



United States Copyright Office

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**Re: Second Request for Reconsideration for Refusal to Register Avalon B481,
Correspondence ID: 1-2YXOYYW; SR 1-5053873841**

Dear Mr. Hicks:

The Review Board of the United States Copyright Office (the “Board”) has considered Dickson Furniture International, LLC’s (“Dickson’s”) second request for reconsideration of the Registration Program’s refusal to register a sculpture claim in the suite of bedroom furniture titled “Avalon B481” (the “Suite”). After reviewing the application, deposit copy, and relevant correspondence, along with the arguments in the second requests for reconsideration, the Board affirms the Registration Program’s denials of registration.

I. DESCRIPTION OF THE WORKS

The Suite contains four pieces of bedroom furniture: a panel bed, nightstand, bureau, and dresser with mirror. The panel bed features a nail head trim that lines the headboard. A mirror-backed semi-circle fret design runs down the center of the headboard. The nightstand, bureau, and dresser feature fronts with rectangular molding lining each front. The drawer fronts feature identical silver knobs with petal-molded bases and concentric circles. Each item in the Suite rests upon tulip-shaped feet that feature linear carvings and concentric circles on each foot. The Suite is depicted below:



II. ADMINISTRATIVE RECORD

On May 5, 2017, Dickson filed an application to register a copyright claim in sculpture, “[n]ew ornamentation, such as wood carvings, veneers, trim, surface treatment, mixed media, fretwork, metalwork, hardware, and decorative elements, and compilations and arrangements thereof.”¹ In an August 7, 2017 letter, a Copyright Office registration specialist refused to register the claim, finding that the Suite is a “useful article that does not contain any copyrightable authorship needed to sustain a claim to copyright.” Letter from R. Baker, Registration Specialist, to Jack Hicks, Womble Carlyle Sandridge & Rice, LLP at 1 (August 7, 2017). In a November 6, 2017 letter, Dickson argued that the Suite consists of “works of artistic craftsmanship” which include “original sculptural works applied in a decorative fashion to the frames of furniture pieces.” Letter from Jack B. Hicks to Examiner Barker, at 1 (July 31, 2017) (“First Request”). Dickson focused its argument on the bed and dresser, asserting, “the bed and dresser are adorned with original artwork in the form of a fanciful design of frets.” *Id.* at 3. After reviewing the Suite in light of the points raised in the First Request, the Office re-evaluated the claims and denied Dickson’s first request for reconsideration. The Office considered only the fret design on the dresser and rejected the claimant’s argument that the fret was copyrightable. The Office found that the “semi-circles that make up the pattern are a common and familiar shape, and as such, do not contain a sufficient amount of creative authorship to support a copyright registration.” Letter from Stephanie Mason, Attorney-Advisor,

¹ Dickson excluded from the claim “[p]re-existing furniture designs and/or design elements.”

to Jack Hicks, at 4 (Apr. 6, 2018). And, considering the design as a whole, the Office stated that the “pairs of semi-circles are simply arranged in a stacked configuration, a basic design standard that does not display copyrightable authorship.” *Id.*

In a July 6, 2018 letter, Dickson requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Suite. Letter from Jack B. Hicks, to Copyright Office (July 6, 2018) (“Second Request”). Dickson stated that it “never intended to claim as copyrightable the underlying furniture frames themselves, but rather only the aesthetic ornamentation applied thereto, namely the ‘wood carvings, veneers, trim, surface treatment, mixed media, fretwork, metalwork, hardware, and decorative elements, and compilations and arrangements thereto’ as set forth in the Application.” *Id.* Beyond the fret design, Dickson argued that all of the design features featured in the suite “would qualify as a protectable pictorial, graphic, or sculptural work if imagined separately from the useful article (here the individual furniture pieces).” *Id.* at 8. Dickson contended that “[e]ach of the design elements may be considered by the Board independently as well as with respect to the ‘compilations and arrangements thereof.’” *Id.* at 7.

The Board then sought to clarify Dickson’s claim to copyright. Noting that the Office received a fee for reconsideration of one claim, but that the deposit material contains multiple potential claims for review, the Board informed Dickson that it would construe the pictorial, graphic, and sculptural elements of the dresser as the claim. *See* Letter from Whitney Levandusky, Attorney-Advisor, U.S. Copyright Office, to Jack B. Hicks (Aug. 31, 2018). In response, Dickson disagreed with the Board’s construction of the claim and reasserted that the scope of the claim is the “ornamentation applied across the suite.” Letter from Jack B. Hicks, to Whitney Levandusky, at 1 (Sept. 27, 2018). Citing the Office’s unit of publication regulation, Dickson argued that it considers the “three dimensional ornamentation applied to a suite of bedroom furniture to be a unit of work [that] would qualify as a ‘single work’ under 37 C.F.R. § 202.3(b)(4)(i)(A).” *Id.*

III. DISCUSSION

A. The Legal Framework

1) Unit Of Publication

Generally, a registration covers an individual work, and an applicant must prepare a separate application, filing fee, and deposit for each work that is submitted for registration. There are several exceptions to this rule, however, including the option to register a unit of publication. A unit of publication is “a package of separately fixed elements and works that are physically bundled together for distribution to the public as a single, integrated unit, and all of the works are first published in that integrated unit.” U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 1107.1 (3d ed. 2017) (“COMPENDIUM (THIRD”). Types of

works that may qualify as units of publication include: “a package of greeting cards; a CD packaged with cover art and a leaflet containing lyrics; a board game with playing pieces, game board, book published with a CD-ROM,” and the like. *Id.* Such works “must be distributed to the public as an integral part of the unit.” Indeed, “works that have been physically packaged or bundled for distribution or sale to wholesalers, distributors, retailers, or other intermediaries for the purpose of further distribution . . . do not satisfy” the requirement that works must be distributed to the public in the unit. *Id.* The unit must also “contain an actual copy or phonorecord of the self-contained works,” as opposed to a mere representation of the works. *Id.* Thus, “a box of jewelry containing an actual necklace and an actual set of earrings that are packaged together and sold to the public as a single, integrated unit would be considered a unit of publication,” but “a catalog that merely contains photographs of necklaces and earrings that are offered for sale would not.” *Id.*

2) *Useful Articles and Separability*

Copyright does not protect useful articles as such, which are defined in the Copyright Act 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. Importantly, however, artistic features applied on or incorporated into a useful article may be eligible for copyright protection if they constitute pictorial, graphic, or sculptural works under sections 101 and 102(a)(5) of the Copyright Act. This protection is limited 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.’” *Star Athletica v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1007 (2017) (quoting 17 U.S.C. § 101).

To assess whether an artistic feature incorporated into the design of a useful article is protected by copyright, the Office examines whether the feature “(1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated.” *Id.* at 1007; *see also* COMPENDIUM (THIRD) § 924. This analysis focuses on “the extracted feature and not on any aspects of the useful article that remain after the imaginary extraction [because the] statute does not require the decisionmaker to imagine a fully functioning useful article without the artistic feature.” *Star Athletica*, 137 S. Ct. at 1013. Put another way, while useful articles as such are not copyrightable, if an artistic feature “would have been copyrightable as a standalone pictorial, graphic, or sculptural work, it is copyrightable if created first as part of a useful article.” *Id.* at 1011; 17 U.S.C. § 113(a) (“[T]he exclusive right to reproduce a copyrighted pictorial, graphic, or sculptural work in copies under section 106 includes the right to reproduce the work in or on any kind of article, whether useful or otherwise.”); *see also Esquire 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”).

3) *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 Publications, Inc. v. Rural Telephone Service 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).

B. Analysis of the Work

After carefully examining the Suite and applying the legal standards discussed above, the Board finds that the Suite is not registrable as a unit of publication. Even if it were, the ornamentation applied across the Suite does not contain the requisite authorship necessary to sustain a claim to copyright.

The *Compendium*'s examples in section 1107.1 are directly applicable to the Suite. Section 1107.1 states, “[w]orks that are initially offered to the general public both individually and as a set,” “[w]orks created as part of the same collection, series, or set that have not been distributed together as a single, integrated unit,” and “[w]orks that share the same characters, the same theme, or other similarities that have not been distributed together as a single, integrated unit” cannot be registered as units of publication. COMPENDIUM (THIRD) § 1107.1. While it is possible that the Suite is distributed to wholesalers, retailers, or intermediaries as a physically bundled unit, the Suite is not distributed to the public as a physically bundled unit; rather, each piece in the suite can be sold separately.² Thus, the Suite may not be considered a unit of publication.

Even if the Office were to accept the Suite as a unit of publication, the Suite consists of useful articles that do not contain the requisite separable authorship necessary to sustain a claim to copyright. Dickson cites four features that it argues warrant copyright protection:

- (1) Juxtaposed Surface Treatment of Reflective, Semi-Reflective, & Metallic Finishes;
- (2) Turned Foot with Vertical Carving Detail;
- (3) Decorative Metallic Knob with Filigree and Rosette Inlay over Petalled Base; and

² See *Regency Park by Avalon Furniture*, LINDY'S FURNITURE COMPANY, <https://www.lindysfurniture.com/item/regency-park-dresser-and-mirror/679226818> (web listing for the dresser with mirror). Compare *Regency Park by Avalon Furniture*, LINDY'S FURNITURE COMPANY, <https://www.lindysfurniture.com/collection.aspx?collectionid=Regency%20Park&collectionnum=B481> (web image of Suite, without the option to buy as a collective unit).

(4) Fret Designs Placed on Reflective Surface

The Board agrees with Dickson that aspects of these elements “can be perceived as a two- or three-dimensional work of art separate from the useful article.” *Star Athletica* 137 S. Ct. at 1007. These separable features, however, do not qualify as protectable pictorial, graphic, or sculptural works because they lack, individually or in combination, the requisite minimum degree of creativity required for copyright protection.

The constituent elements—semi-circles, straight lines, triangles, concentric circles, cross-hatch and petal designs—are standard geometric shapes and familiar designs that do not individually qualify for copyright protection. 37 C.F.R. § 202.1(a) (stating that “familiar symbols or designs” are not registrable); COMPENDIUM (THIRD) § 906.1 (including straight lines, triangles, diamonds, and circles in the list of non-protectable common geometric shapes); *See Cosmos Jewelry Ltd. v. Po Sun Hon, Co.*, 470 F. Supp. 2d 1072, 1082 (C.D. Cal. 2006) (deeming uncopyrightable the basic features of the flower-shaped three-dimensional work at issue as “standard, stock, or common” to gold jewelry). Additionally, the reflective and metallic finishes are standard coloration features that are not copyrightable. 37 C.F.R. § 202.1 (“examples of works not subject to copyright and applications for registration [include] mere . . . coloring”). Accordingly, none of the individual elements that make up the Suite’s separable features exhibit a sufficient amount of original and creative authorship to support a copyright registration.

When viewed as a whole, the combinations of these elements in the cited features also constitute *de minimis* creativity, in large part because they merely combine standard elements in furniture design in predictable ways. *See Satava*, 323 F.3d at 811 (holding that the selection of the clear glass, bright colors, proportion, and stereotyped jellyfish form in glass-in-glass jelly fish sculptures lacked sufficient originality because this combination was commonplace in glass-in-glass sculpture). The foot design combines straight lines, triangles, and concentric circles to create a common and repeating pattern, which does not constitute a sufficient amount of creative expression. *See* COMPENDIUM (THIRD) § 905. The knob design combines concentric patterns of cross-hatch etchings and petal shapes. That particular combination of shapes is standard, commonplace, and expected in knob designs—a good example of a “common architecture molding” that the Office will not register. *Id.* § 313.4(J). Finally, the fret design consists of semi-circles overlaid into a standard design choice. Considered in turn, each feature is but a standard combination of long-standing design features in furniture.

Dickson finally argues that the Suite is copyrightable as a compilation. The Board disagrees. A compilation is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. 17 U.S.C. § 101 (definition of “compilation”). In 2012, the Office issued a policy statement clarifying the practices relating to the examination of claims in compilations. The Office concluded that a compilation is a subset of the subject matter categories set forth in section 102(a), rather than a separate and distinct

category of work. *See* Registration of Claims to Copyright, 77 Fed. Reg. 37,605, 37,606 (June 22, 2012) (noting that the “Office will refuse registration” “if a selection and arrangement of elements does not result in a compilation that is subject matter within one of the categories identified in section 102(a)”). Therefore, a compilation “must qualify as a literary work; a musical work; a dramatic work; a pantomime or choreographic work; a pictorial, graphic or sculptural work; a motion picture or audiovisual work; a sound recording; and/or an architectural work.” COMPENDIUM (THIRD) § 312.1. The Suite is not a compilation because furniture (as a useful article) does not constitute copyrightable subject matter. The ornamentation applied across four different pieces of furniture cannot be a compilation because the resulting work, as a whole, is not a single pictorial, graphic or sculptural work.

Dickson cites *Universal Furniture International, Inc. v. Collezione Europa USA, Inc.*, 618 F.3d 417, 430–31 (4th Cir. 2010), for the proposition that a suite of furniture may be considered a “compilation” under the Copyright Act. But this case was decided prior to the Office’s policy statement on compilation claims explained above. Further, assuming that the Suite could qualify as a compilation of sculptural elements, it would still fall short. The works at issue in *Universal* involved “highly ornate collections of furniture adorned with three-dimensional shells, acanthus leaves, columns, finials, rosettes, and other carvings.” *Id.* at 434. In contrast, the Suite consists of individual pieces of furniture that place a minimal amount of basic, geometric molding in a predictable linear or concentric fashion. *See* COMPENDIUM (THIRD) § 906.1, 906.5 (addressing common geometric shapes and standard formatting).

After analyzing both the individual ornamental features of the Suite and the combinations of those features, the Office concludes that the Suite fails to demonstrate registrability.

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 Suite. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action in this matter.



U.S. Copyright Office Review Board

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