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

July 24, 2013

Birch, Stewart, Kolasch & Birch LLP
Attention: James M. Slattery
P.O. Box 747
Falls Church, VA 22040

Re: SUSPENSION FLOOR LAMP 2097/5
FLOOR LAMP STYLOS
TABLE LAMP TACCHIA
FLOOR LAMP ARCO
SUSPENSION LAMP PARENTESI
Correspondence ID: 1-9NKA1Z

Dear Mr. Slattery:

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: *Suspension Floor Lamp 2097/5; Floor Lamp Stylos; Table Lamp Tacchia; Floor Lamp Arco;* and *Suspension Lamp Parentesi* (the "Works"). You submitted these requests on behalf of your client, FLOSA S.p.A. (the "Applicant"), on January 6, 2012. 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.

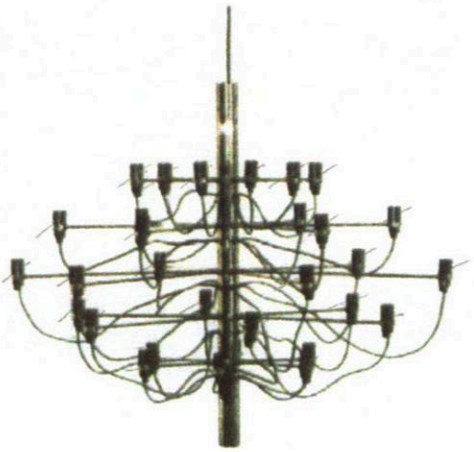
The Board has examined the applications, the deposit copies, and all of the correspondence in this case. After careful consideration of the arguments in your second requests for reconsideration, the Board affirms the Registration Program's denial of these copyright claims. The Board's reasoning is set forth below. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action on this matter.

II. DESCRIPTION OF THE WORKS

The Works consists of a collection of various lamps designs.

(1) *Suspension Floor Lamp 2097/5* is a ceiling-mounted lighting fixture that consists of a long metal tube with at least twenty-eight thin electrical wires attached to it. The

wires have light sockets attached to their ends and are all bent so that the sockets face upward. The wires are held in a fixed position by a series of straight metal bars that connect the light sockets to the central metal tube. The following is a photographic reproduction of the Work from the deposit materials.



(2) *Floor Lamp Stylos* is a floor lamp that consists of a smooth and round pillar shape connected to a round, flat base. The following is a photographic reproduction of the Work from the deposit materials.



(3) *Table Lamp Tacchia* is a floor or table lamp that consists of a simple, rectangular base with a long, bendable stem protruding upward and out of it. At the end of the stem is semi-circle-shaped, metal cover. The following is a photographic reproduction of the Work from the deposit materials.



(4) *Floor Lamp Arco* is a floor lamp that consists of a simple base with rounded edges, a long metal stem that protrudes upward and out of the base, and a small rounded piece that sits at the top of the stem. The stem has a slight bend in it near its top. A light socket is attached to the stem at the center of the bent portion. The following is a photographic reproduction of the Work from the deposit materials.



(5) *Suspension Lamp Parentesi* is a lamp design that consists of a short, ribbed pillar attached to a half-circle-shaped lamp shell. The lamp shell faces upward. The following is a photographic reproduction of the Work from the deposit materials.



I. ADMINISTRATIVE RECORD

On March 18, 2011, the United States Copyright Office (the "Office") issued a letter notifying you that it had refused registration of the above mentioned Works. *Letter from Registration Specialist, Robin Jones, to James Slattery* (March 18, 2011). In its letter, the Office indicated that it could not register the Works because the Works are useful articles which do not contain any separable authorship that is copyrightable. *Id.*

In five letters dated October 6, 2011, you requested, pursuant to 37 C.F.R. § 202.5(b), that the Office reconsider its initial refusal to register the Works. *Letters from James Slattery to Copyright RAC Division* (October 6, 2011) ("First Requests"). Your letters set forth the reasons you believed the Office improperly refused registration. *Id.* Upon reviewing the Works in light of the points raised in your letters, the Office again concluded that the Works are useful articles that do not contain any authorship that is both separable and copyrightable and refused registration. *Letters from Attorney-Advisor, Virginia Giroux-Rollow, to James Slattery* (October 6, 2011).

Finally, in five letters dated January 6, 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 James Slattery to Copyright R&P Division* (January 6, 2012) ("Second Requests 1-5" respectively). In arguing that the Office improperly refused registration, you claim the following: (1) the Works include elements that are both physically and conceptually separable from their utilitarian aspects; and, (2) that those separable elements include at least the minimum amount of creativity required to support registration. *Id.* at 2-4. In support of your argument, you have supplied the Board with forty-two examples of copyright registrations for lamps that you offer for purposes of comparison to the

Applicant's Works. You also include a list of cases in which various courts have found specific lamp designs to be copyrightable. *Id.* at 3-4.

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., Mazur 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 (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 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 all five Works are useful articles void of elements that possess the requisite separable authorship necessary to sustain a claim to copyright. Accordingly, we affirm the denial of registration for all five Works.

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 Works (a collection of lamps and lighting fixtures) are useful articles. Thus, for there to be any consideration of the Works' design features, the features must be either physically or conceptually separable from the Works utilitarian functions as lamps and lighting fixtures.

Below, we list each Work and identify why we have concluded that the Work lacks separable authorship that is sufficiently creative to warrant copyright registration.

(1) Suspension Floor Lamp 2097/5

This work is a ceiling-mounted lighting fixture that consists of a long metal tube with at least twenty-eight thin electrical wires attached to it. The wires have light sockets attached to their ends and are all bent so that the sockets face upward. The wires are held in a fixed position by a series of straight metal bars that connect the light sockets to the central metal tube. We find that none of the Work's constituent elements (the tube, the wires, the sockets, or the bars) can be separated, physically or conceptually, from the Work without destroying its basic form and function. *See Esquire,* 591 F.2d at 800.

Your argument that the overall shape of the Work is separable from its use as a lamp and that the Work is eligible for registration as a sculpture of a tree with its wires resembling stylized "branches" is unpersuasive. *See Second Request 1* at 2-3. Even if it were possible to imagine the Work's shape as separate from its function as a hanging lamp, the Work itself is a simple combination of a basic, cylindrical tube, straight metal bars, plain wires, and ordinary light sockets. This basic combination of common shapes and designs is, at best, *de minimus* and lacks the requisite "creative spark" for copyrightability. *See Feist*, 499 U.S. at 359; *see also* 37 C.F.R. § 202.1(a) (prohibiting registration of familiar symbols or designs). Accordingly, we find that the Work is not eligible for protection under the Copyright Act.

(2) Floor Lamp Stylos

This work is a floor lamp that consists of a smooth and round tube shape connected to a round, flat base. We find that none of the Work's constituent elements (a simple round pillar and a flat base) can be separated, physically, or conceptually, from the Work without destroying its basic form and function. *See Esquire,* 591 F.2d at 800.

Your argument that the Work is a sculpture and that "the image of the sculpture and the shape of the sculpture" are registerable because they represent the "original tangible expression of the author" is unpersuasive. *See Second Request 2* at 2-3. Even if it were possible to imagine the Work's shape as separate from its function as a floor lamp, the Work itself is a simple combination of a basic, cylindrical tube and an ordinary flat base. This familiar combination of common shapes is, at best, *de minimus* and lacks the requisite "creative spark" for copyrightability. *See Feist*, 499 U.S. at 359; *see also* 37 C.F.R. § 202.1(a) (prohibiting registration of familiar symbols or designs). Accordingly, we find that the Work is not eligible for protection under the Copyright Act.

(3) Table Lamp Tacchia

This work is a floor or table lamp that consists of a simple, rectangular base with a long, bendable stem protruding upward and out of it. At the end of the stem is half-circle-

shaped, metal cover. We find that none of the Work's constituent elements (a simple rectangular base, a thin metal stem, and a circular metal shell) can be separated, physically or conceptually, from the Work without destroying its basic form and function. *See Esquire,* 591 F.2d at 800.

Your argument that the Work is a sculpture and that "the image of the sculpture and the shape of the sculpture" are registerable because they represent the "original tangible expression of the author" is unpersuasive. *See Second Request 3* at 2-3. Even if it were possible to imagine the Work's shape as separate from its function as a floor lamp, the Work itself is a simple combination of a rectangular base, a wire stem, and a round metal light cover. This familiar combination of common shapes is, at best, *de minimus* and lacks the requisite "creative spark" for copyrightability. *See Feist*, 499 U.S. at 359; *see also* 37 C.F.R. § 202.1(a) (prohibiting registration of familiar symbols or designs). Accordingly, we find that the Work is not eligible for protection under the Copyright Act.

(4) Floor Lamp Arco

This work is a floor lamp that consists of a simple base with rounded edges, a long metal stem that protrudes upward and out of the base, a small rounded piece that sits at the top of the stem, and a light fixture that is attached to the upper portion of the stem. We find that none of these constituent elements can be separated, physically or conceptually, from the Work without destroying its basic form and function. *See Esquire,* 591 F.2d at 800.

Your argument that the Work is a sculpture and that "the image of the sculpture and the shape of the sculpture" are registerable because they represent the "original tangible expression of the author" is unpersuasive. *See Second Request 4* at 2-3. Even if it were possible to imagine the Work's shape as separate from its function as a floor lamp, the Work itself is a simple combination of a round base and cap, a straight metal stem with a slight bend in it, and a light socket. This familiar combination of common shapes is, at best, *de minimus* and lacks the requisite "creative spark" for copyrightability. *See Feist*, 499 U.S. at 359; *see also* 37 C.F.R. § 202.1(a) (prohibiting registration of familiar symbols or designs). Accordingly, we find that the Work is not eligible for protection under the Copyright Act.

(5) Suspension Lamp Parentesi

This work is a small lamp design that consists of a short, ribbed pillar attached to a half-circle-shaped lamp shell. We find that none of the Work's constituent elements (the pillar or the lamp shell) can be separated, physically, or conceptually, from the Work without destroying its basic form and function. *See Esquire,* 591 F.2d at 800.

Your argument that the Work is a sculpture and that "the image of the sculpture and the shape of the sculpture" are registerable because they represent the "original tangible expression of the author" is unpersuasive. *See Second Request 2* at 2-3. Even if it were possible to imagine the Work's shape as separate from its function as a small lamp, the

Work itself is a simple combination of a basic pillar shape and a basic half-circle shape. This familiar combination of common shapes is, at best, *de minimus* and lacks the requisite "creative spark" for copyrightability. *See Feist*, 499 U.S. at 359; *see also* 37 C.F.R. § 202.1(a) (prohibiting registration of familiar symbols or designs). Accordingly, we find that the Work is not eligible for protection under the Copyright Act.

With regard to your argument that the Office has registered works similar to the ones in contention, the Office does not compare works that have already been registered or refused registration. Each work is examined independently and on its own merits. The Office is not required to make comparisons of copyright deposits to determine whether or not a similar work has already been registered. *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"). Again, each work submitted for registration is evaluated on its own merits, with the Office applying the relevant statutory and regulatory guidelines. Thus, the fact that Office examiners might have accepted for registration works that you perceive as similar to the Works at issue does not impact the Board's decision in the matter at hand.

In sum, the Board finds that none of the Works include design elements that are both separable from the Works themselves 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 Works entitled: *Suspension Floor Lamp 2097/5; Floor Lamp Stylos; Table Lamp Tacchia; Floor Lamp Arco;* and *Suspension Lamp Parentesi.* 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