**United States Copyright Office**
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March 19, 2015

Julie R. Daulton, Esq.
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RE: MOLDED WALL BLOCK SURFACE

ETN: 614218878
ETN: 614062688
ETN: 613172840
ETN: 613119746
ETN: 614054511
ETN: 614125631

Control No. 61-311-9746(D)

Dear Ms. Daulton:

The Review Board of the United States Copyright Office (the "Board") has examined Anchor Wall Systems' ("Anchor's") second request for reconsideration of the Registration Program's refusals to register three dimensional artwork copyright claims in the nineteen works, entitled "Molded Wall Block Surface." After reviewing the application, deposit copies, and relevant correspondence in the case, along with the arguments in the second request for reconsideration, the Board affirms the Registration Program's denial of registration of this copyright claim. 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 nineteen Molded Wall Block Surface works (the "Works") at issue are concrete ornamental structures designed to look like natural rock formations. They are used to construct outside walls on residential and commercial property. According to the record, the first step in the manufacturing process of the Works is the selection of a natural rock texture, from an array of rock samples, that has the desired visual appearance. Then, a portion of the rock sample is used as a base texture. Next, a portion of the rock's surface is scanned into a computer database to create a three-dimensional representation. This representation is electronically modified to develop the desired appearance and to create the desired look, feel, and character of the Works.

The last step in the process is creating a mold from the three-dimensional representation, which in turn is used to create the molded wall block surfaces.

Photographic reproductions of the Works are included as Appendix A.

## II. ADMINISTRATIVE RECORD

Anchor has attempted to register nineteen three dimensional copyright claims under the Form VA title "Molded Wall Block Surface," which are described as a "molded surface of a wall block." In each instance, a Copyright Office registration specialist refused to register the Work, having found that it is a useful articles that does not "contain any separable authorship needed to sustain a claim to copyright." *See, e.g.*, Letter from Sandra D. Ware, Copyright Office, to Julie R. Daulton, Merchant & Gould (Jan. 15, 2006). Each of the rejection letters states that the Work is utilitarian in nature and does not contain any physically or conceptually separate copyrightable authorship. *Id.*

In a series of letters, Anchor individually addressed each of the nineteen Works and requested that the Office reconsider its initial refusal to register the Works. *See, e.g.*, Letter from Julie R. Daulton, Merchant & Gould to U.S. Copyright Office (Mar. 24, 2006) ("First Request"). In response to Office inquiries, Anchor explained that it created the Works by scanning naturally occurring rock surfaces. The scans were then smoothed out to eliminate the sharp features and control the total distance from high points on the surface to the low points on the surface. *See, e.g.,* Email from Matthew A. Bredesen, Merchant & Gould to Virginia Giroux-Rollow, Attorney-Advisor (Mar. 20, 2006). Upon reviewing the Works in light of the points raised in the correspondence and the requests for reconsideration, the Office responded in a letter dated April 2, 2007, which re-evaluated the claims and again found that the Works are useful articles that do not contain any authorship that is both separable and copyrightable. Letter from Virginia Giroux-Rollow, Attorney-Advisor, to Julie R. Daulton, Merchant & Gould (Apr. 2, 2007).

In a letter dated June 27, 2007, Anchor requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Works. Letter from Julie R. Daulton, Merchant & Gould to U.S. Copyright Office (June 27, 2007) ("Second Request"). In that letter, Anchor did not dispute the Office's prior determination that the Works are useful articles. Anchor did, however, assert that the Works include design features that are separable from their utilitarian functions. Anchor also disagreed with the Office's conclusion that those design features lack a sufficient amount of separable original authorship to qualify for copyright protection. *Id.* Anchor noted that the front surfaces of the blocks are not load bearing, and are not configured to fit against other blocks. Anchor asserted that the front surfaces are separable, and that they are molded to have three dimensional shapes, with projections and recesses (nooks and crannies) corresponding to natural rocks. *Id.*

## III. DECISION

### A. *The Legal Framework*

#### 1) *Separabilty*

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 craftsmanship, 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) (holding that copyright protection is not available for the "overall shape or configuration of a utilitarian article, no matter how aesthetically pleasing that shape may be"). The Office conducts 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 was physically separable from the article's utilitarian function); *Ted Arnold, Ltd. v. Silvercraft Co.*, 259 F. Supp. 733 (1966) (holding a pencil sharpener shaped like a telephone was physically separable from the article's utilitarian function). 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 that 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 Publ'ns v. Rural Tel. Serv. 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, the Supreme Court has ruled that some works (such as the telephone directory at issue in *Feist*) fail to meet even this low threshold. *Id.* The Court observed that "[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity." *Id.* at 363. It further found that there can be no copyright in a work in which "the creative spark is utterly lacking or so trivial as to be 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"); 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.C. Cir. 1989).

To be clear, the mere simplistic arrangement of non-protectable 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.*, 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 language in *Satava* is particularly instructive:

> It is true, of course, that a combination of unprotectable elements may qualify for copyright protection. But it is not true that *any* combination of unprotectable elements automatically qualifies for copyright protection. Our case law suggests, and we hold today, that a combination of unprotectable elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.

*Id.* (internal citations omitted) (emphasis original).

Finally, Copyright Office registration specialists (and the Board) 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); *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 useful articles that do not contain the requisite separable authorship necessary to sustain claims to copyright. Although the patterns on the face of each of the Works are conceptually separable, the separable three dimensional shapes on the face of the blocks do not contain sufficient original and creative artistic authorship to support copyright registration.

The Works are useful articles because they are "article[s] having an intrinsic utilitarian function that is not merely to portray the appearance of the article[s] or to convey information." 17 U.S.C. § 101. As discussed above, the design features of a useful article may become eligible for copyright registration when they contain original authorship that is either physically or conceptually separable from the utilitarian aspects of the article. *See id.* Here, it is undisputed that the Works (wall blocks) are useful articles. The Board does not question that the Works contain design elements that are separable from the Works' utilitarian function (the projections and recesses, nooks, and crannies corresponding to natural rocks). However, the Board finds that none of these features possesses the requisite amount of creative authorship to warrant copyright registration.

It is true that public domain elements, such as naturally occurring rock formations, may satisfy the requirement for copyrightable authorship as a compilation through their selection, coordination, or arrangement. Thus, although the individual components of a given work may not be copyrightable, the Copyright Office also follows the principle that works should be judged in their entirety and not judged in terms of the protectablity of individual elements within the work. *Atari Games Corp. v. Oman*, 979 F.2d 242, 244-245 (D.C. Cir. 1992). Works based on public domain elements may be copyrightable if there is some distinguishable element in their selection, arrangement, or modification that reflects sufficient choice and authorial discretion and that is not so obvious or so minor that the "creative spark is utterly lacking or so trivial as to be nonexistent." *Feist* at 359. But, this does not mean that all combinations and arrangements of commonplace, simple, or unprotected elements will rise to the level of copyrightable authorship. In *Satava*, for example, the Ninth Circuit explained that not "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." *Satava*, 323 F.3d at 811.

As noted, certain design elements are not copyrightable. Here, the only separable features of the Works are minor variations on naturally occurring rock, surfaces and/or simple combinations of natural rock features. The texture and appearance of a naturally occurring cut or broken stone, that is itself created from slavish copying of unprotectable material (such as through electronic scanning of naturally occurring rock surfaces), does not display the requisite level of independent creativity to warrant copyright protection. Merely "smoothing out" such features and controlling the total distance from "high points" on the surface to the "low points" on the surface does not represent a sufficient level of authorship. Furthermore, the selection, combination, and arrangement of rock faces, including the nooks and cracks presented in the Works' features, are not sufficient to render each of the Works, taken individually or as a whole, original. *See Feist*, 499 U.S. at 358. We find that the level of creative authorship involved in these configurations of unprotectable elements is, at best, *de minimis*, and far too trivial to enable copyright registration. *See Feist*, 499 U.S. at 359.

## 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 the Works. This decision constitutes final agency action on this matter. *See,* 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

BY: 

Stephen Ruwe
Member of the Review Board