United States Copyright Office
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September 11, 2014

Howard & Howard Attorneys PLLC
Attn: Daniel Bliss
450 West Fourth Street
Royal Oak, MI 48067-2557

Re: THOR
Correspondence ID: 1-JT7IKH

Dear Mr. Bliss:

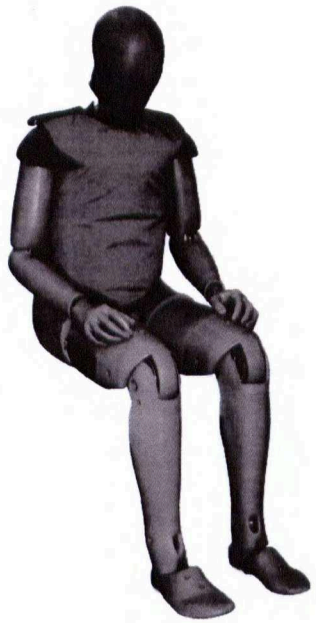
The Review Board of the United States Copyright Office (the "Board") is in receipt of your second request for reconsideration of the Registration Program's refusal to register the work entitled: *THOR*. You submitted this request on behalf of your client, Humanetics Innovative Solutions, Inc., on May 2, 2014.

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

THOR (the "Work") is an anthropomorphic test device, shaped like a human in order to measure the effects of a traumatic event on a person's body; these devices are frequently known as crash test dummies. The "skin" of the work is a beige material that is molded into the shape of a human's extremities, including fingers but excluding toes. The Work contains several joints – such as ankles, knees, elbows, etc. – where metallic mechanisms join two separate pieces of the molded shell. The only piece of clothing worn by the Work is a bright orange vest covering the Work's torso. The head of the Work is a faceless oblong ovoid, flattened on the front and closely mimicking the general shape of the human head. The head is connected to the rest of the Work's body via a joint in the neck.

The below image is a photographic reproduction of the Work (color removed) from the deposit materials:



II. ADMINISTRATIVE RECORD

On September 13, 2013, the United States Copyright Office (the "Office") issued a letter notifying Humanetics Innovative Solutions, Inc. (the "Applicant") that it had refused registration of the above mentioned Work. *Letter from Wilbur King, Registration Specialist, to Daniel Bliss* (Sept. 13, 2013). In its letter, the Office stated that it could not register the Work because it was a "useful article" which did not contain any of the separable sculptural authorship needed to sustain a claim to copyright. *Id.*

In a letter dated October 30, 2013, you requested that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusal to register the Work. *Letter from Daniel Bliss to Copyright RAC Division* (Oct. 30, 2013) ("First Request"). Upon reviewing the Work in light of the points raised in your letter, the Office concluded that the Work "is a useful article that does not contain any authorship that is both separable and copyrightable" and again refused registration. *Letter from Stephanie Mason, Attorney-Advisor, to Daniel Bliss* (Feb. 5, 2014).

Finally, in a letter dated May 2, 2014, 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 Daniel Bliss to Copyright R&P Division* (May 2, 2014) ("Second Request"). In your letter, you assert that the Office improperly refused registration because it failed to consider the conceptual separability of the sculpted appearance of the Work. You claim that the visual

aesthetic appearance of the Work can be conceptualized on paper and that it serves no utilitarian purpose or function, thus making it separable from the useful article. You cite to *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980) (holding that ornamented designer belt buckles are copyrightable) to support your argument that some features of objects, such as visual appearance, are not essential to the usefulness of a useful article. As such, you assert that the visual aesthetic appearance of the Work is conceptually separable from the functional aspects of the crash test dummy and that this separable sculpted form contains sufficient authorship to be eligible for copyright registration. *Second Request* at 3.

III. DECISION

A. *The Legal Framework*

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); *and see Inhale, Inc. v. Starbuzz Tobacco, Inc.*, 755 F.3d 1038 (9th Cir. 2014).[1]

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[1] In *Inhale*, the court characterized the deference owed to the Office's interpretation of the "separability" doctrine as follows: "'Courts have twisted themselves into knots trying to create a test to effectively ascertain whether the artistic aspects of a useful article can be identified separately from and exist independently of the article's utilitarian function.' *Masquerade Novelty, Inc. v. Unique Indus.*, 912 F.2d 663, 670 (3d Cir. 1990). Under some interpretations of 17 U.S.C. § 101, distinctiveness of shape would be relevant. *See, e.g., Brandir Int'l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1145 (2d Cir. 1987) (asking whether "design elements can be identified as reflecting the designer's artistic judgment exercised independently of functional influences"). We think § 101 is sufficiently ambiguous to justify deference to administrative interpretations. *See High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 638-39 (9th Cir. 2004)." *Inhale, Inc.*, 755 F.3d at 1042.

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, at 55 (1976), *reprinted in* U.S.C.C.A.N. 5659, 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.

B. *Analysis of the Work*

After carefully examining the Work and applying the legal standards discussed above, the Board finds that *THOR* is a useful article that does not possess design elements that are separable from the Work's utilitarian functions. 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). The Board accepts the general principle that design features incorporated into utilitarian articles 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, it is undisputed that the Work (a crash test dummy) is a useful article. Thus, for there to be any consideration of the Work's design features, the features must be either physically or conceptually separable from the Work's utilitarian functions. *See id.* In the *Second Request*, you argue that the Work's overall visual aesthetic appearance is conceptually separable from the utilitarian functions of the crash test dummy. *Second Request* at 2-3. We find your arguments to be unpersuasive. Specifically, we find it impossible to imagine a way to conceptually separate the aesthetic design elements from the Work without destroying its shape and configuration as a human-based testing device. In

order for *THOR* to be useful as a crash test dummy, designed to measure the forces imposed on the human body during an impact, *THOR necessarily* needs to be designed in the basic image of a human. 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. To argue that the aesthetic appearance of the Work is separable from the useful article underneath is to claim that the Work's overall shape and form is distinguishable from its intended function. We do not agree.

The Board finds your reliance on *Kieselstein-Cord* to be misplaced. *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980). In a decision that the court said was "on a razor's edge of copyright law," the court found two designer belt buckles to be copyrightable because the artistic ornamentation on the buckles was deemed to be conceptually separable from the utilitarian aspects of the object. *Id.* at 990, 993. In reaching the conclusion that there were conceptually separable sculptural elements on the belt buckles, the court pointed to the fact that many people had begun to use the buckles "as ornamentation for parts of the body other than the waist." *Id.* at 993. The court found that the "primary ornamental aspect of the [belt] buckles [was] conceptually separable from their subsidiary utilitarian function." *Id.* at 993. However, we do not find the facts of *Kieselstein-Cord* to be analogous to the issue at hand. The sculptural aspects of the Work cannot be envisioned separately without completely destroying its image or configuration. If one were to conceptually separate the features of *THOR*, there would be no underlying work remaining. The Work, therefore, fails the Copyright Office's test for conceptual separability.

In sum, the Board finds that the Work, *THOR*, does not include design elements that are separable from the Work itself.

IV. CONCLUSION

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