United States Copyright Office
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May 15, 2006

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Re: Twenty-Eight Art Frames
Canaletto Frame Nos. 415301, 415303, 415304, 415305, 435301, 435303, 435304, 435305, 645301, 645303, 645304 and 645305
Ferrosa Frame Nos. 235252, 235254, 385252, 385254, 395252, 395254, 575252, 575254, 655252 and 655254
Deco Frame Nos. 349335, 418332, 446333, 447334, 549335 and 718332
Copyright Office Control No. 61-201-7536 (merged file)
Your Reference No. 17926-0002

Dear Mr. Warren:

I write on behalf of the Copyright Office Review Board [hereinafter Board] in response to your letter dated October 27, 2004, in which you requested the U.S. Copyright Office [hereinafter Office] to reconsider for a second time its refusal to register the twenty-eight art frames identified above. The Board has carefully examined the applications, the deposits and all correspondence concerning these applications. The Board has decided to register Deco Frame Numbers 349335 and 549335, but it must affirm denial of registration for the remainder of the frames due to their lack of sufficient, separable copyrightable authorship.

I. DESCRIPTION OF WORKS

The applicant has divided the twenty-eight art frames into three "style" groups: Canaletto, Ferrosa and Deco. Appendix A displays images of portions of these frames.

Twelve works from the Canaletto group are subject to this appeal. This group of works is characterized by two matching, concentric rectangles which flank a third, contrasting, concentric rectangle. The molding which comprises the outer and innermost rectangles is slightly rounded. The outer molding is wider than the inner molding in most of the works, except that three of the works feature wider inner molding. The outer and innermost molding has a very slight undulating texture which you describe as wavy. The contrasting, center section is a veneer of various colors and textures. The ivory veneer has a wood grain and a clear skip coating that gives the appearance of aged glaze. Irregular divots enhance the rustic appearance. The ebony veneer also features the wood grain, skip coat and irregular divots, but also includes a slightly wavy texture. The gold veneer includes the wood grain and waves, but no skip coat or irregular

divots. Instead, it has more of a mottled coloring where the edges are a darker tone than the center of the veneer. The brown veneer has wood grain and many irregular divots, but no waves or skip coat.

The ten Ferrosa frames at issue are pewter or iron-toned rectangles with either a slightly concave or convex slope towards the center of the rectangle. Each work in this series features irregular divots and a slightly wavy surface.

The Deco works at issue in this appeal contain four designs. The first Deco design, of which there is a smaller and larger version, features a gold-leafed, linear inside molding edged with a wider, sloping, linear molding whose surface is textured with a pebble motif. The second consists of black, rectangular, linear molding. Decorative silver molding consisting of overlapping layers of half-circles runs along the inside edge of the black molding. Two of the works subject to this appeal use this design, although one is smaller than the other. The third Deco design consists of two rounded, wood-grained, linear moldings edged on the inside of the frame by a third gold-toned strip of rounded molding. The fourth and final Deco work features two strips of molding. The inner strip is a smooth ivory wood-grain with horizontal notches, somewhat reminiscent of bamboo. The outer gold strip features a zig-zag design in its center surrounded by diagonal, decorative lines.

II. ADMINISTRATIVE RECORD

A. Initial Applications and Office's Refusal to Register

Between August 26, 2003, and September 9, 2003, the Office received twenty-eight Form VA applications from you on behalf of your client, Albecca, Inc., or from Margaret Ivester, a representative of your client, to register individual art frames. In letters dated between October 27, 2003 and December 12, 2003, Visual Arts Section Examiners Joy Fisher Burns, Kathryn Sukites, Colleen Kearney, Wilbur King, Marjorie M. Kress, James L. Shapleigh, Helen Livanios and Sandra D. Ware refused registration of these works because they determined that each work lacked the authorship necessary to support a copyright claim. Letter from King to Warren of 10/15/03, at 1; Letter from Kress to Warren of 10/21/03, at 1; Letter from Kearney to Warren of 10/22/03, at 1; Letter from Burns to Warren of 10/27/03, at 1; Letter from Kress to Warren of 10/28/03, at 1; Letter from Ware to Warren of 10/28/03, at 1; Letter from Burns to Warren of 11/03/03, at 1; Letter from Shapleigh to Warren of 11/03/03, at 1; Letter from Kress to Warren of 11/12/03, at 1; Letter from Sukites to Ivester of 11/12/03, at 1; Letter from Shapleigh to Warren of 11/17/03, at 1; Letter from Kearney to Warren of 11/18/03, at 1; Letter from King to Ivester of 11/18/03, at 1; Letter from Burns to Ivester of 11/21/03, at 1; Letter from Sukites to Ivester of 11/24/03, at 1; Letter from Sukites to Warren of 12/12/03, at 1; Letter from Livanios to Ivester of 01/28/04, at 1; Letter from Kearney to Warren of 02/23/04, at 1.

B. First Request for Reconsideration

In a letter dated January 30, 2004, you requested reconsideration of the Office's refusal to register twenty-seven art frames. After providing background information on the framing industry and the frequency of infringement, you explained that your client's artisans and designers "take tremendous pride in the craftsmanship, quality and unique appearance of each frame and line of frames" and that its frames "are frequently copied by competitors because of their popularity and distinctiveness." Letter from Warren to Chief, Receiving and Processing Division of 1/30/04, at 2-3. You set forth the basic legal provisions regarding the separability of copyrightable subject matter from utilitarian objects, and argued that "any authorship beyond the simple border concept is in fact conceptually separable because no such single design element or combination of design elements is required for the frame to be a frame." *Id.* at 4. You also explained the "minimal" amount of original authorship required for copyrightability, and argued that the expression found in each of the frames beyond their requisite connected sides easily meets the minimal standards required for copyright protection. *Id.* at 5. In the remainder of the letter, you described each of the twenty-seven frames and highlighted features that were separable and copyrightable. You specifically noted the inner and outer raised edge moldings and their relative proportions, the slope of the primary, flat area, the overall structural shape as seen in cross-section, surface texturing and coloring, as well as the zig-zag pattern, the scallop edging and the pebble motif on three of the deco frames. *Id.* at 5-12.

On February 6, 2004, you submitted a supplement to your request for reconsideration in which you requested reconsideration of refusals to register six additional frames which the Office had rejected subsequent to your submitting your initial request for reconsideration. In this first supplement, you reiterated the points of law stated in your initial request and described the features of the six additional works. Letter from Warren to Chief, Receiving and Processing Division of 02/06/2004, at 2-4. Similarly, on April 16, 2004, you submitted a second supplement to this request with respect to an additional seven works for which the Office had subsequently refused registration.

C. Examining Division's Response to First Request for Reconsideration and First and Second Supplements

In response to your request and in light of the points raised in your letters of January 30, 2004, February 6, 2004, and April 16, 2004, Attorney Advisor Virginia Giroux of the Examining Division reexamined the forty applications and determined that all of these frames were useful articles, the majority of which did not contain any separable authorship which was copyrightable. Letter from Giroux to Warren of 07/22/04, at 3. After further correspondence, the Office determined that registration was available for seven of the frames in the Taos design group.

With respect to the remaining thirty-three works, Ms. Giroux explained that each frame is a useful article that does not contain any design elements that could be physically or conceptually

separated from the frame without destroying the frame's basic shape. Specifically, she found that the raised outer and inner edges, whether oval, straight, curved or sloping, were part of the overall shape, contour and configuration of the useful articles themselves and therefore not subject to copyright protection. She stated that even if some portion of these designs were conceptually separable, such elements consisted of common shapes in the public domain which were consequently not sufficiently creative, in and of themselves or in combination, to sustain a copyright registration. *Id.* at 5 (citing 37 CFR § 202.1 and *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991)). She noted that coloring per se is not a copyrightable element, and even the combination and arrangement of these few sculptural elements would not support a registration. Based on the reasoning discussed above, Ms. Giroux refused copyright registration for these thirty-three works.

D. Second Request for Reconsideration

In a letter dated October 27, 2004, you request the Office to reconsider for a second time its refusal to register the copyright claims in twenty-eight of the thirty-three rejected art frames. Letter from Warren to Board of 10/27/04, at 1.[1] After reiterating the background historical and legal information you provided in your first request for reconsideration, you address each of the three lines of frames.

You describe the Ferrosa frames as having the look of forged, hammered metal due to the waves, indentations and speckling that appear on the surface of the frames. You inform that these elements are not the result of a manufacturing process, but rather are applied to each frame via a mold. *Id.* at 5. You argue that the test of conceptual separability set forth in *Esquire v. Ringer*, 591 F.2d 796 (D.C. Cir. 1978) is too narrow in light of subsequent court rulings, but that in any event, physical separability is sufficient to find that the sculptural elements of the subject frames could be cut off of the frame without impairing the utility of a remaining flat frame. *Id.* at 6-7. You argue that the "unique forged, hammered metal look with the unique speckling and sculptural cross-section" exceeds the low level of creativity required by *Feist* for copyright registration. *Id.* at 8.

Turning to the Canaletto frames, you describe them as having "a unique sculptural cross-section with a raised outer ridge, an elongated flat middle surface, and a further raised inner ridge" where the ridges are textured to be wavy. You state the frames have a rich color scheme and are intended to reflect Venetian architecture. *Id.* at 8. You argue that the Canaletto frames may be cut to physically separate the flat underlying frame from the sculptural elements, and that the cross-sections of the frames evidence the creativity embodied in the surface elements. *Id.* at 9.

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[1] You state that your client is no longer pursuing the appeal of five of the frames. Letter from Warren to Board of 10/27/04, at 1.

With respect to the Deco frames, you again assert that the decorative features on the surface can be separated from the functional component of the underlying frame. You point to the scalloped edging, the speckled texture, the outer artistic zig-zag design and the sculptural cross sections of the various frames in the Deco grouping as evidence of their sufficient creativity to support a copyright registration. *Id.* at 12.

In conclusion, you argue that the applicant is entitled to registrations under the Rule of Doubt, and note that the applicant has defended its frames from knock-offs. *Id.* at 13.

III. DECISION

A. The Legal Framework

1. Useful Articles and Separability

As a general proposition, copyright protection presumptively does not extend to a useful article, defined as "an article 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. However, works of artistic craftsmanship, which may be useful articles themselves or incorporated into a useful article, can receive protection as pictorial, graphic or sculptural works pursuant to 17 U.S.C. § 102(a)(5). This protection is limited, though, in that it extends only "insofar as their form but not their mechanical or utilitarian aspects are concerned." *Id.* § 101. The design of the useful article will be protected "only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." *Id.* This separability can be physical or conceptual. Congress has explained that:

> [A]lthough the shape of an industrial product may be aesthetically satisfying and valuable, the Committee's intention is not to offer it copyright protection under the bill. Unless the shape of an . . . industrial product contains some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted under the bill. The test of separability and independence from 'the utilitarian aspects of the article' does not depend upon the nature of the design–that is, even if the appearance of an article is determined by esthetic (as opposed to functional) considerations, only elements, if any, which can be identified separately from the useful article as such are copyrightable. And, even if the three-dimensional design contains some such element (for example, a carving on the back of a chair or a floral relief design on silver flatware), copyright protection would extend only to that element

> and would not cover the over-all configuration of the utilitarian article as such.

H.R. Rep. No. 94-1476, at 55.

Physical separability means that the subject pictorial, graphic or sculptural features must be able to be separated from the useful article by ordinary means. *Compendium of Copyright Office Practices II,* § 505.03 - 505.04 (1984) [hereinafter *Compendium II*].

Conceptual separability means that the subject features are "clearly recognizable as a pictorial, graphic, or sculptural work which can be visualized on paper, for example, or as a free-standing sculpture, as another example, independent of the shape of the useful article, *i.e.*, the artistic features can be imagined separately and independently from the useful article without destroying the basic shape of the useful article. The artistic features and the useful article could both exist side by side and be perceived as fully realized, separate works–one an artistic work and the other a useful article." *Compendium II*, § 505.03. For example, while a carving on the back of a chair cannot readily be physically separated from the chair, it can easily be conceptually separated because one could imagine the carving existing as a drawing. The chair, meanwhile, would still remain a useful article having retained its basic shape, even absent the carving. The carving would therefore qualify as conceptually separable.

You argue that "any authorship beyond the simple border concept is in fact conceptually separable because no such single design element or combination of design elements is required for the frame to be a frame." Letter from Warren to Chief, Receiving and Processing Division of 1/30/04, at 4. However, the fact that a feature is not necessary to or dictated by the utilitarian concerns of an article does not mean that the feature is automatically conceptually separable. If removing such features would destroy the useful article's basic shape, namely because the features are an integral part of the overall shape or contour of the useful article, then the features would not qualify as conceptually separable.

Additionally, as explained in *Esquire*, 591 F.2d at 800, copyright protection is not available for the "overall shape or configuration of a utilitarian article, no matter how aesthetically pleasing that shape may be." In that case, the Office had refused to register an outdoor lighting fixture which arguably contained non-functional, purely aesthetic features. The court upheld the Office's refusal, noting that "Congress has repeatedly rejected proposed legislation that would make copyright protection available for consumer or industrial products." *Id.*[2] Similarly in *Norris Industries, Inc. v. International Telephone & Telegraph Corp.*, 696 F.2d

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[2] Although *Esquire* was decided under the 1909 version of the Copyright Act, its reasoning is still applicable to cases arising under the 1976 Act. "[T]he 1976 Act and its legislative history can be taken as an expression of congressional understanding of the scope of protection for utilitarian articles under the old regulations." 591 F.2d at 803.

918, 924 (11th Cir. 1983), *cert. denied,* 464 U.S. 818 (1983), the court held that a wire-spoked wheel cover was not entitled to copyright protection because it was a useful article used to protect lugnuts, brakes, wheels and axles from damage and corrosion, and it did not contain any sculptural design features that could be identified apart from the wheel cover itself.

2. Original Works of Authorship

Just because an artistic feature may be separable from a utilitarian object, though, does not mean that it will necessarily merit copyright protection. All copyrightable works, be they sculptures, engravings or otherwise, must also qualify as "original works of authorship." 17 U.S.C. § 102(a).

The term "original" consists of two components: independent creation and sufficient creativity. *Feist*, 499 U.S. at 345. First, the work must have been independently created by the author, *i.e.*, not copied from another work. The Office accepts at face value the assertion on the subject applications for registration that your client Albecca, Inc. acquired any copyrights in and to these works by virtue of assignments from its wholly-owned subsidiaries who originally created the works. Therefore, the first component of the term "original" is not at issue in the analysis set forth herein. Second, the work must possess sufficient creativity. In determining whether a work embodies a sufficient amount of creativity to sustain a copyright claim, the Board adheres to the standard set forth in *Feist*, where the Supreme Court held that only a modicum of creativity is necessary.

As you properly noted in your first request for reconsideration, the requisite level of creativity is "extremely low"; "even a slight amount will suffice." Letter from Warren of 01/30/04, at 5 (citing *Feist*, 499 U.S. at 345). However, the Court also ruled that some works (such as the work at issue in that 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 minimis* quantum of creativity," 499 U.S. at 363, and 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; *see also*, 37 CFR § 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."); 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.01(B) (2002) ("[T]here remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright."). Indeed, the article entitled "*Selling Knockoff Frames is Illegal*" that you attached to your requests for reconsideration notes that "not all frames are protected by IP laws," although copyright may protect "particularly ornate frames and those with interesting patterns."

Even prior to *Feist*, the Office recognized the modest, but existent, requisite level of creativity necessary to sustain a copyright claim. *Compendium II* states, "Works that lack even a certain minimum amount of original authorship are not copyrightable." *Compendium II*,

§ 202.02(a). With respect to pictorial, graphic and sculptural works, *Compendium II* states that a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." *Id.* § 503.02(a).

In implementing this threshold, the Office and courts have consistently found that standard designs, figures and geometric shapes are not sufficiently creative to support a copyright claim. *Id.* § 503.02(a) ("[R]egistration cannot be based upon the simplicity of standard ornamentation . . . . Similarly, it is not possible to copyright common geometric figures or shapes . . . .").[3] Moreover, making minor alterations to these otherwise standard shapes will not inject the requisite level of creativity. *Id.* § 503.02(a) ("[Registration cannot be based upon] a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations.").

Of course, some combinations of common or standard forms contain sufficient creativity with respect to how they are combined or arranged to support a copyright, such as in some of the Deco and Taos frames that the Office did indeed register. *See Feist*, 499 U.S. at 358 (the Copyright Act "implies that some 'ways' [of compiling or arranging uncopyrightable material] will trigger copyright, but that others will not"; determination of copyright rests on creativity of coordination or arrangement). However, merely combining non-protectible elements does not automatically establish creativity where the combination or arrangement itself is simplistic. For example, the Eighth Circuit upheld the Register's refusal to register a simple logo consisting of four angled lines which formed an arrow and the word "Arrows" in cursive script below the arrow. *John Muller & Co. v. New York Arrows Soccer Team*, 802 F.2d 989 (8th Cir. 1986). *See also Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) ("It is true, of course, that a *combination* of unprotectible elements may qualify for copyright protection. [citations omitted.] But it is not true that *any* combination of unprotectible elements automatically qualifies for copyright protection. Our case law suggests, and we hold today, that a combination of unprotectible 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.") (emphasis in the original).

After again examining the twenty-eight art frames and in light of the above-described legal framework, the Board has determined that all of the subject works are intrinsically useful articles, only two of which contain any separable authorship that is copyrightable.

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[3] *See also, id.* § 202.02(j) ("Familiar symbols or designs, and mere variations of typographic ornamentation, lettering, or coloring, are not copyrightable."); *id.* § 503.03(b) ("No registration is possible where the work consists solely of elements which are incapable of supporting a copyright claim. Uncopyrightable elements include common geometric figures or symbols, such as a hexagon, an arrow, or a five-pointed star . . . ."); 37 CFR § 202.1(a) ("[F]amiliar symbols or designs" are "not subject to copyright and applications for registration of such works cannot be entertained.").

B. Analysis of Works

1. The Art Frames are Useful Articles

As self-evident from the "Nature of this Work" designation on the applications for registration, the "art frames" at issue are useful articles. They hold the art in place away from a wall and permit hanging without compromising the art itself. While the Office recognizes that some art frames may incorporate artistic features, the intrinsic purpose of a frame is useful. An industrial product qualifies as a "useful article" as long as it has "an intrinsic utilitarian function." You appropriately recognize that the structural frame is a "useful object," as does one of the supporting articles you submitted. Letter from Warren of 1/30/04, at 4.

Based on the foregoing, the Board finds that these art frames fit squarely within the definition of useful articles. As you correctly note, though, separable elements incorporated into a useful article can warrant copyright protection in and of themselves provided they embody a sufficient amount of creativity. Physical separability, however, is a moot point in the case of these frames because the solid, wood frames have no design elements that could be separated by ordinary means. You argue that the decorative tops of the frames do qualify as physically separable from the underlying, flat, functional rectangles because they could be separated by cutting. Letter from Warren to Board of 10/27/04, at 7. We point out that each frame at issue here is an integrated, solid medium; cutting the base away from the upper structure is not within *Compendium II's* intended scope of physical separation by "ordinary means." *Compendium II*, 505.03-505.04. Such physical division would destroy the overall objects of the frames as they exist in the exact form in which they have been submitted for registration: the frames for which you seek registration are not plain, wooden rectangles. Your statement that the frames "can be cut such that a perfectly flat, unadorned, rectangular frame may be removed from the upper and side surfaces" [Letter from Warren of 10/27/04, at 7] does not aid your argument for registration–such cutting would essentially destroy the specifically adorned frames for which registration is sought. The Board, therefore, will evaluate the frames in terms of conceptual separability and sufficient creativity of each grouping of frames.

2. The Canaletto Frames Contain No Elements that are both Conceptually Separable and Sufficiently Creative

The Canaletto Frames contain four principle design elements: the surface undulations or what you refer to as "waves," the surface indentations or divots, the concentric rectangular inner and outer moldings and the center section veneer which features coloring, graining and/or skip coating. The waves and divots are not conceptually separable. They are unable to exist independently of the frame itself. They are not akin to a pattern that could be represented in another medium. Similarly, the moldings are not separable. They are part of the overall shape and contour of the frame, as is evident from the cross-sections of the frames. Even if these elements were conceptually separable, they would still not warrant copyright protection as they

embody only *de minimis* creative authorship. The waves and divots appear to be minimal and trivial aspects of the frame. It also appears that they may simply be the product of the manufacturing process, and you state nothing in your requests for reconsideration to indicate that the waves and divots were purposefully positioned. The moldings are standard, linear moldings which are mitered together at the corners. Standard designs such as these are not eligible for copyright protection.

In contrast, the Board finds the coloring, graining and skip coating appearing on the center section veneers to be conceptually separable from the utilitarian frame. Such design elements, however, are not sufficiently creative to garner copyright protection. Color in and of itself is not copyrightable per se, and each of these particular veneers is simply colored ivory, ebony, brown or shades of gold. The graining appearing on some of the frames simply mimics a generic wood grain, and does not appear to have any particular pattern which could embody sufficient creativity. The skip coating is simply a standard, decorative technique used to give an object an aged appearance. Even in combination, these standard design elements embody so little creative expression that they are not the proper subject matter of copyright registration.

3. The Ferrosa Frames Contain No Conceptually Separable Elements Nor Sufficiently Creative Ones

The Ferrosa line of frames consist of sloped, linear molding with waves and divots dotting the surface. As discussed in relation to the Canaletto frames, the waves and divots are not separable elements, and even if they were, would not be copyrightable. Although you explain in your second request for reconsideration that the waves, indentations and speckling on the surface of the Ferrosa frames are not part of the manufacturing process, but rather applied to each frame by means of a mold [Letter from Warren of 10/27/04, at 5], a work does not merit copyright protection simply because someone purposefully chose certain design elements; those elements must also embody the requisite amount of creative authorship, and these waves, divots and speckles do not. The only other element of the Ferrosa frames is the sloped, linear molding that is the very frame itself. This molding is necessarily part of the general shape and contour of the frame, and therefore cannot be conceptually separated from the utilitarian frame. Even if it could be, it is a straight piece of wood whose slope at most embodies a *de minimis* amount of creative expression.

4. Only Two of the Deco Frames Contain Elements that are both Conceptually Separable and Sufficiently Creative

In response to the Board's inquiry, you provided a supplemental letter stating: "the 'pebble' design [present on the Deco Frames Nos. 349335 and 549335] is applied to each frame through the use of a mold. The design is not the result of any type of manufacturing process. Rather, each pebble is specifically and individually created." Letter from Warren to Crago of 12/05/05, at 1. The Board has reconsidered these frames and determined that they meet the

minimum requirements to be entitled to copyright protection, albeit in a very limited fashion. The Board bases this determination on the particular contours and specific placement of each of the hundreds of "pebbles." We point out the minimal nature of the authorship which we register with respect to these works and the case law which describes the scope of copyright protection in certain works to be narrow. *See, e.g., Satava v. Lowry*, 323 F.3d 805, 812 (9th Cir. 2003); *Express LLC v. Fetish Group, Inc.*, 2006 U.S. Dist. Lexis 21682, * 42 (C.D. Cal.); *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 741 (9th Cir. 1971).

The other Deco frames suffer from the same fatal flaws as do the Canaletto and Ferrosa frames. Deco frame number 446333 consists of three strips of linear molding conjoined as one. The innermost strip is gold and the middle and outer strips are brown, all with streaks. There are simply no other elements to discuss. The molding is the very frame itself, and nothing is separable from it. The only design feature is the gold and brown colors, which are not copyrightable in and of themselves. Similarly, Deco frame numbers 718332 and 418332 also consist of conjoined strips of molding, this time in black and silver. The Board finds that the overlapping semi-circles, or "scalloped edging," are conceptually separable from the frame, but this design element consists solely of a common configuration of an uncopyrightable geometric shape. Therefore, there is no single element, much less multiple, that could warrant possible copyright protection. Finally, Deco frame number 447334 consists of an ivory strip bordered by a gold strip. The ivory strip has streaks and horizontal notches, reminiscent of bamboo. The gold strip features a zig-zag pattern on top of a background of diagonal slashes. While the Board finds the zig-zag pattern and diagonal slashes to be conceptually separable from the utilitarian function of the frame, they still cannot qualify for copyright protection because they are standard, geometric design elements that do not embody the requisite amount of creativity necessary to sustain a copyright registration.

C. Other Considerations

Several other arguments that you make, while perhaps important on personal or commercial levels, have no bearing on the determination of whether or not copyright registration is available for these works. For example, you state that your client's artisans and designers "take tremendous pride in the craftsmanship, quality and unique appearance of each frame and line of frames" and that its frames "are frequently copied by competitors because of their popularity and distinctiveness." Letter from Warren of 1/30/04, at 2-3; Letter from Warren of 10/27/04, at 3. However, as discussed above, the commercial success or quality of a work are not material, and should not be for policy purposes, to a copyrightability analysis. *See Compendium II*, § 503.02(b) ("The requisite minimal amount of original sculptural authorship necessary for registration in Class VA does not depend upon the aesthetic merit, commercial appeal, or symbolic value of a work.")

You also repeatedly describe the various frames as "unique" or "distinctive." Letter from Warren of 1/30/04, at 5-12; Letter from Warren of 10/27/04, at 5-12. Uniqueness is material to a

patent analysis, but not to a copyrightability analysis. As is well-settled, two identical works may both be registered for copyright protection, provided that each was independently created and contains the requisite level of creativity. Uniqueness is neither necessary nor sufficient to support a copyright registration.

Finally, you argue that the applicant is entitled to registrations under the Rule of Doubt. Letter from Warren of 10/27/04, at 13. You will note that this rule applies only when the Office determines that there is "reasonable doubt" as to whether a court would determine that the works contain copyrightable subject matter. Based on the analysis above, and except for the two Deco frames which the Office will proceed to register, the Office does not believe that any reasonable doubt exists with respect to the other twenty-six frames. These works embody so little copyrightable authorship that it is not reasonable to conclude, under any analysis, that they would satisfy the threshold necessary to sustain a copyright registration.

IV. CONCLUSION

For the reasons stated herein, the Copyright Office Review Board affirms the refusal to register twenty-six of the art frames identified above. The Board will instruct the Copyright Office to register the two pebble motif designs on the Deco frames numbered 349335 and 549335. This decision constitutes final agency action on this matter.

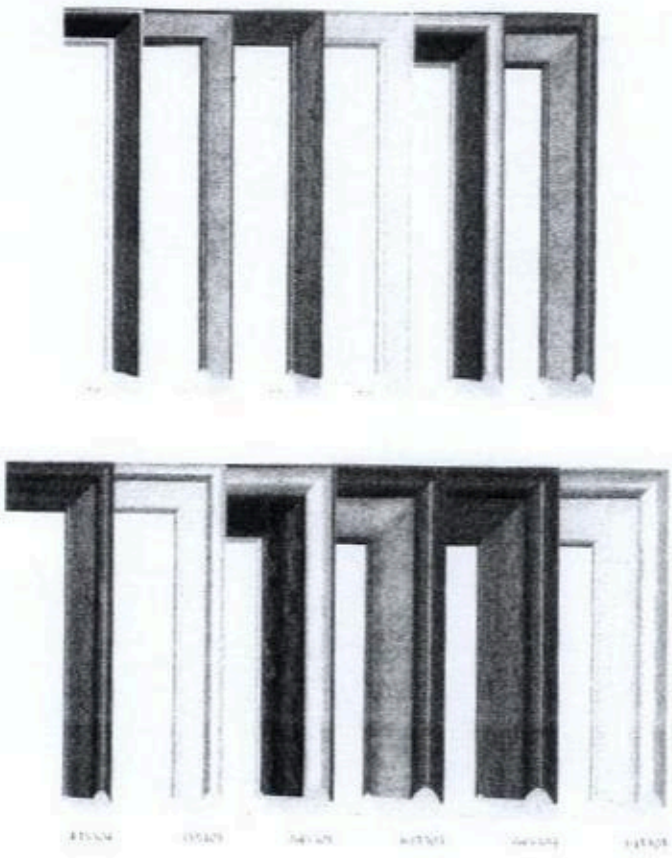
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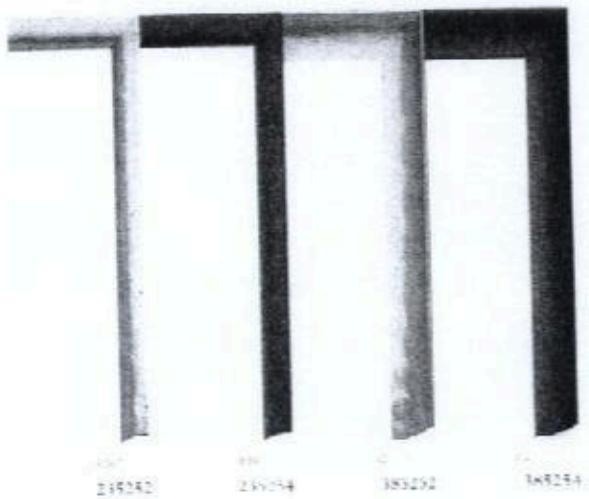
Nanette Petruzzelli
Special Legal Advisor for Reengineering
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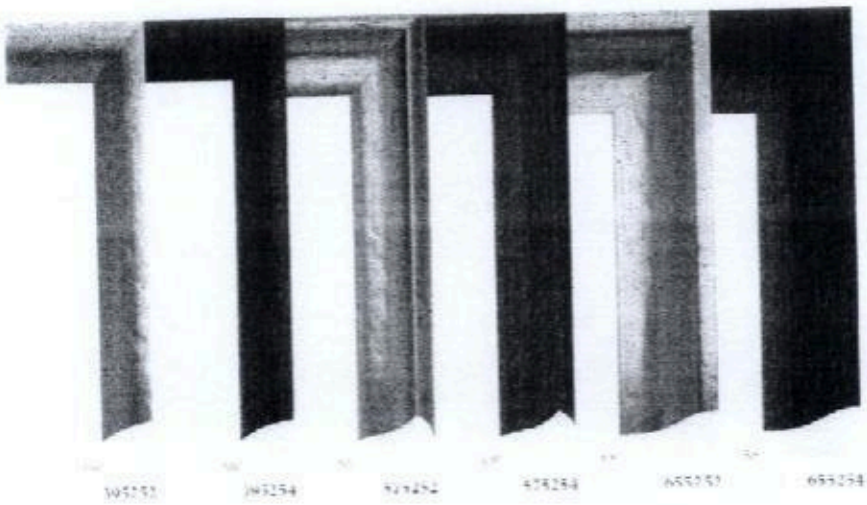
Appendix A

Canaletto Frames



Ferrosa Frames





Deco Frames

