United States Copyright Office
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July 24, 2013

Frankfurt, Kurnit, Klein & Selz
Attention: Jean Voutsinas
488 Madison Avenue
New York, NY 10022

Re: **IS 1416.2 SOLEIL**
IS 1691.2 THELONIUS TWIN
HL 1483 WINSTON
HL 040 DEVON
HL 1293.8 ASTRID SINGLE
HL 1293 ASTRID
Control No. 61-406-1313(V)

Dear Mr. Voutsinas:

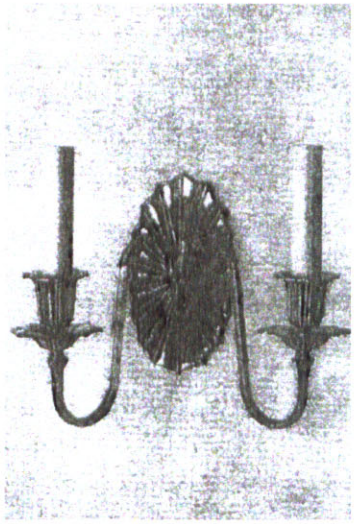
The Review Board of the United States Copyright Office (the "Board") has now considered your second request for reconsideration of the Registration Program's refusal to register the Works entitled: *IS 1416.2 Soleil; IS 1691.2 Thelonius Twin; HL 1483 Winston; HL 040 Devon; HL 1293.8 Astrid Single; HL 1293 Astrid* (the "Works"). You submitted this request on behalf of your client, Aesthetonics, Inc. dba Antique Lighting Remains (the "Applicant"), on February 14, 2007. I apologize for the lengthy 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 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 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.

II. DESCRIPTION OF THE WORKS

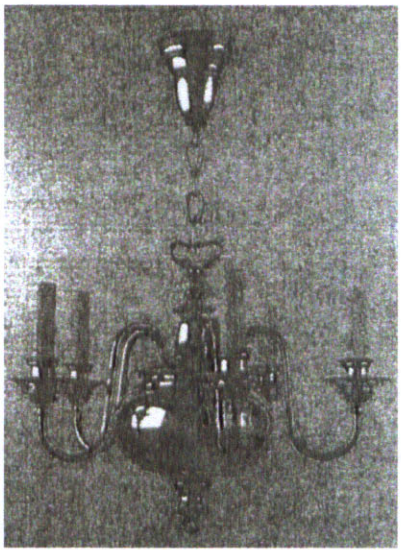
The Works consists of a collection of wall and ceiling-mounted lighting fixtures and chandeliers.

(1) *IS 1416.2 Soleil* is a wall-mounted lighting fixture that consists of a backplate, arms, cups, and wax pans. Ornamental fluting and ribbing covers most of the Work. The following is a photographic reproduction of the Work from the deposit materials.

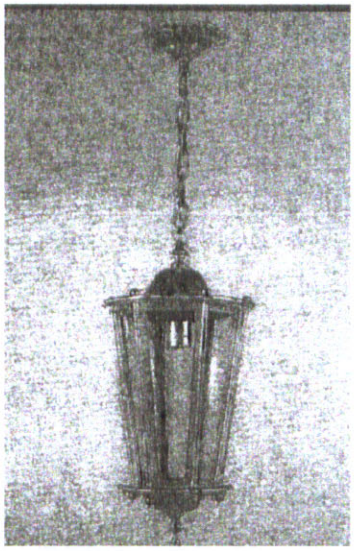


(2) *IS 1691.2 Thelonius Twin* is a wall-mounted lighting fixture that consists of a backplate, stems with baluster-shaped extensions, a crossbar, and a pair of finials. Ornamental circles cover most of the Work. The following is a photographic reproduction of the Work from the deposit materials.

(3) *HL 1483 Winston* is a five-branch brass chandelier that consists of a large ball body, beaded cups, bobeches, and ornamental rope detailing. The following is a photographic reproduction of the Work from the deposit materials.

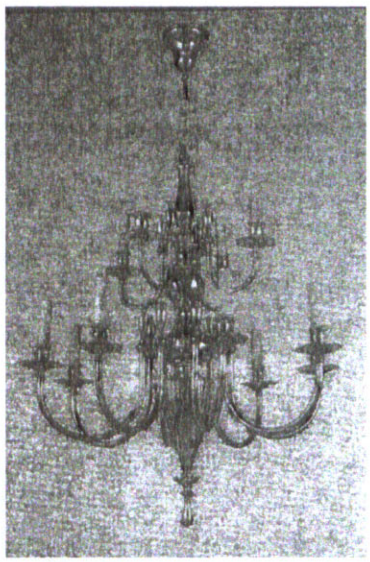


(4) *HL 040 Devon* is a hanging lantern with a hand worked surface and glass panels. At the bottom of the lantern are finials garnished with an ornamental rope design. The following is a photographic reproduction of the Work from the deposit materials.



(5) *HL 1293.8 Astrid Single* is a single-tiered, eight-arm version of the *Astrid* chandelier (described below). The following is a photographic reproduction of the Work from the deposit materials.

(6) *HL 1293 Astrid* is a large brass chandelier with a tier of four arms over a tier of eight arms. The arms are attached to a baluster-form stem. The stem has a finial at its bottom. At the ends of the arms are cups and wax pans. Incised, ornamental designs cover most of the Work. The following is a photographic reproduction of the Work from the deposit materials.



I. ADMINISTRATIVE RECORD

On January 27, 2006, the United States Copyright Office (the "Office") issued a letter notifying the Applicant that it had refused registration of the above-mentioned Works. *Letter from Registration Specialist Corwin to Calligeros* (January 27, 2006). In its letter, the Office indicated that it could not register the Works because the Works are useful articles which do not contain any separable features that are copyrightable. *Id.*

In a letter dated June 16, 2006, you requested, pursuant to 37 C.F.R. § 202.5(b), that the Office reconsider its initial refusal to register the Works. *Letter from Voutsinas to Copyright RAC Division* (June 16, 2006) ("First Request"). Your letter set forth the reasons you believed the Office improperly refused registration. *Id.* Upon reviewing the Works in light of the points raised in your letter, the Office again concluded that the Works are useful articles that do not contain any authorship that is both separable and copyrightable and refused registration. *Letter from Attorney-Advisor, Virginia Giroux-Rollow, to Voutsinas* (December 1, 2006).

Finally, in a letter dated February 14, 2007, 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. *Letter from Voutsinas to Copyright R&P Division* (February 14, 2007) ("Second Request"). In arguing that the Office improperly refused registration, you claim the following: (1) the Works do indeed include elements that are separable from their utilitarian aspects; and, (2) that those separable elements (in some cases the Applicant's selection and arrangement of those separable elements) include at least the minimum amount of 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.

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 (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) (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 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 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 do contain design elements that are separable from the Works' utilitarian functions. However, we further find that none of those separable design elements possess a sufficient amount of copyrightable authorship to satisfy the requirement of originality. Accordingly, we affirm the denial of registration for all six Works.

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 lighting fixtures) are useful articles. It is also evident from the deposit materials that the designs incorporated into the Works are not physically separable from the Works. *Contra, Mazer v. Stein*, 347 U.S. 201 (1954). Therefore, for there to be any consideration of such design features, the features must be conceptually separable –*i.e.* able to be imagined separately and independently from the Works' utilitarian aspects without destroying the Work's basic purpose.

Below, we list each Work, identify the design elements we have determined are conceptually separable from the Work's utilitarian function, and explain why we have concluded that the separable design features are not sufficiently creative to warrant registration.

(1) IS 1416.2 Soleil

We find that the ornamental ribbing and fluting that appear on the Work's backplate, cups, wax pans, and arms are the only design elements that are separable from the Work's utilitarian function as a wall-mounted lighting fixture. These basic, shape and texture-related ornamentations, however, lack the requisite "creative spark" for copyrightability and are, at best, *de minimus*. *See Feist*, 499 U.S. at 359; *see also* 37 C.F.R. § 202.1(a) (prohibiting registration of familiar symbols or designs).

You argue in your *Second Request* that the following elements are also separable from the Work: the cross-sectional profile of the Work's arm tubes; the Work's arm tip and its flaring; and the particular cross-sectional profile of the Work's backplate, cups and waxpans. *Second Request* at 2-3. We find your arguments to be unpersuasive. Specifically, we cannot imagine a way to separate these elements from the Work without destroying its basic function as a wall-mounted lighting fixture. Accordingly, we find that the Work is not

eligible for protection under the Copyright Act.

(2) IS 1691.2 Thelonius Twin

We find that the following design features are separable from the Work's utilitarian function as a wall-mounted lighting fixture: the ornamental, concentric circles that appear on the Work's backplate; the ornamental ring designs that appear on the Work's stems, crossbar, and finials; the finials themselves; and the baluster-shaped extensions that make up the lower portion of the stems.

These basic design features, considered individually, are no more than simple variations of common shapes and designs that lack the requisite "creative spark" for copyrightability. *See Feist*, 499 U.S. at 359; *see also* 37 C.F.R. § 202.1(a) (prohibiting registration of familiar symbols or designs). Likewise, the Applicant's selection and arrangement of these basic features fail to meet the grade for registration. *Id.; see also Atari Games,* 888 F.2d at 883 (accepting that combinations of geometric shapes may be eligible for copyright protection; but, concluding that in order to be accepted for registration, such combinations must contain more than mere *de minimis* creative authorship). Here, the Applicant has arranged the elements the Board has identified as separable so that the Work resembles classic, hanging candlestick holders. This combination is, at best, *de minimis*, and lacks the requisite amount of creative authorship to support registration.

You argue in your *Second Request* that the following elements are also separable from the Work: the profile of the Work's backplate; the "T"ing off the side of the Work's nose; and the profile of the Work's columns. *Second Request* at 2-3. We cannot imagine a way to separate these shape and form-related elements from the Work without destroying its basic function as a wall-mounted lighting fixture. Accordingly, we find that the Work is not eligible for protection under the Copyright Act.

(3) HL 1483 Winston

We find that the ornamental bead and rope designs that appear on the Work's backplate, cup, and wax pans are the only design elements that are separable from the Work's utilitarian function as a chandelier. These basic ornamentations, however, lack the requisite "creative spark" for copyrightability and are, at best, *de minimus*. *See Feist*, 499 U.S. at 359; *see also* 37 C.F.R. § 202.1(a) (prohibiting registration of familiar symbols or designs).

You argue in your *Second Request* that the following elements are also separable from the Work: the shape, size, and profile of the Work's ceiling canopy; the double-"C" curving loop at the top of the Work's body; the way the pointed ends of the "C" scrolls attach to the rest of the Work; the profile of the Work's large ovoid belly; and various other elements related to the shape of the baluster-form central belly. *Second Request* at 2-3. As with the Works already discussed, we cannot imagine a way to separate these shape-related

elements from the Work without destroying its basic function as a chandelier (especially the "double 'C' curving loop," which is integral to the Work's ability to hang from a ceiling). Accordingly, we find that the Work is not eligible for protection under the Copyright Act.

(4) HL 040 Devon

We find that the ornamental rope design that appears on the Work's finial is the only design element that is separable from the Work's utilitarian function as a hanging lantern. This basic ornamentation, however, lacks the requisite "creative spark" for copyrightability. *See Feist*, 499 U.S. at 359; *see also* 37 C.F.R. § 202.1(a) (prohibiting registration of familiar symbols or designs).

You argue in your *Second Request* that the following elements are also separable from the Work: the shape, size, and profile of the Work's ceiling canopy; the ogee profile of the lantern body's top and base caps; and the step and bull nose profile of the plates that sandwich the lantern's body. *Second Request* at 2-3. We find your arguments to be unpersuasive. Once again, we cannot imagine a way to separate these basic elements from the Work without destroying its basic function as a hanging lantern. Accordingly, we find that the Work is not eligible for protection under the Copyright Act.

(5) HL 1293.8 Astrid Single

We find that the incised, ornamental designs that appear on the Work's main stem, finial, wax pans, and cups are the only design elements that are separable from the Work's utilitarian function as a chandelier. This basic ornamentation, however, lacks the requisite "creative spark" for copyrightability and is, at best, *de minimus*. *See Feist*, 499 U.S. at 359; *see also* 37 C.F.R. § 202.1(a) (prohibiting registration of familiar symbols or designs).

You argue in your *Second Request* that the following elements are also separable from the Work: the shape of the Work's suspension loop, the profile of the elements that comprise the stem; and the shape of the cup and waxpans. *Second Request* at 2-3. We cannot imagine a way to separate these shape and form-related elements from the Work without destroying its basic function as a chandelier, especially the "suspension loop," which is integral to the Work's ability to hang from a ceiling. Accordingly, we find that the Work is not eligible for protection under the Copyright Act.

(6) HL 1293 Astrid

We find that the incised, ornamental designs that appear on the Work's main stem, finial, wax pans, and cups are the only design elements that are separable from the Work's utilitarian function as a chandelier. This basic ornamentation, however, lacks the requisite "creative spark" for copyrightability and is, at best, *de minimus*. *See Feist*, 499 U.S. at 359; *see also* 37 C.F.R. § 202.1(a) (prohibiting registration of familiar symbols or designs).

You argue in your *Second Request* that the following elements are also separable from the Work: the shape of the Work's suspension loop, the profile of the elements that comprise the stem; and the shape of the cup and waxpans. *Second Request* at 2-3. We cannot imagine a way to separate these shape and form-related elements from the Work without destroying its basic function as a chandelier, especially the "suspension loop," which is integral to the Work's ability to hang from a ceiling. Accordingly, we find that the Work is not eligible for protection under the Copyright Act.

Finally, the fact that the six Works may be considered highly sophisticated and aesthetically pleasing does not add to your claim of sufficient creativity. As discussed above, the Board does not assess the attractiveness of a design, its visual effect or the uniqueness of its appearance in determining whether a work contains the requisite minimal amount of original authorship necessary for registration. Thus, even if accurate, the mere fact that the Works consists of an aesthetically appealing arrangement of familiar shapes and design features would not qualify the Works, as a whole, as copyrightable.

In sum, the Board finds that none of the Works include elements that are both conceptually separable from the Works themselves nor do they 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: *IS 1416.2 Soleil; IS 1691.2 Thelonius Twin; HL 1483 Winston; HL 040 Devon; HL 1293.8 Astrid Single; HL 1293 Astrid.* 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