



United States Copyright Office

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January 18, 2017

Cary J. Deaton
3524 16th Street, Suite F
Metairie, LA 70002

**Re: Second Request for Reconsideration for Refusal to Register Louisiana Art Deco Table;
Correspondence ID: 1-1D845YL, SR #1-1020228606**

Dear Mr. Deaton:

The Review Board of the United States Copyright Office (“Board”) has considered Lydia Anne Juge’s (“Ms. Juge”) second request for reconsideration of the Registration Program’s refusal to register a 3-Dimensional sculpture claim¹ in the work titled “Louisiana Art Deco Table” (“Work”). After reviewing the application, deposit copy, and relevant correspondence, along with the arguments in the second request for reconsideration, the Board affirms the Registration Program’s denial of registration.

I. DESCRIPTION OF THE WORK

The Work is a wooden table. The table top is constructed of one large, rectangular piece of wood. There are two wooden legs positioned near the center underneath the table top. Each leg is comprised of a wooden stake running through the center of a piece of wood carved into the shape of a curved line. Both legs rest on a square base constructed of dark wood with a lighter piece of wood running through the center. A reproduction of the Work is set forth below.



¹ Though the application lists a claim in “2-Dimensional artwork,” in correspondence about the Office’s refusal to register the Work, both the Copyright Office’s Registration Program and Ms. Juge referenced a 3-Dimensional sculpture. On August 3, 2016, the Review Board wrote to Ms. Juge to clarify the scope of her claim. *See* Letter from Regan A. Smith, Review Board, to Cary J. Deaton (Aug. 3, 2016). Because the claim was listed as 2-Dimensional but the subsequent file history only referred to the Work as 3-Dimensional sculpture, the Board asked Ms. Juge to clarify which claim she seeks to register. *Id.* The Board stated that if Ms. Juge did not respond within 30 days from the date of that letter, it would review the Work as 3-Dimensional sculpture. Ms. Juge did not respond to that request for clarification and so the Board reviews the Work as 3-Dimensional.

II. ADMINISTRATIVE RECORD

On October 17, 2013, Ms. Juge filed an application to register a copyright claim in the Work. In a July 1, 2015, letter, a Copyright Office registration specialist refused to register the claim, finding that it “[was] a ‘useful article’ which does not contain any separable authorship needed to sustain a claim to copyright.” Letter from Annette Coakley, Registration Specialist, to Cary J. Deaton (July 1, 2015).

In a letter dated August 19, 2015, Ms. Juge requested that the Office reconsider its initial refusal to register the Work. Letter from Cary J. Deaton, to U.S. Copyright Office (Aug. 19, 2015) (“First Request”). After reviewing the Work in light of the points raised in the First Request, the Office re-evaluated the claims and again concluded that the Work, and other works of its kind, “in which the design of the actual article is not separable from its creative elements were never meant to be protected by copyright” and that “all of the elements of this [W]ork [are] related to the utilitarian aspects or functions of the table, or are part of the overall shape, contour, and configuration of the work,” and as such “there is no authorship that is separable and therefore copyrightable.” Letter from Stephanie Mason, Attorney-Advisor, to Cary J. Deaton (Dec. 21, 2015).

In a letter dated March 15, 2016, Ms. Juge 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 Cary J. Deaton, to U.S. Copyright Office (Mar. 15, 2016) (“Second Request”). In that letter, Ms. Juge, citing, *inter alia*, *Mazer v. Stein*, 347 U.S. 201 (1954), argued that works subject to design patents are also copyrightable; that useful articles are subject to copyright; and that the Work “has very unique and original legs” and that “[s]uch uniqueness entitles [it] to a copyright registration.” *Id.* at 1-2.

III. DISCUSSION

A. *The Legal Framework*

1) *Useful Articles and Separability*

The copyright law does not protect useful articles, which are defined as “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. Works of artistic craftsmanship that have been incorporated into a useful article may be eligible for copyright protection if they constitute pictorial, graphic, or sculptural works pursuant to 17 U.S.C. § 102(a)(5). The protection for such works is limited, however, in that it extends only “insofar as [the works’] form but not their mechanical or utilitarian aspects are concerned.” *Id.* at 101. In other words, a design incorporated into a useful article is only eligible for copyright protection to the extent that the design includes artistic “features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.” *Id.*; see also *Esquire, Inc. v. Ringer*, 591 F.2d 796, 800 (D.C. Cir. 1978) (holding that 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 Office employs two tests to assess separability: (1) a test for physical separability; and (2) a test for conceptual separability. See COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 924.2 (3d ed. 2014) (“COMPENDIUM (THIRD)”); see also *Inhale, Inc. v. Starbuzz Tobacco, Inc.*, 755 F.3d 1038, 1041 n.2 (9th Cir. 2014) (finding that the Office’s interpretation of conceptual separability is entitled to deference); *Custom Chrome, Inc. v. Ringer*, 35 U.S.P.Q.2d 1714 (D.D.C. 1995) (finding that the Office’s tests for physical and conceptual separability are “a reasonable

construction of the copyright statute[]” consistent with the words of the statute,” existing law, and the legislature’s declared intent in enacting the statute).

To satisfy the test for physical separability, a useful article must contain pictorial, graphic, or sculptural features that can be physically separated from the article by ordinary means. *See* COMPENDIUM (THIRD) § 924.2(A). To satisfy the test for conceptual separability, a useful article must contain pictorial, graphic, or sculptural features that can be visualized—either on paper or as a freestanding sculpture—as a work of authorship that is separate and independent from the utilitarian aspects of the article and the overall shape of the article. In other words,

the feature must be [able to be] imagined separately and independently from the useful article without destroying the basic shape of that article. A pictorial, graphic, or sculptural feature satisfies this requirement only if the artistic feature and the useful article could both exist side by side and be perceived as fully realized, separate works—one an artistic work and the other a useful article.

COMPENDIUM (THIRD) § 924.2(B). If the feature is an integral part of the overall shape or contour of the useful article, that feature cannot be considered conceptually separable because removing it would destroy the basic shape of the article. *See id.*; *cf.* H.R. REP. NO. 94-1476, at 55 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5668 (citing a carving on the back of a chair or a floral relief design on silver flatware as examples of conceptually separable design features).

If the useful article does not contain any features that can be physically or conceptually separated from its utilitarian function, the Office will refuse to register the claim because Congress has made it clear that copyright protection does not extend to any aspect of a useful article that cannot be separated from its utilitarian elements. If the Office determines that the work contains one or more features that can be separated from its functional elements, the Office will examine those features to determine if they contain a sufficient amount of original authorship to warrant registration.

2) Originality

A work may be registered if it qualifies as an “original work[] of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102(a). In this context, the term “original” consists of two components: independent creation and sufficient creativity. *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). 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.* Only a modicum of creativity is necessary, but the Supreme Court has ruled that some works (such as the alphabetized telephone directory at issue in *Feist*) fail to meet even this low 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 virtually nonexistent.” *Id.* at 359.

The Office’s regulations implement the longstanding requirement of originality set forth in the Copyright Act and described in the *Feist* decision. *See, e.g.*, 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”); *id.* § 202.10(a) (stating “to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form”). 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 test.

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”). A determination of copyrightability in the combination of standard design elements depends 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.C. Cir. 1989).

A mere simplistic arrangement of non-protectable elements does not demonstrate the level of creativity necessary to warrant protection. For example, the United States District Court for the Southern District of New York upheld the Copyright Office’s refusal to register simple designs consisting of two linked letter “C” shapes “facing each other in a mirrored relationship” and two unlinked letter “C” shapes “in a mirrored relationship and positioned perpendicular to the linked elements.” *Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 496 (S.D.N.Y. 2005). Likewise, the Ninth Circuit has held that a glass sculpture of a jellyfish consisting of clear glass, an oblong shroud, bright colors, 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 language in *Satava* is particularly instructive:

It 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).

Similarly, while the Office may register a work that consists merely of geometric shapes, for such a work to be registrable, the “author’s use of those shapes [must] result[] in a work that, as a whole, is sufficiently creative.” COMPENDIUM (THIRD) § 906.1; see also *Atari Games Corp.*, 888 F.2d at 883 (“[S]imple shapes, when selected or combined in a distinctive manner indicating some ingenuity, have been accorded copyright protection both by the Register and in court.”). Thus, the Office would register, for example, a wrapping paper design that consists of circles, triangles, and stars arranged in an unusual pattern with each element portrayed in a different color, but would not register a picture consisting merely of a purple background and evenly-spaced white circles. COMPENDIUM (THIRD) § 906.1.

B. Analysis of the Work

After carefully examining the Work and applying the legal standards discussed above, the Board finds that the Work is a useful article that does not contain the requisite separable authorship necessary to sustain a claim to copyright.

Ms. Juge does not dispute that the Work, a table, is a useful article. Thus, for there to be any consideration of the copyrightability of the Work’s design features, the features must first be determined to be either physically or conceptually separable from the Work’s utilitarian function as a container for beverages. See *Norris Indus., Inc. v. Int’l Tel. & Tel. Corp.*, 696 F.2d 918, 922 (11th Cir. 2011); see also *Esquire*, 591 F.2d at 800.

As explained above, under the Office’s rule for physical separability, a useful article must contain pictorial, graphic, or sculptural features that can be physically separated from the article by

ordinary means. COMPENDIUM (THIRD) § 924.2(A). As mentioned, the Work is a wooden table, with two wooden legs positioned near the center, each comprised of a wooden stake running through the center of a piece of curved wood. Both legs rest on a square base constructed of dark wood with a lighter piece of wood running through the center. Ms. Juge contends that these “art deco” wooden legs can “be easily separated from” the “standard table top.” First Request at 2. However, to separate the legs from the table top would destroy the useful aspects of the table—the table would no longer serve the utilitarian purpose of providing an elevated platform on which to eat or work or rest items on, etc. As such, the Board concludes that the table legs are not physically separable.

As to conceptual separability, a pictorial, graphic, or sculptural feature of a work satisfies this test “only if the artistic feature and the useful article could both exist side by side and be perceived as fully realized, separate works—one an artistic work and the other a useful article.” COMPENDIUM (THIRD) § 924.2(B). The Board finds that the legs of the table cannot be “imagined separately and independently from the useful article without destroying the basic shape of that article” and thus the Work does not satisfy the test for conceptual separability. COMPENDIUM (THIRD) § 924.2(B).

Assuming *arguendo* that the Board did find the legs—or a portion of the legs such as the curved wood—physically or conceptually separable from the table, these elements would still be insufficient to support a claim of copyright. The table legs are comprised of a straight line running through a curved line, two common geometric shapes. This represents a *de minimis* combination of two uncopyrightable elements that lacks sufficient creativity to support a copyright claim. See COMPENDIUM (THIRD) §§ 906.1 (“The Copyright Act does not protect common geometric shapes . . . including . . . straight or curved lines.”); 313.4(B) (“Works that contain . . . only a *de minimis* amount of original expression are not copyrightable and cannot be registered with the U.S. Copyright Office.”).

Ms. Juge focuses a large part of her argument on the issue of whether a “design of useful article[] secured through the design patent law” could also be copyrightable. Second Request at 1. But that is not the issue here. The Board agrees that “the patentability of [a work] does not bar copyright of [of the] work[.]” *Mazer*, 347 U.S. at 217. If the Work had any physically or conceptually separable elements that were also copyrightable, the Board would not hesitate to approve registration of Ms. Juge’s claim, but it does not.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the copyright claim in the Work. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action in this matter.

BY:



Regan A. Smith
Copyright Office Review Board