United States Copyright Office
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July 24, 2013

Cislo & Thomas LLP
Attn: Mark Nielson
1333 2nd St., Suite 500
Santa Monica, CA 90401-4110

Re: Round Sectional Wicker Furniture Collection
Modern Boxy Sectional Wicker Furniture Collection
U-Shaped Sectional Wicker Furniture Collection
Capri Sectional Wicker Furniture Collection
Correspondence ID: 1-8H0M4T & 1-8I1IPY

Dear Mr. Nielson:

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: *Round Sectional Wicker Furniture Collection; Modern Boxy Sectional Wicker Furniture Collection; U-Shaped Sectional Wicker Furniture Collection;* and, *Capri Sectional Wicker Furniture Collection* (the "Works"). You submitted this request on behalf of your client, Zen Path LLC (the "Applicant"), on September 7, 2011. I apologize for the lengthy 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 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

The Works consist of four furniture collections, each made up of several individual pieces of large, sectional wicker furniture. The individual pieces of furniture are comprised of an aluminum frame, wicker woven in a specific pattern, a series of "feet" or "legs" attached to the bottom portions of the furniture, and cushions in a variety of colors.

The Applicant's request for protection applies only to its selection and arrangement of the following "ornamental" elements: (1) "the specific wicker design and weave pattern that it has chosen to use on its furniture"; (2) "the specific 'feet' or 'legs' that it has chosen to use on its furniture"; and, (3) "the oversized width of the arms and back on its furniture relative to the depth of the seating area on its furniture." *Letter from Mark Neilsen to Copyright R&P Division*

(September 9, 2011) ("Second Request") at 7; *see also Letter from Mark Nielsen to Copyright RAC Division* (January 31, 2011) ("First Request") at 5-6.

Representative of photograph of the Works from the deposit materials are included as attachments to this letter:

II. ADMINISTRATIVE RECORD

In November, 2010, the United States Copyright Office (the "Office") issued a letter notifying the Applicant that it had refused registration of the above mentioned Works. *Letter from Registration Specialist, Adrienne Brown, to Mark Nielsen* (November 1, 2010); *Letter from Registration Specialist, Thomas P. Brina, to Mark Nielsen* (November 4, 2010). In its letters, the Office indicated that it could not register the Works because they are "useful articles" which do not contain any separable authorship needed to sustain a copyright claim. *Id.*

In a letter dated January 31, 2011, you requested that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusal to register the Works. *First Request*. Your letter set forth the reasons you believed the Office improperly refused registration. *Id.* Upon reviewing the Works in light of the points raised in your letter, the Office concluded that the Works are indeed useful articles which do not contain any separable authorship. *Letter from Attorney-Advisor, Virginia Giroux-Rollow, to Mark Neilsen* (June 27, 2011). The Office further concluded that, even if separable, the Works' design elements do not contain a sufficient amount of original and creative authorship to warrant copyright protection. *Id.*

In a letter dated September 7, 2011, 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. *Second Request*. In arguing that the Office improperly refused registration, you claim that the Office erred in denying registration of the four Works because the following "ornamental" elements are "physically and/or conceptually" separable from the utilitarian aspects of the Works' function as furniture: (1) The specific wicker design and weave pattern; (2) The specific "feet" or "legs"; and, (3) The oversized width of the arms and back, as it relates to the depth of the seating area. *Id.* at 7-10.

You also claim that the Applicant's selection and arrangement of the above elements includes 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 7-10. In support of this argument, you assert that the Applicant's claim of copyright is directed to the aesthetic aspects of the Works, the Applicant's choice to use wicker over other materials, the Applicant's opting to add "ornamental" feet and legs to the Works, and the "distinct visual impression" created by the utilization of oversized arm and back rests. *Id.*

III. DECISION

A. *The Legal Framework*

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 non-protectable 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.*, 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 Works***

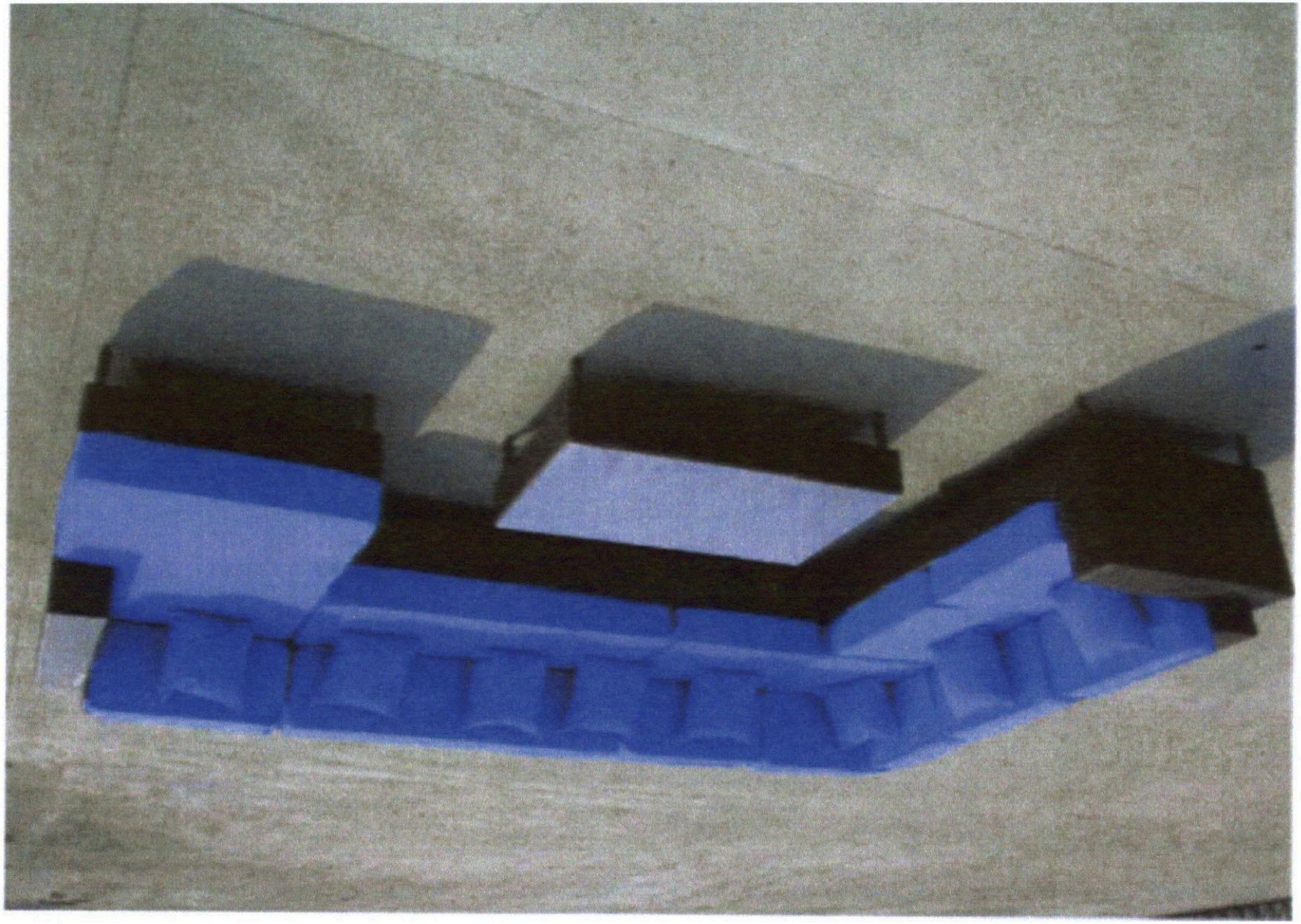
After carefully examining the Works and applying the legal standards discussed above, the Board finds that the Works, particularly the selection and arrangement of the elements to which the Applicant claims its application applies, fail to satisfy the requirement of creativity.

As indicated in your first and second requests for reconsideration, the Applicant claims that it only seeks copyright protect for "its selection and arrangement of ornamental elements that it has applied to its furniture." *See Second Request* at 7; *see also First Request* at 5-6. To wit: (1) "the specific wicker design and weave pattern that it has chosen to use on its furniture"; (2) "the specific 'feet' or 'legs' that it has chosen to use on its furniture"; and, (3) "the oversized width of the arms and back on its furniture relative to the depth of the seating area on its furniture." *Id.* These elements (a standard woven pattern; ordinary furniture legs; and mere variations in width and depth) are, in and of themselves, not sufficiently creative to warrant copyright protection. *See* 37 C.F.R. § 202.1(a).

The Board does accept the principle that combinations of uncopyrightable elements may be eligible for protection. However, in order to be accepted for registration, such combinations must contain some distinguishable variation in the selection, coordination, or arrangement of their elements that is not so obvious or minor that the "creative spark is utterly lacking or so trivial as to be nonexistent." *Feist,* 499 U.S at 359; *see also Atari Games,* 888 F.2d at 883. Here, the simple incorporation of a standard woven pattern, ordinarily shaped furniture legs, and mere variations in width and depth into a furniture design is, at best, *de minimis*, and lacks the requisite "creative spark" for copyrightability. *See Feist*, 499 U.S. at 359; *see also* 37 C.F.R. §§ 202.1(a), 202.10(a). Accordingly, we find the selection of elements to which the Applicant claims its application applies is unregisterable.

Your assertions that the Applicant's claim of copyright is directed to the aesthetic aspects of the Works, *i.e.*, the choice to use wicker over other materials, the choice to add simple feet and legs, and the "distinct visual impression" created by the oversized arm and back rests, do not add to your argument of sufficient creativity. *Second Request* at 7-10. The Board recognizes the general principle that all works involve choices. Thus, the mere fact that the Applicant could have selected other shapes, materials, contours, and configurations in forming the Works has no bearing on the Board's creativity analysis. Further, the Board does not assess the attractiveness of a design, its uniqueness, or its visual effect or appearance 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 v. Donaldson*, 188 U.S. 239 (1903). Thus, even if accurate, the fact that the Applicant's Works consists of a distinct, aesthetically appealing arrangement of familiar shapes would not qualify the Works, as wholes, as copyrightable. Similarly, the Board does not





assess commercial appeal 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 v. Donaldson*, 188 U.S. 239 (1903). Thus, your assertion that the Works have "engendered a number of copyists" also does not add to your claim of sufficient creativity.

Finally, the Board has considered the separability argument you make in your second request for reconsideration of registration. *Second Request* at 7-10. We conclude that, because neither the Works as a whole, nor their constituent elements, possess sufficient creativity to warrant registration, we need not analyze whether the Works contain any design elements that are separable from their utilitarian function as furniture. *See Esquire, Inc. v. Ringer,* 591 F.2d 796, 800 (D.C. Cir. 1978), *cert. denied,* 440 U.S. 908 (1979) (finding although works which may be useful articles themselves, or are incorporated into a useful article, are eligible for protection, such protection only extends to the pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article); *see also Amini Innovation Corp. v. Anthony Cal. Inc.*, 439 F.3d 1365 (Fed. Cir. 2006) (upholding protection of ornamental carvings on furniture, not the furniture as a whole). As explained above, the Applicant's selection and arrangement of the Works "ornamental" elements lacks sufficient creativity for copyrightability. Thus, even if assessed independently under a separability analysis, the Works would not warrant registration.

In sum, the Board finds that the Applicant's selection and arrangement of the elements that comprise the Works lacks a sufficient level of creativity to make the Works registerable under the Copyright Act.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the work entitled: *Round Sectional Wicker Furniture Collection; Modern Boxy Sectional Wicker Furniture Collection; U-Shaped Sectional Wicker Furniture Collection;* and, *Capri Sectional Wicker Furniture Collection.* 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