United States Copyright Office
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February 10, 2014

Greenberg Traurig LLP
Attn: Richard Harris
77 West Wacker Drive, Suite 3100
Chicago, IL 60601

RE: Ornamented Vanity (Infinity Kitchen Cabinet)
Ornamented Coffee Table (Atelier Display Cabinet)
Ornamented Cabinet (Guinevere 8' Breakfront Cabinet)
Correspondence ID: 1-FJGCFS

Dear Mr. Harris:

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 works entitled: *Ornamented Vanity (Infinity Kitchen Cabinet), Ornamented Coffee Table (Atelier Display Cabinet), Ornamented Cabinet (Guinevere 8' Breakfront Cabinet)* (collectively, the "Works"). You submitted this request on behalf of your client, Habersham Plantation Corporation. The Board has examined the applications, 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

Ornamented Vanity (Infinity Kitchen Cabinet) is a square two-door kitchen cabinet with framed glass doors. The glass doors are overlaid with matching molding that, across the view of both doors, forms a large circle topped by an oval and flanked by two smaller circles at the intersection point. The doors each have a handle, and trim molding frames the

glass windows and the cabinet itself. The below image is a photographic reproduction of the work from the deposit materials.



Ornamented Coffee Table (Atelier Display Cabinet) is a free-standing, corner cabinet with a single, framed glass door. The door is overlaid with molding, similar to the *Ornamented Vanity (Infinity Kitchen Cabinet)* but the pattern is different. The top and bottom corners of the glass, and the center sides, each contain a square. Emanating from the squares are moldings that form opposing half circles; two at the top of the glass and two at the bottom. The connecting points of the half circles contain solid ovals. The shape of the cabinet is rectangular, and the back of the cabinet appears to contain a full mirror. The below image is a photographic reproduction of the work from the deposit materials.



Ornamented Cabinet (Guinevere 8' Breakfront Cabinet) is a wall cabinet bookcase containing three framed glass doors in the middle, and framed glass arch at the top and three solid wood doors at the bottom. As with the other works, the glass is overlaid with molding. The center door contains a standard cross-hatch pattern that forms eight squares. The two center side doors have three horizontal pieces of molding each, creating four squares. The top arched glass contains three V-shaped moldings. The two outside V-shapes intersect one another at one point, and the center V-shape intersects and crosses the other two. The overall arch is also framed with molding. Additionally, the three, solid bottom doors contain center moldings in the shapes of a square (the center door) and rectangles (the two outside doors). The below image is a photographic reproduction of the work from the deposit materials.



III. ADMINISTRATIVE RECORD

On October 12, 2012, the United States Copyright Office issue a letter notifying you that it had refused registration of the above identified Works. *Letter from Registration Specialist Sandra Ware to Richard Harris* (October 12, 2012). In its letter, the Office stated that it could not register the Works because they were useful articles that did not contain any separable features that were copyrightable. *Id.*

In a letter dated January 15, 2013, you requested that the Office reconsider its initial refusal to register the Works. *Letter from Richard Harris to Copyright RAC Division* (January 15, 2013). Upon reviewing the Works in light of the points raised in your letter, the Office affirmed the initial refusal on the same grounds. *Letter from Attorney Advisor Stephanie Mason to Richard Harris* (May 23, 2013). You subsequently sought a second

reconsideration of the registration refusal. *Letter from Richard Harris to Copyright RAC Division* (August 22, 2013).

In support of your second request for reconsideration, you acknowledge that the Works are useful articles but argue that the designs are conceptually separable from the utilitarian functions of the Works and that they warrant copyright protection. With respect to *Ornamented Vanity (Infinity Kitchen Cabinet)*, you assert that the moldings on the glass doors, the accent moldings around the doors, the crown and base moldings, and the intersection circles contained on the handle doors are all separable and protectible. *Id.* at 4. For *Ornamented Coffee Table (Atelier Display Cabinet)*, you argue that the intersecting curve, oval and line segments on the glass door, the accent and crown moldings, the curvature of the cabinet legs, and the intersecting circles on the door handles are separable and protectible. *Id.* at 4-5 And for *Ornamental Cabinet (Guinevere 8' Breakfront Cabinet)*, you state that molding on and around the glass arch, on the center glass doors and the lower cabinet doors, and on the crown and base of the cabinet are all separable and protectible, as well as the scored cabinet door handles. *Id.* at 5.

You also argue that the Office has applied the wrong legal standard with respect to the conceptual separability of elements of a useful article. Specifically, citing cases that involved works which contained public domain or otherwise uncopyrightable elements, you assert that the Office should have examined any conceptually separable elements of each of the Works as a whole, and failed to do so. *Id.* at 8-13.

IV. 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 (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.

If a useful article does possess elements that are conceptually separable from the work, the Office examines these elements to determine if one or more of the elements possesses sufficient creativity to warrant copyright protection. If one or more of the elements does is copyrightable, a registration can be made but it is important to understand the registration does *not* cover the entire useful article; rather, it only applies to the copyrightable elements. This is precisely the teaching of the *Mazer v. Stein* case. The sculpture of the Balinese dancer, as a separable element, was protectible, but the overall lamp design was not.

You argue that the Office should have identified those elements of the Works that are conceptually separable and, if none of those elements possessed sufficient authorship, consider them "as a whole" to examine whether their selection, organization, and arrangement resulted in a copyrightable work. This is not the correct legal standard, and is not the teaching of *Atari* which did not involve a useful article. The Office does examine each conceptually separable element for creative selection, arrangement or organization

within that element, but will not examine all conceptually separable elements together as a whole, for to do so would violate Congress' express intent in not offering industrial design protection. *See*, H.R. Rep. No 94-1476 at 55 (1976). This is why the copyright consideration for useful articles is different from other types of works, including works that incorporate public domain or uncopyrightable elements as in the cases that you cited in your second request for reconsideration. Further, even it were permissible for the Office to consider conceptually separable elements together "as a whole," it is not certain how this could be accomplished without placing the items back on the useful article and then considering their organization, selection and arrangement. This would result in a consideration of the entire work, i.e. an industrial design, which the law prohibits. The alternative, leaving the conceptually separable elements off the useful article in a free-floating fashion and subjecting them to examination, would prevent the Office from considering the arrangement and organization of these otherwise uncopyrightable elements.[1]

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 Publications 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.* 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").

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[1] This appears to be what was done by the Court in *Universal Furniture Int'l, Inc. v. Collezione Europa USA, Inc.*, 618 F. 3d 417 (4th Cir. 2010), which is the principal case that you argue favors registering the Works. This is not the approach that is applied by the Office, as discussed above.

Of course, some combinations of common or standard shapes or designs that comprise a conceptually separable element 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).

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 *Ornamented Vanity (Infinity Kitchen Cabinet), Ornamented Coffee Table (Atelier Display Cabinet), Ornamented Cabinet (Guinevere 8' Breakfront Cabinet)* are useful articles that are void of separable authorship.

A "useful article," as discussed above, is 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. To be eligible for registration, any design features incorporated into the Works must be either physically[2] or conceptually separable from their respective utilitarian function. *See Esquire*, 591 F.2d at 800.

1. Ornamented Vanity (Infinity Kitchen Cabinet)

You have identified six elements in your second request for reconsideration that, in your view, are conceptually separable from the utilitarian aspects of a kitchen cabinet, including the circular moldings on the glass doors, base, crown and accent moldings, and

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[2] There is no challenge in this second reconsideration that the Works have any physical separable elements for consideration; your arguments are based upon the notion of conceptual separability.

circles engraved in the door handles. The Board, however, finds there to be only two conceptually separable elements: the circular molding design in the doors and the rectangular accent moldings around the glass. The Board cannot conceptually envision the shape and configurations of the base and crown moldings without destroying the image of the top and bottom of the cabinet. *Id.* The Board also cannot consider the engraved circles in the handles of the door handles that you discuss because the identifying deposit materials, submitted by you, do not reveal any such engravings (see above photographic deposit material).

Examination of the moldings/carvings located on the doors reveals that they are a series of four intersecting circles, a smaller oblong sitting atop a large circle and flanked by two circles. These are basic geometric shapes and figures that are arranged in a common intersection fashion. This design arrangement is too simplistic and rudimentary to warrant copyright protection. Furthermore, the rectangular accent moldings on the doors are basic geometric figures that are not capable of copyright protection. *See*, 37 C.F.R. § 202.1(a).

2. Ornamented Coffee Table (Atelier Display Cabinet)

You have identified five elements in your second request for reconsideration that, in your view, are conceptually separable from the utilitarian aspects of a display cabinet, including the intersecting moldings/carvings on the glass door face, accent and crown moldings, curvature of the cabinet legs, and intersecting circles appearing on the door handles. The Board, however, determines that there are only three conceptually separable elements present: the intersecting moldings/carvings on the door face, the rectangular accent molding around the door, and the two crown moldings that surround the upper portion of the cabinet. The shape and configuration of the crown of the cabinet cannot be envisioned separably without destroying the image of the top of the cabinet. The same analysis applies to the curvature of the support legs. And, as with *Ornamented Vanity (Infinity Kitchen Cabinet)*, the deposit material is insufficient to identify circular patterns on the door handles (see above photographic deposit material).

The design pattern on the door are two opposed half-circles connected by a solid oval, with hollow squares at all four corners and at the borders of the center of the glass. While perhaps aesthetically pleasing, this straightforward collection of geometric shapes in arranged in a simple pattern that is a public domain arrangement and does not warrant copyright protection. The square molding surrounding the door, and the moldings that surround the upper portion of the cabinet to form (viewed from the top) rectangles, are geometric shapes that are not copyrightable. *Id.*

3. Ornamented Cabinet (Guinevere 8' Breakfront Cabinet)

You have identified nine elements in your second request for reconsideration that you believe are conceptually separable from the utilitarian aspects of a display cabinet/bookcase, including the arched moldings and surrounding, encased arch at the top, accent moldings around the glass doors and bottom cabinets, a projecting center cabinet and bottom door, base molding and "scored" door handles. The Review Board, however, determines that there are only four conceptually separable elements contained in the work[3]: the curved "V" moldings/carvings at the top, the molding surrounding the top glass, the moldings surrounding the glass doors, and the rectangular center moldings on the bottom cabinet doors. None of the these conceptually separable elements contain sufficient creativity to warrant protection. The "V" shaped moldings/carvings on the top glass are basic figures that intersect in a commonplace fashion, and the half-circle molding surrounding the top glass is a basic geometric shape. Likewise, the molding surrounding the glass cabinet doors, and the straight moldings forming the squares in the doors, are basic geometric figures, as are the square moldings in the bottom drawers. In sum, these elements are too basic and rudimentary in their configuration and arrangement to warrant copyright registration.

IV. CONCLUSION

For the reasons stated above, the Copyright Office Review Board affirms the refusal to register the Works entitled *Ornamented Vanity (Infinity Kitchen Cabinet), Ornamented Coffee Table (Atelier Display Cabinet), Ornamented Cabinet (Guinevere 8' Breakfront Cabinet)*. This decision constitutes final agency action in this matter. 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

BY: _____
William J. Roberts, Jr.
Member of the Review Board

[3] The deposit material is insufficient to show "internal moldings," and the "scored" nature of the door handles. The raised center glass and bottom cabinets and the base molding cannot be envisioned by the Board separately from the work without destroying its configuration.