United States Copyright Office
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September 3, 2013

Schultz & Associates, P.C.
Attn: George Schultz
5400 LBJ Freeway, Suite 1200
Dallas, TX 75240

Re: MCOR4 Metal Bar Bracket
Correspondence ID: 1-DG85IR

Dear Mr. Schultz:

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 work entitled: *MCOR4 Metal Bar Bracket*. You submitted this request on behalf of your client, Hardware Resources, on June 6, 2013. I apologize for the 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.

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

MCOR4 Metal Bar Bracket (the "Work") consists of a standard metal bracket decorated with a metal, scroll work design. The design is comprised of two parallel curved bars joined at its ends by a curlicue shape. There is a third curlicue shape attached to the top right portion of the scroll design. The below image is a photographic reproduction of the Work from the deposit materials:



II. ADMINISTRATIVE RECORD

On August 23, 2012, the United States Copyright Office (the "Office") issued a letter notifying Hardware Resources (the "Applicant") that it had refused registration of the above mentioned Work. *Letter from Registration Specialist, Ivan Proctor, to George Schultz* (August 23, 2012). In its letter, the Office stated that it could not register the Work because it is a useful article that does not contain any separable features that are copyrightable. *Id.*

In a letter dated November 21, 2012, you requested that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusal to register the Work. *Letter from George Schultz to Copyright RAC Division* (November 21, 2012) ("First Request"). Upon reviewing the Work in light of the points raised in your letter, the Office again concluded that the Work "is a useful article that does not contain any authorship that is both separable and copyrightable" and refused registration. *Letter from Attorney-Advisor, Stephanie Mason, to George Schultz* (March 8, 2013).

Finally, in a letter dated June 6, 2013, you requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Work. *Letter from George Schultz to Copyright R&P Division* (June 6, 2013) ("Second Request"). In your letter, you agree with the Office's prior determination that the Work is a useful article that includes design features that are separable from its utilitarian function, but disagree with the Office's conclusion that those design features lack a sufficient amount of original authorship to qualify for copyright protection. *Id.* Specifically, you claim the Work's separable design features represent "a sculptural interpretation" of "an ancient Roman parchment" and include at least the minimum amount of creativity required to support registration under the standard for originality set forth in *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). *Second Request* at 3.

In addition to *Feist*, your argument references several cases in support of the general principle that ornamental designs incorporated into useful articles are eligible for registration under the Copyright Act if they are both separable and possess a requisite amount of creative authorship. *Second Request* at 4-5. You also direct the Board's attention to several examples of registered works that you argue are analogous to the Work at issue. *Id.* at Exhibit 2.

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 (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, U.S. Code Cong. & Admin.News 1976, p. 5668 (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.

(2) Originality

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. *See Feist*, 499 U.S. at 345. 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 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"). 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. D.C. 1989).

To be clear, the mere simplistic arrangement of unprotectable elements does not automatically establish 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., Inc. v. N.Y. Arrows Soccer Team, Inc. et. al.*, 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 court's language in *Satava* is particularly instructional:

> [i]t 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, 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 Work*

After carefully examining the Work and applying the legal standards discussed above, the Board finds that the *MCOR4 Metal Bar Bracket* is a useful article that does not possess design elements that are *both* separable from the Work's utilitarian functions and sufficiently creative to

support a claim to copyright. Accordingly, we affirm the Registration Program's decision to deny registration.

A "useful article" is defined by statute 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 (2007). As discussed above, the law requires that, to be eligible for registration, design features incorporated into useful articles must be either physically or conceptually separable from the utilitarian aspects of the work. *See Esquire,* 591 F.2d at 800. Here, it is undisputed that the Work (a metal bracket) is a useful article. It is also undisputed that the Work's design feature (a curlicue scroll design) is separable from its function as a bracket. However, the Board finds that this feature, although separable, does not possess the requisite amount of creative authorship to warrant copyright registration.

As noted, 37 C.F.R. § 202.1(a), identifies certain elements that are not copyrightable. These elements include, among others, "familiar symbols or designs" such as simple lines, basic curls, incomplete circles, or any minor variation thereof. *Id.* Here, the Work's only separable features are its common curlicue designs and the two simple arched lines that connect them. Consistent with the above regulations, these common shapes and designs are ineligible for protection under the Copyright Act. *Id.* Moreover, viewed as a whole, the Work's separable design feature consists of the simple combination of three ordinary curlicue designs and two simple, arched lines to form a standard scroll shape. This basic arrangement of unprotectable elements is, at best, *de minimis*, and fails to meet the threshold for copyrightable authorship. *Feist,* 499 U.S at 359; *see also Atari Games,* 888 F.2d at 883. Accordingly, we conclude that both the individual elements that comprise the Work's separable design feature, as well as their selection and arrangement, lack the requisite "creative spark" necessary for registration. *Feist,* 499 U.S at 359; *Satava*, 323 F.3d at 811.

Your assertion that the Work's separable elements represent "a sculptural interpretation" of "an ancient Roman parchment" does not add to your claim of sufficient creativity. *Second Request.* at 3. As discussed above, the Board does not assess a design's visual effect or appearance, its symbolism, or the espoused intentions of the author in determining whether a work contains the requisite minimal amount of original authorship necessary for registration. *See* 17 U.S.C. § 102(b); *see also Bleistein*, 188 U.S. 239. Thus, even if accurate, the mere fact that the Work's author intended for it to resemble a "Roman parchment" would not qualify the Work, as a whole, as copyrightable.

Finally, regarding to your argument that the Office has registered works similar to the ones in contention, the Office has a policy of not comparing works that have been previously registered or refused registration. Each claim of copyright is examined on its own merits, with the Office applying uniform standards of copyrightability throughout the examination process. Because copyrightability involves a mixed question of law and fact, differences between any two works can lead to different results. Thus, the fact that an individual examiner might have previously registered a work that is, arguably, less original than the work at issue does not require the Board to reverse the denial of a work that we find lacks sufficient creative authorship. *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) (indicating the Office "does not compare works that have gone through the registration

process."). While we appreciate you bringing perceived inconsistencies in the application of Office regulations to our attention, we will not compare the Work at issue with prior registrations in our review of your requested reconsideration of refusal.

In sum, the Board finds that the Work does not include design elements that are both separable from the Work and possess the requisite amount of copyrightable authorship, either individually or in their selection and arrangement, to warrant registration.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the work entitled: *MCOR4 Metal Bar Bracket*. 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