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

September 20, 2013

Fish & Associates, PC
Attn: Ryan Dean
2603 Main Street, Suite 1000
Irvine, CA 92614

**Re: Faux-Flame Candle/Flameless Candle**
**Correspondence ID: 1-DNEZPB**

Dear Mr. Dean:

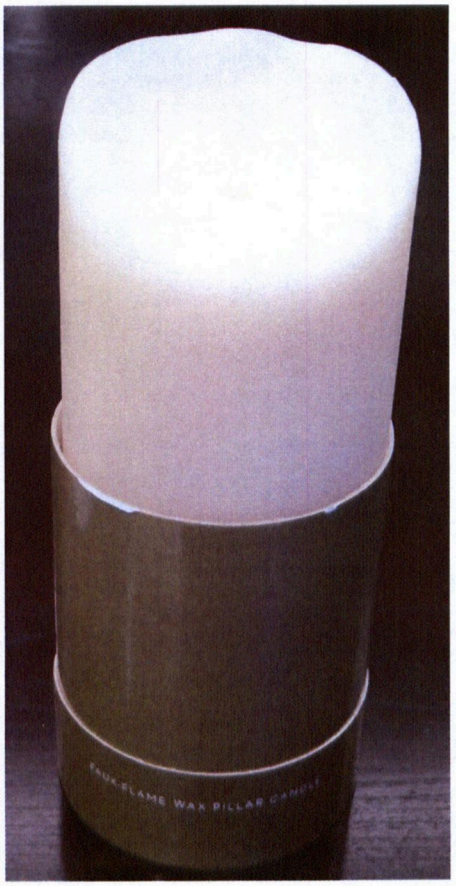
The Review Board of the United States Copyright Office (the "Board") is in receipt of your second requests for reconsideration of the Registration Program's refusal to register the work entitled: *Faux-Flame Candle/Flameless Candle*. You submitted these requests on behalf of your client, Candella LLC, on December 10, 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 application, 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 registration 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.

## I. DESCRIPTION OF THE WORK

The applications for *Faux-Flame Candle* and *Flameless Candle* both refer to the same work (hereinafter the "Work"). The Work is a cylindrical wax candle with a battery-powered lighting mechanism embedded in its body. The top of the candle's body has a concave "crater" shape carved out of it, as if to simulate the look of a used candle. In place of a wick, the Work includes a plastic, flame-shaped element. The flame-shaped element is attached to the embedded mechanical lighting mechanism and protrudes from a hole in the Work's top at the place where a wick would normally protrude from a traditional candle.

The below image is a photographic reproduction of the Work from the materials included in your correspondence with the Office:



## II. ADMINISTRATIVE RECORD

On April 12, 2012, the United States Copyright Office (the "Office") issued two letters notifying Candella LLC (the "Applicant") that it had refused registration of the above mentioned Work. *Letters from Assistant Chief of the Visual Arts Division, Bill Briganti, to Ryan Dean* (April 12, 2012). In its letters, the Office stated that it could not register the Work because it lacks the authorship necessary to support a copyright claim. *Id.*

In letters dated July 9, 2012 and August 6, 2012, you requested that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusal to register the Work. *Letter from Ryan Dean to Copyright RAC Division* (July 9, 2012) ("Faux-Flame Request"); *Letter from Ryan Dean to Copyright RAC Division* (August 6, 2012) ("Flameless Request"). Upon reviewing the Work in light of the points raised in your letters, 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 Assistant Chief of the Visual Arts*

*Division, Bill Briganti, to Ryan Dean* (July 24, 2012); *Letter from Attorney-Advisor, Stephanie Mason, to Ryan Dean* (September 19, 2012)[1].

Finally, in two letters dated December 10, 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 Work. *Letters from Ryan Bell to Copyright R&P Division* (December 10, 2012) ("Second Requests"). In arguing that the Office improperly refused registration, you claim the Work includes elements that are both separable from its utilitarian function as an electric candle; and, that those separable elements possess at least the minimum amount of creativity required to support registration. *Id.* at *passim*. Specifically, you claim the following aspects of the Work are separable and copyrightable: (1) the Work's cylindrical body; (2) the "crater-shaped" sculpting at the top of the Work; and, (3) the "distinct concavity" of the Work's plastic flame element. *Id.* at 2.

## III. DECISION

### A. *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

[1] In this letter, Attorney-Advisor, Stephanie Mason, pointed out the following: "Please note; it appears that the works submitted with these two applications are the same work (with a third application filed on August 22, 2012)." You did not dispute this statement in either of your Second Request letters (discussed *infra*).

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., 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 (1976), U.S. Code Cong. & Admin.News 1976, p. 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.

***(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 unprotectable 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., Inc. v. NY Arrows Soccer Team, Inc. et. al.*, 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 Work***

After carefully examining the Work and applying the legal standards discussed above, the Board finds that the Work is a useful article that is void of separable authorship. We further find that, even if the aspects of the Work that you identify as separable were capable of being considered apart from the Work's utilitarian function, they would lack a sufficient amount of copyrightable authorship to satisfy the requirement of originality. Accordingly, we affirm the denial of registration.

***(1) Separability***

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 Work (a candle with a battery-powered light that illuminates a plastic flame shape) is a useful article. *Second Requests* at 1.

As discussed above, the law requires that, to be eligible for registration, the designs of useful articles must be either physically or conceptually separable from the utilitarian aspects of the work. *See Esquire,* 591 F.2d at 800. In your Second Requests, you claim the following aspects of the Work are separable and copyrightable: (1) the Work's cylindrical body; (2) the "crater-shaped" sculpting at the top of the Work; and, (3) the "distinct concavity" of the Work's plastic flame element. *Second Requests* at 2. There is no question that these three aspects cannot be physically separated from the Work without destroying its basic utility as a candle with a battery-powered light that illuminates a plastic flame shape. *Contra, Mazer v. Stein*, 347 U.S. 201 (1954). Therefore, for there to be any consideration of such aspects, those aspects must be conceptually separable –*i.e.* able to be imagined separately and independently from the Works' utilitarian function without destroying the Work's basic purpose.

Imagining the Work without its "cylindrical body" and "crater-shaped" concave top leaves the examiner with little more than the mechanical frame and structure of the battery-powered lighting mechanism that is embedded in the candle. Likewise, imagining the Work without its plastic flame shape leaves the examiner with a cylindrical piece of wax that has a battery-powered lighting mechanism embedded into its body, but no device onto which the lighting mechanism can project its light. It is clear from your descriptions of the work (*see, e.g., First Requests* at Exhibits A-B) and from the Applicant's original name for the Work ("*Faux-Flame Candle*") that a crucial aspect of the Work's utility is its incorporation of an electric light that shines upon a piece of plastic and simulates a traditional candle flame. Thus, in the Board's view, any attempt at separability destroys the Work's intended purpose as a candle with a battery-powered light that illuminates a plastic flame shape. Accordingly,

we find that the Work contains no separable pictorial or graphic features that are eligible for copyright protection.

***(2) Originality***

The Board is not persuaded by your argument that the Work's cylindrical body, "crater-shaped" sculpting, and plastic flame element are separable from the Work's utilitarian function. However, even if these aspects were capable of being considered apart from the Work's utility, we find that they lack a sufficient amount of copyrightable authorship to satisfy the requirement of originality.

First, none of the Work's constituent elements, considered individually, are sufficiently creative to warrant protection. As noted, 37 C.F.R. § 202.1(a), identifies certain elements that are not copyrightable. These elements include: "[w]ords and short phrases such as names, titles, slogans; familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering, or coloring." *Id.* Here, the aspects of the Work that you identify as separable include: (1) the common cylindrical shape of its body; (2) the simple concave "crater" at its top; and, (3) the ordinary oval shape of its plastic flame element. Consistent with the above regulations, common shapes such as cylinders, concave impressions, and simple ovals are not eligible for copyright protection. *See id.* (prohibiting the registration of basic symbols or designs). Thus, none of the work's individual elements are sufficiently creative to warrant registration.

Second, considered as a whole, the aspects of the Work that you identify as separable fail to meet the creativity threshold set forth in *Feist*. 499 U.S. at 359. As explained, the Board accepts the principle that combinations of unprotectable elements may be eligible for copyright registration. However, in order to be accepted, such combinations must contain some distinguishable variation in the selection, coordination, or arrangement of their elements that is not so obvious or minor that the "creative spark is utterly lacking or so trivial as to be nonexistent." *Id.*; *see also Atari Games,* 888 F.2d at 883 (finding a work should be viewed in its entirety, with individual uncopyrightable elements judged not separately, but in their overall interrelatedness within the work as a whole). Viewed as a whole, the aspects of the Work you deem separable consist of little more than a traditional candle shape with a simple concave crater carved into it's top and a piece of plastic cut to resemble a flame in place of a wick. This basic pairing of an unprotectable, public domain candle shape with an unprotectable flame shape is, at best, *de minimis*, and fails to meet the threshold for copyrightable authorship. *Feist,* 499 U.S. at 359; *see also Atari Games,* 888 F.2d at 883. Accordingly, we conclude that the Work, as a whole, lacks the requisite "creative spark" necessary for registration. *Feist,* 499 U.S. at 359; *Satava*, 323 F.3d at 811.

In sum, the Board finds that both the individual elements that comprise the Work, as well as the Applicant's selection, organization, and arrangement of those elements lack the sufficient level of creativity to make them eligible for registration under the Copyright Act.

## IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the work entitled: *Faux-Flame Candle/Flameless Candle*. 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