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Re: Second Request for Reconsideration for Refusal to Register *McII Petal et al.*
(SR # 1-5725399421, 1-5726349401, 1-5726349443, 1-5726349267, 1-5726349309, 1-5726349577; Correspondence ID: 1-3EEWNUY)

Dear Mr. Hyra:

The Review Board of the United States Copyright Office (“Board”) has considered McTeigue & McClelland’s (“McTeigue”) second request for reconsideration of the Registration Program’s refusal to register six claims in jewelry design titled *McII Petal*, *McII Leaf*, *McII Marquise Petal*, *McII Bella Flora*, *McII Flora Pave*, and *McII Trillium* (collectively the “Works”). After reviewing the applications, deposit copies, and relevant correspondence, along with the arguments in the second request for reconsideration, the Board affirms the Registration Program’s denials of registration.

I. DESCRIPTION OF THE WORKS

The Works are six claims for jewelry designs:

- *McII Petal* is a ring design with a simple shank and a shoulder that expands in an oval shape that tapers into a rounded point.
- *McII Leaf* is a ring design with a simple shank and an oval-shaped shoulder, with an embedded rounded stone.
- *McII Marquise Petal* is a ring design whose shoulder is shaped similarly to *Petal*¹ but with a small rounded stone.
- *McII Bella Flora* is a ring design with a shoulder that consists of three scalloped shapes fanning out from the shank, with a head consisting of repeating silver ovals surrounding the center stone.
- *McII Flora Pave* is a ring design employing the same shoulder design as *Bella Flora* containing diamonds in a pavé setting.
- *McII Trillium* is a ring design with a shoulder consisting of three rounded shapes fanning out from the shank at a larger angle than the design in *Bella Flora*.

Representative images of each design are provided below, with full deposit images attached in the Appendix.

¹ Because the title of each work begins with “McII,” the Board will refer to the Works as *Petal*, *Leaf*, etc. for clarity.



Petal
SR # 1-5725399421



Leaf
SR # 1-5726349401



Marquise Petal
SR # 1-5726349443



Bella Flora
SR # 1-5726349267



Flora Pavé
SR # 1-5726349309



Trillium
SR # 1-5726349577

II. ADMINISTRATIVE RECORD

McTeigue filed applications to register the Works on October 25, 2017. In a March 27, 2018 letter, a Copyright Office registration specialist refused to register each of the Works for lack of copyrightable authorship. Initial Letter Refusing Registration from U.S. Copyright Office to Clifford Hyra at 1 (Mar. 27, 2018).

In a letter dated June 26, 2018, McTeigue requested that the Office reconsider its initial refusal to register the Works. Letter from Clifford Hyra to U.S. Copyright Office (June 26, 2018) (“First Request”). After reviewing the Works in light of the points raised in the First Request, the Office re-evaluated the claims and again concluded that the Works lacked sufficient creative authorship because they “consist only of standard ring designs using common shapes positioned in a typical manner” and employed only “minor variation[s] of common and garden-variety ring design.” Refusal of First Request for Reconsideration from U.S. Copyright Office to Clifford Hyra at 3 (Feb. 8, 2019).

In a letter dated May 8, 2019, McTeigue requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register each of the Works. Letter from Clifford Hyra to U.S. Copyright Office (May 8, 2019) (“Second Request”). In its letter, McTeigue emphasized the low threshold of creativity necessary for copyrightability and pointed to the use of concave petals around a center stone as creative elements that were “completely unknown prior to [McTeigue]’s design thereof.” *Id.* at 2–3. McTeigue also noted that the designs for *Trillium* and *Bella Flora* are “quite similar” to its previous registrations *McII Wildflower* (VA0002103866) and *McII Aster* (VA0002095500), arguing that because those registered works contained sufficient copyrightable authorship, *Trillium* and *Bella Flora* do as well. *Id.* at 3. Finally, as further support for the creative authorship of the Works, McTeigue attached copies of two design patents, D834,984 and D834,985, reflecting aspects of the Works, and argued that the U.S. Patent and Trademark Office’s decision to issue these design patents “should in itself be sufficient to demonstrate at least the extremely low amount of creativity necessary.” *Id.*

III. DISCUSSION

After carefully examining each of the Works and applying the relevant legal standards, the Board finds that none of the claimed designs are eligible for copyright registration. This conclusion is based solely on the criteria established in the copyright law and does not reflect any judgment about the aesthetic value of the Works as items of jewelry.

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 the copyright 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, “as opposed to copied from other works.” *Id.* Second, the work must possess sufficient creativity. *Id.* Only a modicum of creativity is necessary, but the Supreme Court has held that some works fail to meet even this low threshold. *Id.* at 358–59.

Jewelry, such as the designs before the Board, are works of artistic craftsmanship. U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 925.1 (3d ed. 2021) (“COMPENDIUM (THIRD)”) (listing examples of works of artistic craftsmanship, including “ornamental jewelry”). The Copyright Act provides that sculptural works “include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned.” 17 U.S.C. § 101 (definition of “pictorial, graphic, and sculptural works”). Though the term “works of artistic craftsmanship,” is not defined in the Act, the Supreme Court has described these works as “works of art that might also serve a useful purpose.” *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1011 (2017) (discussing Copyright Office regulations as considered in *Mazer v. Stein*, 347 U.S. 201 (1954)). When considering the copyrightability of jewelry, the Office applies the “mirror image” of the *Star Athletica* test for useful articles: the Office segregates the “mechanical or utilitarian aspects” of the work, while considering the remainder for registration. COMPENDIUM (THIRD) § 925.2. In evaluating these elements, the Office “will consider both the component elements of the design and the design as a whole,” which may include decoration on the surface of the jewelry, such as engraving, as well as the selection and arrangement of various elements such as shape and color. *Id.* § 908.3.

Before addressing each of the designs submitted by McTeigue, the Board addresses a procedural question regarding the application. The Office generally limits registration applications to “one work.” *See id.* § 511 (“As a general rule, a registration covers one individual work, and an applicant should prepare a separate application, filing fee, and deposit for each work that is submitted for registration.”).² Even if there are multiple versions of a work, an individual registration will “only cover[] the specific version of the work that is submitted” to the Office. *Id.* § 504.3. All but one of the applications submitted to the Board contain deposit images that depict multiple, different physical rings.³ For example, the deposit images for *Petal* depict both gold and silver rings, as well as variations with 6 prongs and 8 prongs holding the center diamond in place.

Though these deposits depict different physical objects, most of them are consistent with the “one work per registration” requirement. Where the only differences among the deposit images are the precious metal used to form the ring and the number of clasps holding the center stone in place, these elements are not copyrightable and thus not part of the claimed design. The choice to create a ring in either silver or gold is not copyrightable—“the materials used to create a work have no bearing on the originality analysis.” *Id.* § 310.9. And prongs that hold the center stone in place are functional elements that, as explained above, are “mechanical or utilitarian aspects” not protected by copyright. 17 U.S.C. § 101 (definition of “pictorial, graphic, and sculptural works”). So, while these deposits depict different physical objects, the relevant expression is identical within each. The exception is the deposit for *Trillium*, which the Board discusses further below.

As a general matter, the Board reminds McTeigue and future applicants of the requirements for jewelry deposits. Applicants for jewelry claims are not required to submit the

² There are some exceptions to this general rule, such as the option to register all material bundled together for distribution, or options created by the Office to register groups of works. *See generally* COMPENDIUM (THIRD) §§ 1103.1 (discussing unit of publication), 1105.1 (discussing group registration).

³ The two deposit images for *Marquise Petal* appear to depict the same ring.

physical work to the Office; they only need to submit identifying material. *See* 37 C.F.R. § 202.20(c)(2)(xi)(A)(2). Identifying material deposits are “two-dimensional reproductions or renderings of the work” that “show the entire copyrightable content” of the work or that at least provide “an adequate representation of such content.” *Id.* § 202.21(a), (b). The Office recommends that jewelry applicants provide deposits that “include all of the copyrightable elements that the applicant intends to register” and “depict the design from different angles.” COMPENDIUM (THIRD) § 908.3.

A. Petal



The *Petal* design is defined by the shape of the shank and the shoulder of the ring. The Board does not consider the center stone or the prongs on the head because those elements are not protectable: “gemstone cuts” are commonplace design elements with *de minimis* authorship, and the clasps holding the center stone in place are “mechanical [and] utilitarian aspects” of the jewelry. 17 U.S.C. § 101; *see also* COMPENDIUM (THIRD) § 908.2 (discussing copyrightable authorship in jewelry).⁴

⁴ Further, McTeigue confirmed in correspondence with the Office that it “intends to protect (all) the metalwork and not the gemstone” in the design before the Board. Email from Clifford Hyra to U.S. Copyright Office (July 19, 2021).

Viewing the design of the band and shoulder as a whole, the Board concludes that the *Petal* design does not contain sufficient creative authorship to be protected by copyright. The band is a simple ring band, a portion of which rises at the shoulder into a slight oval before tapering to a rounded point at the head of the ring. The Office cannot register jewelry that consists of “designs made up of only commonplace design elements arranged in a common or obvious manner.” COMPENDIUM (THIRD) § 908.2; *see also* 37 C.F.R. 202.1(a) (“familiar symbols or designs” are “not subject to copyright”). A common ring band, employing a variation of a common geometric shape for a shoulder, is a design made up of commonplace design elements. *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) (“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”); *see also Feist*, 499 U.S. at 358 (it is “plain from the statute” that “[n]ot every selection, coordination, or arrangement [of unprotectable elements] will pass muster” to receive copyright protection).

B. Leaf



The *Leaf* design has a single center stone, held in place by four prongs, with a shoulder that rounds slightly when reaching the ring head and is inset with a single, teardrop-shaped stone. There are no additional embellishments on the ring head or shoulder.

Considering the design as a whole, the Board finds that this design lacks sufficient copyrightable authorship for registration. The relevant expression consists of a simple ring band, a rounded shoulder, and a single stone within the shoulder. The *Leaf* design ultimately consists of a simple combination of commonplace design elements, which is not enough to support

registration. See COMPENDIUM (THIRD) § 906.2 (“the copyright law does not protect mere variations on a familiar symbol or design, either in two- or three-dimensional form”).

C. Marquise Petal

The *Marquise Petal* design is visually similar to the *Petal* design, with a shoulder in a similar shape, except *Marquise Petal* contains a small oval-shaped stone.



Marquise Petal perspective view



Petal perspective view

For the same reasons as *Petal* and *Leaf*, the Board concludes that the *Marquise Petal* design contains insufficient creative expression to meet the requirements for registration. Like *Petal*, the shape of the shoulder is a variation of a common geometric shape, which is not material that can support a copyright registration. 37 C.F.R. § 202.1(a). The addition of a small oval-shaped stone is a “commonplace design element[] arranged in a common or obvious manner” that does not materially change the design’s eligibility for protection. COMPENDIUM (THIRD) § 908.2. For these reasons, the Board concludes that the *Marquise Petal* design does not meet the statutory requirements for copyright protection and therefore cannot be registered.

D. Bella Flora



The design in *Bella Flora* employs a shoulder that fans out into three scalloped edges, as well as a scalloped silver bezel that surrounds the center stone and extends underneath it, giving it the appearance of flower petals. The scalloped bezel appears uniform and symmetrical from the top, and the three “petals” on the shoulder are evenly sized and lack additional embellishment.

McTeigue argues that the “concave petal” design on the shoulder of *Bella Flora* is “original, unique, and creative.” Second Request at 2. It further argues that the design of *Bella Flora* “particularly” is “quite similar” to designs previously registered by the Office. *Id.* at 3. Specifically, McTeigue points to registrations for works titled *McII Aster* and *McII Wildflower*:



Aster (VA0002095500)



Wildflower (VA0002103866)

The Board agrees that the *Aster* and *Wildflower* designs are visually similar to *Bella Flora*. In the Board’s view, however, that is because *Bella Flora* is a derivative work of *Aster*, of which *Wildflower* is also derivative. The registration for *Aster* lists a date of publication of December 5, 2014, roughly six months before the May 15, 2015 publication date of *Bella Flora*.⁵ And the shoulder design in *Aster* is very similar to *Bella Flora*—employing several layers of rounded scalloped shapes rather than the simpler three-part structure in *Bella Flora*. As a derivative work, *Bella Flora* must contain a “sufficient amount of new authorship” that is “original and copyrightable itself.” COMPENDIUM (THIRD) § 907.1 (noting that derivative works are those “based on or derived from one or more preexisting works”).

After reviewing the *Bella Flora* design as a whole, and after considering its differences from the *Aster* design, the Board concludes that *Bella Flora* lacks sufficient new authorship to support registration. The design in *Bella Flora* is simpler than the *Aster* design. *Bella Flora* includes a shoulder employing the same three scalloped shapes that *Aster* places closest to the ring head, but it lacks the other decorative metalwork of the shoulder in *Aster*. In other words, the shoulder design in *Bella Flora* amounts to the removal of some expression contained in *Aster*, not the addition of new material. See COMPENDIUM (THIRD) § 503.5 (a registration “covers the new expression that the author created and contributed to the work” but not unclaimable material such as previously registered material).

⁵ The registration for *McII Wildflower* provides a publication date of October 3, 2016.

Moreover, in contrast to the shoulder in the *Aster* design, the shoulder in *Bella Flora* is much simpler, consisting of three identical rounded shapes spreading out from the ring. Simple variations of familiar shapes are not protected by the Copyright Act. COMPENDIUM (THIRD) § 906.2. The only additional material in the design is the silver metalwork surrounding the center stone. This material, comprised of a repeating series of ten identical oblong shapes, arranged symmetrically, does not, in the Board’s view, constitute sufficient creative authorship to support a copyright claim. Instead, they amount to a garden-variety arrangement of a small number of elements. *See id.* § 908.3 (when evaluating jewelry, the Office considers the “degree of symmetry” in a design, as well as “the number of elements”).⁶



⁶ Moreover, the Board notes that the design element surrounding the center stone in *Bella Flora* also appears in some of the deposit images for *Wildflower* (labeled “8045 (Bottom Perspective),” “14 (Perspective),” and “14 (Top).” This calls into question whether this element is part of a prior registration.



Wildflower “14 (Perspective)”

E. Flora Pave



The *Flora Pave* design employs a three-petal design for the ring shoulder, with smaller diamonds embedded in each petal. Each petal is more elongated in shape than the petals in *Bella Flora*, resembling the elongation in *Trillium*, discussed below. In three of the four deposit images, the main stone is surrounded by six clasps.⁷

After reviewing the design as a whole, the Board concludes it lacks sufficient creative authorship to support registration. The main elements of the design are the three-petal shoulder design, with embedded diamonds. As with *Bella Flora*, the Board views the three-petal shoulder design as a derivative of the *Aster* registration. The shape of the three petals *Flora Pave* appear similar to the petals in *Bella Flora*, though the former adds diamonds along the petals:

⁷ In the fourth image, labeled “McII Flora Pave (Side),” the ring appears to have four clasps and a small circular stone on the side of the main stone. The Board does not consider that variation of the design because it is inconsistent with the remaining deposits.



Bella Flora



Flora Pave

Because the three-petal shoulder design is the same as that in *Bella Flora*, the Board's conclusion is the same: it is a variation of the *Aster* design that is too simple to be the basis of registration. While *Flora Pave* is not a derivative work of *Aster*,⁸ the three-petal shoulder design in *Flora Pave* is a slight variation of familiar shapes, employing three identical rounded shapes that emerge from the shoulder. In the Board's view, this design amounts to a mere variation on common geometric shapes, which is not itself sufficient to sustain a copyright. See 37 C.F.R. § 202.1(a) ("familiar symbols or designs" not subject to copyright); COMPENDIUM (THIRD) § 908.3 (similar).

The small diamonds embedded in the ring shoulder do not provide a basis for copyrightability. These diamonds are an example of a pavé setting, a common jewelry design in which small diamonds are set along the band of the ring. See, e.g., Nicole Kliet, *Pavé-Set Engagement Rings: The Complete Guide*, BRIDES.COM (July 8, 2021), <https://www.brides.com/pave-setting-5069960> ("The French word [pavé] translates to 'paved,' and this jewelry technique was named as such because it resembles a paved or cobblestone road."). Diamonds in a pavé setting are therefore a "familiar symbol or design" that cannot be the basis for copyright protection. 37 C.F.R. § 202.1(a); see also *Cosmos Jewelry Ltd. v. Po Sun*

⁸ *Flora Pave* was published on March 14, 2014, while *Aster* was published later that year on December 5, 2014. Both works were completed in 2014.

Hon Co., 470 F. Supp. 2d 1072, 1082 (C.D. Cal. 2006) (use of particular finish on gold jewelry was “standard, stock, or common to the medium of gold jewelry making” and thus unprotectable under *scenes a faire*) (internal citations omitted).

Because the *Flora Pave* design consists only of an unprotectable three-petal shoulder design, using a stock pavé setting, it contains only unprotectable elements without the requisite level of creativity in their arrangement. The Board concludes that *Flora Pave* does not meet the threshold for copyright protection.

F. Trillium

Each of the deposits for *Trillium* depict a three-petal design for the shoulder, which is more elongated than the three-petal design in *Bella Flora* and *Flora Pave*. The petal design in *Trillium* goes higher up the ring head and uses longer petals than *Bella Flora*.



Bella Flora side view



Trillium side view

But beyond this shared design element, however, the deposit images for *Trillium* depict multiple, inconsistent designs. One deposit depicts a small stone on the side of the ring head, whereas another shows the center stone presented without adornment. A third deposit image shows a ring with small teardrop-shapes surrounding the head, whereas a fourth shows the same scalloped bezel depicted in the *Bella Flora* design.



Trillium “8849 (Front)”



Trillium “8455 (Front)”



Trillium “9253 (Side)”



Trillium “9592 Tulip Flora YG (Front)”

If the Board viewed the claim for *Trillium* broadly, these deposit images would be inconsistent with the Office’s rule discussed previously that “a registration covers one individual work, and an applicant should prepare a separate application, filing fee, and deposit for each work that is submitted for registration.” COMPENDIUM (THIRD) § 511.⁹ To the extent that there are multiple variations of *Trillium* with shared design elements, under the Copyright Act, the various designs have been “prepared in different versions,” and thus “each version constitutes a separate work.” 17 U.S.C. § 101 (definition of “created”).

⁹ That fact that each deposit image contains captions with differing numbers suggests that these numbers correspond to different variations of the design.

Instead, the Board will treat the application for *Trillium* as seeking to register only the shared design on the ring band and shoulder and not the elements that clearly differ around the center stone.¹⁰ Viewing the ring band and three-petal design on the shoulder, the Board finds the design too simplistic to register. As is the case for *Bella Flora* and *Flora Pave*, a ring design that employs three rounded shapes, employed symmetrically on the ring band, without other ornamentation or variation, amounts to a design made up of commonplace design elements arranged in an obvious manner. COMPENDIUM (THIRD) § 908.2. In the Board’s view, these elements are not sufficiently creative to be protected by copyright.

McTeigue argues that the U.S. Patent and Trademark Office has granted design patents for rings with similar petal designs and that these registrations should meet its burden under the Copyright Act. *See* Second Request at 3 (pointing to design patent registrations D834,984 and D834,985).

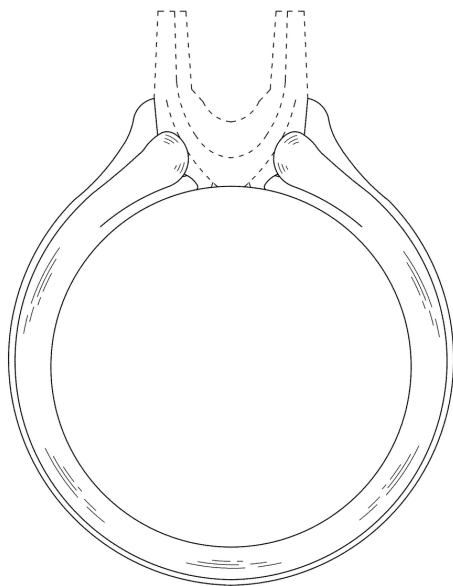


FIG. 2
D834,984

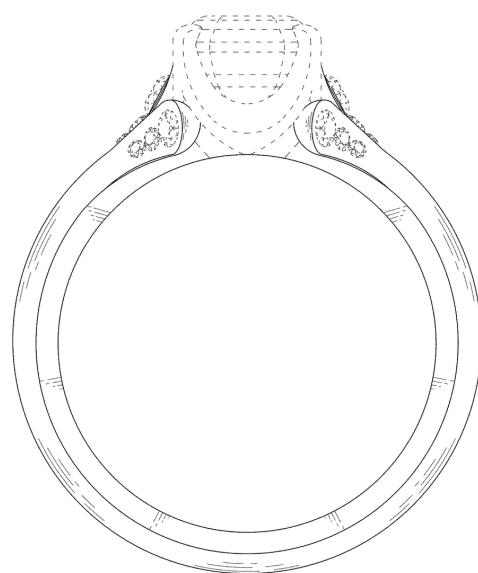


FIG. 3
D834,985

Because the Board applies only U.S. copyright law, these design patent registrations are not relevant. “The fact that a work may or may not be protected by a design patent, trademark registration, or other form of legal protection is irrelevant” to whether a work meets the requirements of the Copyright Act. COMPENDIUM (THIRD) § 310.11.

The deposits for *Trillium* depict different rings, and the only shared design element—the three-petal ring band—is a variation of a familiar shape that does not rise to the level of

¹⁰ The Board views this as consistent with the statement by counsel for McTeigue that it seeks “to protect (all) the metalwork” in the applications before the Board. Email from Clifford Hyra to U.S. Copyright Office (July 19, 2021). These additional, conflicting elements around the center stone, which include gemstones, cannot be characterized solely as “metalwork.”

copyright subject matter. For these reasons, the Board affirms the Registration Program's refusal of registration.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the copyright claims in *McII Petal*, *McII Leaf*, *McII Marquise Petal*, *McII Bella Flora*, *McII Flora Pave*, and *McII Trillium*. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action in this matter.



U.S. Copyright Office Review Board

Shira Perlmutter, Register of Copyrights

Suzanne V. Wilson, General Counsel and

Associate Register of Copyrights

Maria Strong, Associate Register of Copyrights and

Director of Policy & International Affairs

APPENDIX: DEPOSIT IMAGES¹¹

McII Petal (7 images)



Mc2 Petal 8 Cut (Top)



McII Petal 6 pr. (Top)



McII Petal 8 pr. (Top)



MCII Petal Tulip (Top)

¹¹ The deposits for each Work included captions beneath each deposit image, which are reproduced here.



McII Petal (Side)



McII Petal (Perspective)



McII Petal Gold (Perspective)

McII Leaf (4 images)



McII Leaf Gold/Red (Top)



McII Leaf Sapphire (Top)



Mc2 Leaf Gold/Red (Perspective)



McII Leaf Sapphire (Perspective)

McII Marquise Petal (2 images)



McII Marquise Petal (Perspective)



McII Marquise Petal (Top)

McII Bella Flora (5 images)



McII Bella Flora (Perspective)



McII Bella Flora (Top)



McII Bella Flora Gold (Top)



McII Bella Flora (Side)



McII Bella Flora Gold
(Perspective)

McII Flora Pave (4 images)



McII Flora Pave (Top)



McII Flora Pave (Perspective)



McII Flora Pave (Side)



McII Flora Pave (Perspective 2)

McII Trillium (14 images)



8455 (Front)



8455 (Perspective)



8849 (Front)



8849 (Perspective)



8849 (Side)



9051 (Top)



9051 (Front)



9252 (Side)



9253 (Side)



32146 (Top)



9592 Tulip Flora YG (Front)



9592 Tulip Flora YG (Side)



32634 (Perspective)



32634 (Top)