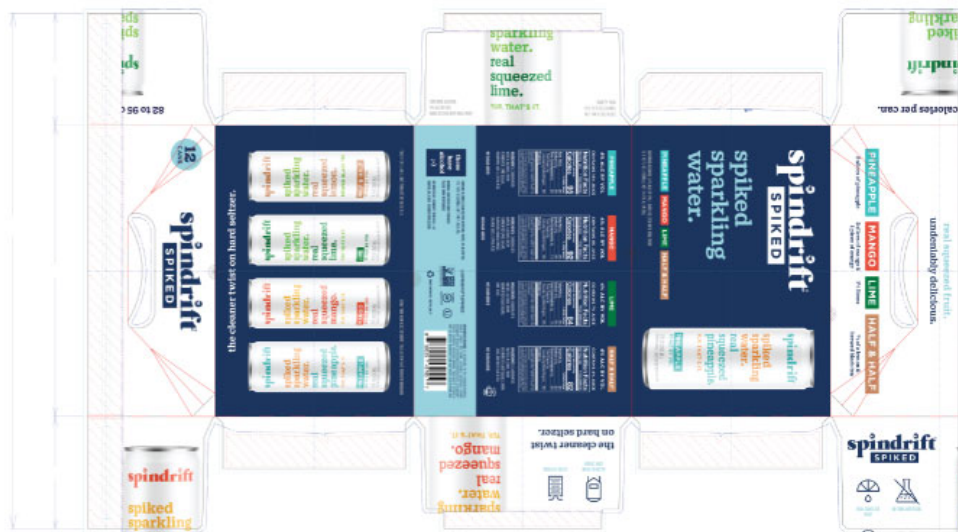
- Spindrift Cucumber Sparkling Water 8 Pack:⁷ The compilation of text on this particular packaging design is sufficiently creative due, in part, to the work containing the following short phrases arranged in varying ways: “We squeezed 2/3 of a real cucumber into this 8-pack of sparkling water[;]” “Just sparkling water & real squeezed fruit. yup, that’s it[;]” and “Unsweetened. 5% juice. Serve chilled.” By contrast, each of the Works includes fewer individual elements, which are presented in a simpler, stacked arrangement. A deposit image for Spindrift Cucumber Sparkling Water 8 Pack is reproduced below:



⁶ See, e.g., *500ml Boxed Water*, BOXED WATER, <https://boxedwaterisbetter.com/products/500ml-boxed-water> (last visited Jan. 25, 2024).

⁷ This 8-pack design was approved as registration number VA0002183631.

- Spindrift Spiked Variety 12 Pack:⁸ The registration for this packaging design contains two annotations, *i.e.*, statements that the Office adds to a registration record to clarify the facts underlying the claim or to identify legal limitations on the claim. *See* COMPENDIUM (THIRD) § 604. One annotation explains that layout and format are not copyrightable while the other annotation limits the scope of registration by noting that the individual elements of text and artwork on the packaging design are not registered as separate authorship.⁹ In other words, the scope of copyright protection in this 12-pack packaging design does not include the text or the artwork. Instead, only the specific combination of textual, pictorial, and graphic elements found on the 12-pack design is sufficiently creative. By contrast, the combination of elements in each of the Works includes fewer short phrases and colors. A deposit image for Spindrift Spiked Variety 12 Pack is reproduced below:



As such, the previously registered works cited in the Second Requests do not support registration of the Works.

⁸ This 12-pack design was approved as registration number VA0002259786.

⁹ The annotations on registration VA0002259786 are: (1) “Regarding basis for registration: Layout and format not copyrightable. Compendium § 313.3(E),” and (2) “Basis for Registration: textual, pictorial and graphic elements registered on a work-as-a-whole basis, not as separate authorship. 17 U.S.C. [§] 102(a).”

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusals to register the copyright claims in the Works. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action in this matter.



U.S. Copyright Office Review Board
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Associate Register of Copyrights
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