United States Copyright Office
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September 3, 2013

Polster, Lieder, Woodruff & Lucchesi, L.C.
Attn: G. Harley Blosser
12412 Powerscourt Drive, Suite 200
St. Louis, Missouri 63131-3615

Re: ***ORN. FOR COBBLESTONE RACK WITH COASTERS – STOS C001***
ORN. FOR COBBLESTONE COUNTERTOP MIRROR– STOS C003
ORN. FOR COBBLESTONE SIGN HOLDER – STOS C004
ORN. FOR IVORY COUNTERTOP MIRRORS – STOS C007
ORN. FOR IVORY COUNTERTOP SIGN HOLDER – STOS C008
SALESMAN RACK NO. 1 – STOS C009
SALESMAN RACK NO. 2 – STOS C010
COUNTERTOP MIRROR – STOS C012
SIGN DISPLAY NO. 1 – STOS C014
SIGN DISPLAY NO. 2 – STOS C015

Correspondence ID: 1-F50UEY

Dear Mr. Blosser:

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 above works. You submitted this request on behalf of your client, Store Supply Warehouse, LLC, on July 3, 2013.

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 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 WORKS

The works at issue are a collection of standing mirror designs, standing frame designs, and standing rack designs. Below, are descriptions of the works.

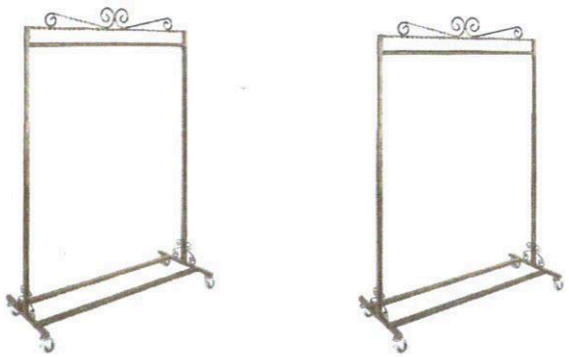
A. The Standing Mirror Designs

Countertop Mirror – STOS C012; Orn. for Cobblestone Countertop Mirror– STOS C003; and *Orn. for Ivory Countertop Mirrors – STOS C007* are all variations of a standing mirror design. They consist of a framed, oval-shaped mirror that is supported by four metal legs; and, have ornamental filigree metal work appearing on their top and between their legs. The claim to copyright in the *Orn. for Cobblestone Countertop Mirror– STOS C003* design includes the work's "cobblestone color." The claim to copyright in the *Orn. for Ivory Countertop Mirrors – STOS C007* includes the work's ivory color. The below images are photographic reproductions of the three works, respectively.



B. The Standing Rack Designs

Salesman Rack No. 1 – STOS C009 and *Orn. for Cobblestone Rack with Coasters – STOS C001* are both variations of a standing rack design. The works consist of a square metal frame, a metal base with four wheels attached to it, a metal hanger bar, and ornamental filigree metal work that appears on their top and sides. The claim to copyright in the *Orn. for Cobblestone Rack with Coasters – STOS C001* design includes the work's "cobblestone color." The below images are photographic reproductions of the two works, respectively.



Salesman Rack No. 2 – STOS C010 is also a variation of a standing rack design. The work is similar in shape and form to *Salesman Rack No. 1 – STOS C009*, but has an ivory color, an ornamental design made up of a series of interlocking circles on its top, and a pair of ornamental semi-circles on its sides. The below image is a photographic reproduction of the work from the deposit material.



C. The Standing Frame Designs

Sign Display No. 1 – STOS C014; Sign Display No. 2 – STOS C015; and *ORN. for Cobblestone Sign Holder – STOS C004* are all variations of a standing frame design. They consists of a square metal frame, a base of four metal legs, and ornamental filigree metal work that appears on their legs and on the bottom portion of their frames. The claim to copyright in the *Orn. for Cobblestone Sign Holder – STOS C004* design includes the "cobblestone color." The below images are photographic reproductions of the three works, respectively.







Orn. for Ivory Countertop Sign Holder – STOS C008 is also a variation of a standing frame design. The work is similar in shape and form to the above sign displays, except for its ivory color, the ornamental design made up of a series of adjacent circles on the bottom of its

frame, and the pair of ornamental semi-circles on its sides. The below image is a photographic reproduction of the work from the deposit material.



II. ADMINISTRATIVE RECORD

On November 20, 2012, the United States Copyright Office (the "Office") issued a letter notifying Store Supply Warehouse, LLC (the "Applicant") that it had refused registration of the above mentioned works. *Letter from Registration Specialist, Larisa Pastuchiv, to Ned Randle* (November 20, 2012). In its letter, the Office stated that it could not register the works because they are useful articles that do not contain any separable authorship on which to base a claim to copyright. *Id.*

In a letter dated December 14, 2012, your firm requested that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusal to register the works. *Letter from Ned Randle to Copyright RAC Division* (December 14, 2012) ("First Request"). Upon reviewing the works in light of the points raised in First Request, the Office again concluded that they are useful articles that do not contain any authorship that is both separable and copyrightable and refused registration. *Letter from Attorney-Advisor, Stephanie Mason, to Ned Randle* (April 3, 2013).

Finally, in a letter dated July 3, 2013, you requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the works.[1] *Letter from G. Blosser to Copyright R&P Division* (July 3, 2013) ("Second Request"). In your letter, you agree with the Office's prior determination that the works are useful articles that include design features that are separable from their utilitarian functions, but disagree with the Office's conclusion that those design features lack a sufficient amount of original authorship to qualify for copyright protection. *Id.* Specifically, you claim the works' separable design features, both individually and in their selection and arrangement, include at least the minimum amount of

[1] Your First Request sought reconsideration of four additional works: *Spiral Rack – STOS C011; Orn. for Cobblestone Spiral Rack – STOS C002; Orn. for Ivory Spiral Rack – STOS C006;* and, *Standing Mirrors – STOS C013*. In your Second Request, you expressly indicate that you are no longer seeking registration of these four works. *Second Request* at 2.

creativity required to support registration under the standard for originality set forth in *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). *Second Request* at 2-3.

In addition to *Feist*, your argument references several cases in support of the general principles that a work need only possess a "modicum of creativity" and that works comprised of otherwise unprotectable elements are acceptable for copyright protection if the selection and arrangement of their elements satisfies the requisite level of creative authorship. *Id.* at 4-5. You also provide a "Declaration" from Patricia Sims (the Applicant's Product Specialist) in which she claims the works' include either an "elegant, but rustic, cobblestone charm, or an ivory theme evocative of the Mediterranean Sea, with a deep, lustrous quality." *Second Request* at 3 (referencing Sims' Declaration, paras. 4-5).

III. DECISION

A. *The 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 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 (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, 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 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 Works*

After carefully examining the works and applying the legal standards discussed above, the Board finds that the works are all useful articles that do not possess design elements that are *both* separable from their utilitarian functions and sufficiently creative to support a claim to copyright. 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). 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 works (a collection of standing mirror designs, standing frame designs, and standing rack designs) are useful articles. It is also undisputed that the works include design features that are separable from their functions as mirrors, frames, and racks. Nevertheless, the Board finds that none of the works include separable features that possess the requisite amount of creative authorship to warrant copyright registration.

Below, we list the works by design group, identify the design elements we have determined are separable from their utilitarian functions, and explain why we have concluded that the separable features are not sufficiently creative to warrant registration.

A. The Standing Mirror Designs

The Board finds that the ornamental "filigree" design features that appears on the tops and between the legs of the *Countertop Mirror – STOS C012; Orn. for Cobblestone Countertop Mirror– STOS C003;* and *Orn. for Ivory Countertop Mirrors – STOS C007* are separable from the works' utilitarian functions as standing mirrors. The Board also finds that these design features lack sufficient creativity, both in their individual elements and as wholes, to qualify for registration.

The design features consists of simple curved lines, curlicue circles and the colors "cobblestone" or ivory. Common shapes like curved lines and curlicues are ineligible for copyright protection. *See Feist*, 499 U.S. at 359; *see also* 37 C.F.R. § 202.1(a) (prohibiting registration of familiar symbols or designs). Ivory and "cobblestone" color schemes are also ineligible for copyright protection. *Id.*; *see also Boisson v. Banian, Ltd.*, 273 F.3d 262, 271 (2d Cir. 2001) (indicating mere coloration cannot support a copyright claim). Thus, consistent with the above regulations, none of the design features' elements are sufficiently creative to warrant protection. The Board accepts the principle that combinations of unprotectable elements may be eligible for copyright registration. *See Feist,* 499 U.S at 359; *see also Atari Games,* 888 F.2d at 883. 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." *See id.* (both finding that a work should be viewed in its entirety, with individual noncopyrightable elements judged not separately, but in their overall interrelatedness within the work as a whole). Viewed as a whole, both design features consist of little more that ordinary curlicue designs placed adjacent to one another and colored ivory or "cobblestone." These basic arrangements are, at best, *de minimis*, and fail to meet the threshold for copyrightable authorship. *Atari Games,* 888 F.2d at 883; *Satava*, 323 F.3d at 811. Accordingly, we find that the *Countertop Mirror – STOS C012; Orn. for Cobblestone Countertop Mirror– STOS C003;* and *Orn. for Ivory Countertop Mirrors – STOS C007* are void of separable, copyrightable authorship and are ineligible for protection under the Copyright Act.

B. The Standing Rack Designs

Regarding *Salesman Rack No. 1 – STOS C009* and *Orn. for Cobblestone Rack with Coasters – STOS C001*, the Board finds that the ornamental "filigree" design features that appear on the works' tops and sides are separable from their utilitarian functions as standing racks. We further find that these design features lack sufficient creativity, in their individual elements and as wholes, to qualify for registration. Here, both design features include two metal bars with curlicue designs at each end, colored "cobblestone" and arranged so that their curlicue shapes abut. As indicated, curved lines, curlicues, and colors, considered individually, are ineligible for copyright protection. *See* 37 C.F.R. § 202.1(a). Likewise, the simple, symmetric

arrangement of two curved lines that end in curlicues is, at best, *de minimis* and lacks the requisite "creative spark" for copyrightability. *Atari Games,* 888 F.2d at 883; *Satava*, 323 F.3d at 811. Accordingly, we find that *Salesman Rack No. 1 – STOS C009* and *Orn. for Cobblestone Rack with Coasters – STOS C001* are void of separable, copyrightable authorship and are ineligible for protection under the Copyright Act.

Regarding *Salesman Rack No. 2 – STOS C010* we find that the ornamental series of interlocking circles that appears at the top of the work, as well as the pair of ornamental semi-circles that appear on its sides, are separable from its utilitarian function as a standing rack. This ordinary arrangement of unprotectable circles and semi-circles, however, lacks the requisite "creative spark" for copyrightability. *See Feist*, 499 U.S. at 359; *see also* 37 C.F.R. § 202.1(a). Circles, semi-circles, and the color ivory are in the public domain and ineligible for copyright registration. *See* 37 C.F.R. § 202.1(a). Likewise, the simple combination of unprotectable, ivory circles so that they interlock and form a straight row lacks the requisite "creative spark" for copyrightability. *See Feist*, 499 U.S. at 359; *see also* 37 C.F.R. § 202.1(a). Thus, we find that *Salesman Rack No. 2 – STOS C010* is void of separable, copyrightable authorship and is ineligible for protection under the Copyright Act.

C. The Standing Frame Designs

Regarding *Sign Display No. 1 – STOS C014; Sign Display No. 2 – STOS C015;* and *ORN. for Cobblestone Sign Holder – STOS C004*, the Board finds that the ornamental "filigree" design features that appear on the works' bottoms and feet are separable from their utilitarian functions as standing racks. We further find that these design features lack sufficient creativity, in their individual elements and as wholes, to qualify for registration. Here, both design features include two "cobblestone"-colored metal bars, with curlicue designs at each end, arranged so that their curlicue shapes abut. As indicated, curved lines, curlicues, and colors, considered individually, are ineligible for copyright protection. *See* 37 C.F.R. § 202.1(a). Likewise, the simple, symmetric arrangement of two curved lines that end in curlicues is, at best, *de minimis* and lacks the requisite "creative spark" for copyrightability. *Atari Games,* 888 F.2d at 883; *Satava*, 323 F.3d at 811. Accordingly, we find that *Sign Display No. 1 – STOS C014; Sign Display No. 2 – STOS C015;* and *ORN. for Cobblestone Sign Holder – STOS C004* are void of separable, copyrightable authorship and are ineligible for protection under the Copyright Act.

Regarding *Orn. for Ivory Countertop Sign Holder – STOS C008*, we find that the ornamental row of circles that appears at the bottom of the work, as well as the pair of ornamental semi-circles that appear on the feet, are separable from its utilitarian function as a standing frame. This ordinary arrangement of unprotectable circles and semi-circles, however, lacks the requisite "creative spark" for copyrightability. *See Feist*, 499 U.S. at 359; *see also* 37 C.F.R. § 202.1(a). Circles, semi-circles and the color ivory are in the public domain and not eligible for copyright registration. *See* 37 C.F.R. § 202.1(a). Likewise, the basic arrangement of five unprotectable, ivory circles in a simple row lacks the requisite "creative spark" for copyrightability. *See Feist*, 499 U.S. at 359; *see also* 37 C.F.R. § 202.1(a). Thus, we find that *Orn. for Ivory Countertop Sign Holder – STOS C008* is void of separable, copyrightable authorship and is ineligible for protection under the Copyright Act.

Finally, your assertion that the Applicant's selection and arrangement of the works' design features and color schemes imbue the works with an "elegant, but rustic, cobblestone charm, or an ivory theme evocative of the Mediterranean Sea, with a deep, lustrous quality" does not add to your claim of sufficient creativity. *Second Request* at 3 (referencing Sims' Declaration, paras. 4-5). As discussed above, the Board does not assess the attractiveness of a design, its visual effect or appearance, or its symbolism in determining whether a work contains the requisite minimal amount of original authorship necessary for registration. *See* 17 U.S.C. § 102(b); *see also Bleistein*, 188 U.S. 239. Thus, even if accurate, the mere fact that the works' design features consist of aesthetically appealing arrangements of familiar shapes and colors would not qualify any of the works, as a whole, as copyrightable.

In sum, the Board finds that the works do not include design elements that are both separable from their utilitarian functions and possess the requisite amount of copyrightable authorship, either individually or in their selection and arrangement, to warrant registration.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the works entitled: *ORN. FOR COBBLESTONE RACK WITH COASTERS – STOS C001;ORN. FOR COBBLESTONE COUNTERTOP MIRROR– STOS C003; ORN. FOR COBBLESTONE SIGN HOLDER – STOS C004; ORN. FOR IVORY COUNTERTOP MIRRORS – STOS C007; ORN. FOR IVORY COUNTERTOP SIGN HOLDER – STOS C008; SALESMAN RACK NO. 1 – STOS C009; SALESMAN RACK NO. 2 – STOS C010; COUNTERTOP MIRROR – STOS C012; SIGN DISPLAY NO. 1 – STOS C014; SIGN DISPLAY NO. 2 – STOS C015*. 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