United States Copyright Office
Library of Congress · 101 Independence Avenue SE · Washington, DC 20559-6000 · www.copyright.gov

November 5, 2013

Lane & Waterman LLP
Attn: April Price
220 North Main Street, Suite 600
Davenport, Iowa 52801-1987

RE: Casket/Urn Design #1
Casket/Urn Design #2
Casket/Urn Design #3
Correspondence ID: 1-FL81TL

Dear Ms. Price:

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: *Casket/Urn Design #1, Casket/Urn Design #2,* and *Casket/Urn Design #3* (collectively, the "Works"). You submitted this request on behalf of your client, Ronald V. Skaggs on August 29, 2013. 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 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

The Works are wood plank caskets with carved inscription. *Casket/Urn Design #1* is an adult-sized casket with black metal looped handles and a raised, four-sided split lid. The deposit material for *Casket/Urn Design #1* contains images for two different caskets. The first is made of a lighter-colored wood, perhaps pine, and has loop-styled metal handles. The bottom front of the casket contains the words "Remember When" carved into the base plank, flanked by a horizontal scroll shape, resembling the configuration of the sound hole on a

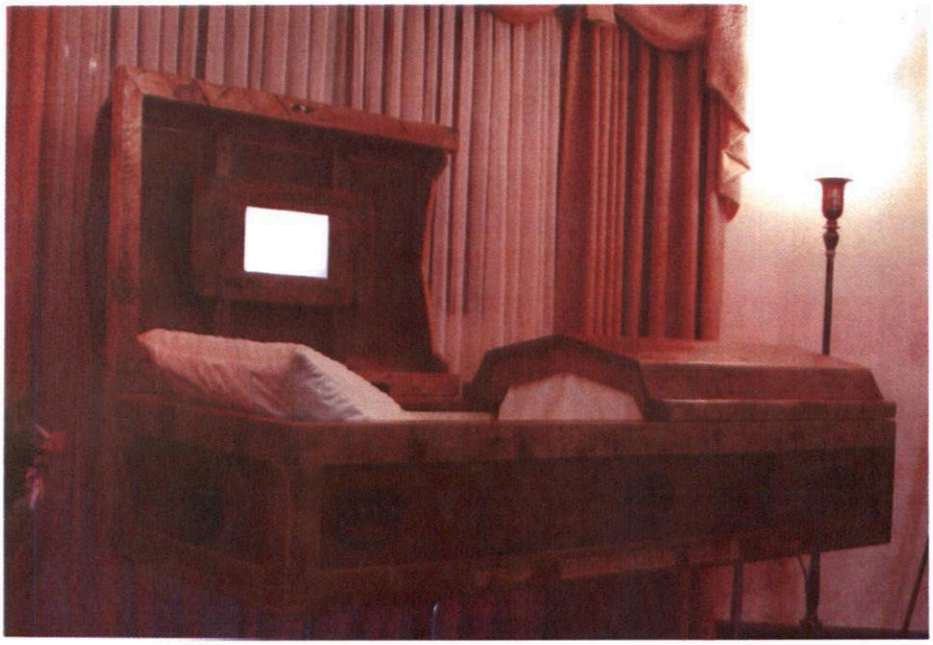
violin or guitar. The underside of the front lid contains the words "I'm only a memory away," flanked by the same scroll. The below images are photographic reproductions of both versions of the work from the deposit materials:





The second version of *Casket/Urn Design #1* is made of a darker wood, perhaps oak, and has metal lock snaps for the hood. The backing of the center handle has a polished silver appearance, while the top of the two piece lid has a beveled wood finish. The inside cover of the top lid contains a raised oval shape. There are no words or engravings evident on this version.

Casket/Urn Design #2 is a polished plank wood casket with metal loop handles. The lid is a four-sided configuration, framed by a thick base trim. The inside cover of the top lid contains a rectangular piece of wood with a rectangular mirror in the center. A short phrase is carved below the mirror ("For the life I was given") and an indecipherable engraving above the mirror. [1] As with *Casket/Urn Design #1*, there appears to be a second version of *Casket/Urn Design #2*. The handles of this casket are twisted pieces of metal, and there are exterior metal laches for the lids. The inside cover of the top lid contains a recessed circular configuration with a raised square in the center. The below images are photographic reproductions of both versions of the work from the deposit materials.



[1] It is the responsibility of the applicant to provide images that identify all of the salient features of a work. The Board cannot consider aspects of a work that are not identifiable from the deposit material.



Casket/Urn Design #3 is a small wood plank casket that appears to be for the placement of urns or possibly for the burial of infant children and/or pets. The casket has metal ring handles on the sides, and an old-styled lock and key on the front boards. The lid is gabled, and the word "Forever" is carved into the front face panel. The below image is a photographic reproduction of the work from the deposit materials.



II. ADMINISTRATIVE RECORD

On November 8, 2012, the United States Copyright Office (the "Office" or "Copyright Office") issued a letter informing you that it had refused registration of the above described Works. *Letter from Registration Specialist, Rebecca Barker, to April A. Marshall* (November 8, 2012). In its letter, the Office stated that it could not register the Works because they lacked the authorship necessary to support a copyright claim. *Id.*

In a letter dated February 7, 2013, you requested that the Office reconsider its initial refusal to register the Works. *Letter from April Price to Copyright RAC Division* (February 7, 2013). Upon reviewing the Works in light of the points raised in your letter, the Office concluded that it was "still unable to register a copyright claim in any of these works, caskets/urns, because they are useful articles that do not contain any authorship that is both separable and copyrightable." *Letter from Attorney-Advisor, Stephanie Mason, to April Price*, at 1 (May 30, 2013).

Finally, in a letter dated August 29, 2013, you requested that the Office reconsider for a second time its refusal to the register the Works. *Letter from April Price to Copyright RAC Division* (August 29, 2013). In arguing that the Office improperly refused registration, you assert that the designs of the caskets are physically separable "[T]he urn and casket designs can be physically separated – after removing the designs an underlying, functional box would remain. Thus, the urn and casket designs do not serve a functional purpose, and instead only exist as 'superfluous ornamental designs' surrounding a functional box." *Id.* at 2. You also argue that designs are conceptually separable, citing *Keiselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980) and *Universal Furniture Intl., Inc. v. Collezione Europa USA, Inc.*, 618 F.3d 417 (4th Cir. 2010). You assert that "Applicant's designs evoke rustic, aged structures structures by incorporating decorative distressed wood, edges like those of a barn, and wide slats." *Id.* at 3. As an alternative, you suggest that the Office should register the designs under the "rule of doubt." *Id.* at 4.

III. DECISION

A. The Legal Framework

1. Separability

Copyright protection does not generally extend to useful articles, *i.e.*, "article[s] 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 authorship, 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 [the designs'] form but not their mechanical or utilitarian aspects are concerned." *Id.* at § 101.

To be clear, a design incorporated into a useful article is only eligible for copyright protection to the extent that the design includes "pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, utilitarian aspects of the article." *Id.*; *see also Esquire, Inc. v. Ringer,* 591 F.2d 796, 800 (D.C. Cir. 1978), *cert. denied,* 440 U.S. 908 (1979) (holding copyright protection is not available for the "overall shape or configuration of a utilitarian article, no matter how aesthetically pleasing that shape may be"). The Board employs two tests to assess separability: (1) a test for "physical separability"; and (2) a test for "conceptual separability." *Id.;see also Custom Chrome, Inc. v. Ringer*, 35 U.S.P.Q. 2d 1714 (D.D.C. 1995) (finding that the Copyright Office's tests for physical and conceptual separability are "a reasonable construction of the copyright statute" consistent with the words of the statute, present law, and the legislature's declared intent in enacting the statute).

To satisfy the test for "physical separability," a work's pictorial, graphic, or sculptural features must be able to be physically separated from the work's utilitarian aspects, by ordinary means, without impairing the work's utility. *See, e.g., Mazer v. Stein*, 347 U.S. 201 (1954) (holding a sculptured lamp base depicting a Balinese dancer did not loose its ability to exist independently as a work of art when it was incorporated into a useful article); *and see, Ted Arnold, Ltd. v. Silvercraft Co.*, 259 F. Supp. 733 (S.D.N.Y. 1966) (upholding the copyright in a sculpture of an antique telephone that was used as a casing to house a pencil sharpener because the sculpture was physically separable from the article without impairing the utility of the pencil sharpener). To satisfy the test for "conceptual separability," a work's pictorial, graphic, or sculptural features must be able to be imagined separately and independently from the work's utilitarian aspects without destroying the work's basic shape. *See, e.g.,* H.R. Rep. No. 94-1476 (1976) (indicating a carving on the back of a chair or a floral relief design on silver flatware are examples of conceptually separable design features). A work containing design features that fail to qualify as either physically or conceptually separable from the work's intrinsic utilitarian functions are ineligible for registration under the Copyright Act.

If a useful article does possess elements that are physically or conceptually separable from the work, the Office examines these elements to determine if one or more of the elements possesses sufficient creativity to warrant copyright protection. If one or more of the elements does is copyrightable, a registration can be made but it is important to understand the registration does *not* cover the entire useful article; rather, it only applies to the copyrightable elements. This is precisely the teaching of the *Mazer v. Stein* case. The sculpture of the Balinese dancer, as a separable element, was protectible, but the overall lamp design was not.

Aspects of a work that are physically or conceptually separable 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 aspects 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 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"); *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. 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").

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. *See* 17 U.S.C. § 102(b); *see also 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 the Works*

After carefully examining the Works and applying the legal standards discussed above, the Board finds that they are useful articles that are void of separable authorship that is copyrightable. Below, we list each work, identify its utilitarian function, and explain why we have concluded that it does not possess copyrightable design features that are physically or conceptually separable from its function.

1. *Casket/Urn Design #1*

Casket/Urn Design #1 is a straightforward, wood plank casket, in two versions, whose utilitarian purpose is obvious; *i.e.* for the burial of physical remains. You argue that the design of the box – which is to say, its shape – is physically separable from the "underlying" box which can still function as a casket. This is not correct. The casket design *is* the box, for there is no underlying box that can be removed from its utilitarian shape. Dismantling the planks in an effort to remove the casket would result in the destruction of the utilitarian function of the work. The metal ring handles may be physically removed from the casket but, as discussed above, such simple geometric shapes (and oval metal base and metal ring) do not warrant copyright protection. It is also possible that the inscription "Remember when" and the scroll at the base of the casket, and the words "I'm only a memory away" and accompanying scroll, could be physically separated from the casket, but words and short phrases, along with common geometric figures, are not copyrightable. 37 C.F.R. § 202.10(a).

The Board also finds the design of *Casket/Urn Design #1* to be lacking in conceptual separability, as well. As explained above, under the test for conceptual separability utilized by the Copyright Office, the artistic aspects of the design must be capable of being envisioned separately from the useful article without destroying the basic shape or configuration of the work itself. It is not acceptable, nor is it Office practice, to imagine the design shape of the casket separately and be left with a rudimentary, square box that, as you argue, serves the utilitarian function of a casket. To do so would destroy the overall shape of the work that is being considered in an attempt to attribute its utilitarian functions to the most basic shape or configuration necessary to accomplish its purpose. Such analysis would not be a consideration of the work as it is presented. Furthermore, even if the Board applied such an analysis, and we are not, the design shape that would be separable would still be too basic and rudimentary in configuration to warrant copyright protection.

2. *Casket/Urn Design #2*

The same analysis applies to *Casket/Urn Design #2*. There is no physical separability of design to consider, save for the basic metal laches, ring handles, and the beveled finish of the lid lip or trim; all of which are too rudimentary and simplistic in shape to warrant copyright protection. Likewise there is no conceptual separability of the shape of the casket for to do so would destroy the image of the work. There appears to be conceptual separability with respect to the oval indentation and raised square on the inside of the front portion of the lid, but the oval and square shapes are basic geometric shapes that are not copyrightable. Finally, the short phrase – "For the life I was given" – is not protectible. *Id.*

3. *Casket/Urn Design #3*

The same analysis applies to *Casket/Urn Design #3* as well. The only physically separable elements of the work are the side ring handles, the old-style keyhole at the front and, possibly, the carved word "Forever" on the front panel. All of these are common elements that are not subject to copyright protection. There is no conceptual separability of the shape of the casket design, to do so would destroy the image of the work. Consequently, there is not sufficient authorship present in this work to support a claim to copyright.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the Works entitled *Casket/Urn Design #, Casket/Urn Design #2*, and *Casket/Urn Design #3*. 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