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

September 20, 2013

Wood Herron & Evans LLP
Attn: Wayne L. Jacobs
2700 Carew Tower
441 Vine Street
Cincinnati, Ohio 45202-2917

**Re: OR7 Casket Ear**
**OR Casket with Hardware**
**OR Casket Without Hardware**

**Correspondence ID: 1-DJ4IHR**

Dear Mr. Jacobs:

The Review Board of the United States Copyright Office (the "Board") is in receipt of your second requests for reconsideration of the Registration Program's refusal to register the works entitled: *OR7 Casket Ear, OR Casket with Hardware,* and *OR Casket Without Hardware* (collectively, the "Works"). You submitted these request on behalf of your client, Batesville Casket Company, Inc., on November 26, 2012. Administratively, your previous registration requests for the three works were addressed with separate correspondence. However, because the issues associated with the three works are similar, for the purpose of second reconsideration, we will address all three claims in this one letter. 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 these cases. After careful consideration of the arguments in your second requests for reconsideration, the Board affirms the Registration Program's denial of registration of these copyright claims. 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 WORKS

*OR Casket Without Hardware* is a casket design that includes a shell, side walls, end walls, corners, a lid, rims, and crowns. The below image is a photographic reproduction of the work from the deposit materials:




*OR Casket With Hardware* is a casket design that includes a shell, side walls, end walls, corners, a lid, rims, and crowns. It also includes four metal rails (two long and two short) that are attached to the casket's sides. The rails are attached to the casket by a series of "ears" and arms. Each "ear" has two arms protruding from it. Within each ear, there is a 2D "rose pattern" design.[1] The below image is a photographic reproduction of the work from the deposit materials:




*OR7 Casket Ear* (the "Ear") is an oval-shaped metal mechanism that is attached to the side walls of the casket shell. The Ear has two openings carved into its left and right

[1] In a letter dated September 4, 2012, the Office indicated the "rose pattern" design, in and of itself, could be eligible for registration and provided you with information regarding the steps you could take to amend your application for the *OR Casket With Hardware* so that you are able to purse copyright protection for the "rose pattern" design.

ends. The Ear's openings are shaped so that the screw and clevis feature of a specific "handle bar" device can fit into the openings and attach to the casket. The below image is a photographic reproduction of the work from the deposit materials:



## II. ADMINISTRATIVE RECORD

In March and April of 2012 the United States Copyright Office (the "Office") issued three letters notifying Batesville Casket Company, Inc. (the "Applicant") that it had refused registration of the above mentioned Works. *Letter from Registration Specialist, Robin Jones, to Wayne Jacobs* (March 15, 2012); *Letter from Registration Specialist, Rebecca Barker to Wayne Jacobs* (April 23, 2012); *Letter from Registration Specialist, Sandra Ware, to Wayne Jacobs* (April 24, 2012). In its letters, the Office stated that it could not register the Works because they are useful articles that do not contain the separable authorship needed to qualify for copyright registration. *Id.*

In May, 2012 you submitted three letters requesting that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusals to register the Works. *Letter from Wayne Jacobs to Copyright RAC Division* (May 18, 2012); *Letter from Wayne Jacobs to Copyright RAC Division* (May 22, 2012); *Letter from Wayne Jacobs to Copyright RAC Division* (May 23, 2012). Upon reviewing the Works in light of the points raised in your letters, the Office concluded that the Works do not contain any authorship that is both separable and copyrightable and again refused registration. *Letters from Attorney-Advisor, Stephanie Mason, to Wayne Jacobs* (September 4, 2012).

Finally, in three letters dated November 26, 2012, you requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Works. *Letters from Wayne Jacobs to Copyright R&P Division* (November 26, 2012) ("Second Requests"). In arguing that the Office improperly refused registration, you claim the Works include elements that are both separable from their utilitarian functions; and, that those separable elements possess 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). *Id.* at *passim*. Specifically, you claim that the Works' design features "could be displayed for visual appreciation just like any other

sculptural work" and that the Applicant should not be "penalized" simply because its Works artistic design features are incorporated into an industrial product. *Id.* at 5-7.

## III. DECISION

### A. *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), 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.

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. NY 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 Works and applying the legal standards discussed above, the Board finds that *OR7 Casket Ear, OR Casket with Hardware,* and *OR Casket without Hardware* are useful articles that are void of separable authorship.

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). The Board accepts the general principal that design features incorporated into utilitarian, industrial products are not, *per se*, disqualified from copyright registration. However, as discussed above, the law requires that, to be eligible for registration, such design features must be either physically or conceptually separable from the utilitarian aspects of the industrial product. *See Esquire,* 591 F.2d at 800.

Here, the Board has determined that the Works at issue are useful articles. Thus, to be eligible for registration, any design features incorporated into the Works must be either physically or conceptually separable from their respective utilitarian function. *See Esquire,*

591 F.2d at 800. Below, we list each work, identify its utilitarian function, and explain why we have concluded that it does not posses design features that are physically or conceptually separable from said function.

***(1) OR Casket without Hardware***

*OR Casket without Hardware* is a casket designed for transporting, displaying and burying a corpse. You argue that the following design features are conceptually separable from the work's function as a casket: its shell, side walls, end walls, corners, lid, rims, and crowns. *Second Request* at 3. We find your arguments to be unpersuasive. Specifically, we find it impossible to imagine a way to physically or conceptually separate these elements from the work without destroying its basic function as a casket.

Indeed, in arguing that the above elements are separable, you are essentially claiming the work's overall shape and form is distinguishable from its intended function. *See id.* at 3-5 (stating that the work is recognizable as a "free-standing sculpture" and that "Applicant should not be penalized just because its authorship in the form of these sculptural elements is embodied in an industrial product . . . "). It is well settled that copyright protection is not available based on the "overall shape or configuration" of a utilitarian article "no matter how aesthetically pleasing that shape or configuration might be." *See Esquire,* 591 F.2d at 800. The simple suggestion that a work can be viewed as a "free-standing sculpture" does not negate its intrinsic utilitarian function. Accordingly, we find that the work lacks separable authorship and is not eligible for protection under the Copyright Act.

***(2) OR7 Casket Ear***

*OR7 Casket Ear* is a mechanism that performs a "washer-like" weight distribution function at the point where rail and handlebar features attach to a casket. More specifically, when the casket is lifted by its rails and handlebars, the pressure that would otherwise bear directly on the casket wall is distributed along the Ear; thus, increasing the effective weight bearing capabilities of the rail and handlebar features. We are unable to imagine a way to physically or conceptually separate any aspect of the Ear from the Ear itself without destroying its intended purpose as a weight distribution instrument. Accordingly, the Ear is ineligible for copyright protection. *See Esquire,* 591 F.2d at 800.

Moreover, even if the design features incorporated into the Ear were to be considered separately from its utilitarian purpose, we would still conclude that the Ear lacks any separable authorship capable of sustaining a claim to copyright. The whole of the Ear design includes little more than a metal oval with circular ends and two spaces cut out of it so that it is capable of joining with a screw and clevis mechanism. Common oval designs, ordinary circle designs, and basic cutouts for attaching a screw or clevis are prohibited from copyright registration. *See* 37 C.F.R. § 202.1(a) (identifying basic symbols or designs as ineligible for copyright registration). Likewise, the simple, symmetric arrangement of such

features fails to meet the threshold for copyrightable authorship. *Feist,* 499 U.S at 359; *see also Atari Games,* 888 F.2d at 883. Thus, even if separable, the Ear design, both in its individual elements and as a whole, lacks the requisite "creative spark" necessary for registration. *Feist,* 499 U.S at 359; *Satava*, 323 F.3d at 811.

***(3) OR Casket with Hardware***

*OR Casket with Hardware* is a casket designed for transporting, displaying and burying a corpse. The work includes all the features of the *OR Casket without Hardware* (*see* section (1) above) as well as four metal rail and handlebar features (two long and two short) that protrude from the casket's sides. The rail and handlebar features are attached to the casket by a series of "ears" (*see* section (2) above). Obviously, the rail and handlebar features are designed to serve as a means by which the casket can be physically lifted and carried.

For the same reasons as indicated above, we find that it is impossible to physically or conceptually separate any aspect of the *OR Casket with Hardware* design from the work itself without destroying its basic function as a casket for transporting, displaying and burying a corpse. Accordingly, the work is ineligible for registration under the Copyright Act.

In sum, the Board finds that all three Works lack any separable sculptural, pictorial or graphic features that are eligible for copyright protection; and, that any attempt to physically or conceptually separate the features the Applicant has identified as separable would destroy the Works' usefulness.

## IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusals to register the works entitled: *OR7 Casket Ear, OR Casket with Hardware,* and *OR Casket without Hardware*. 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