



United States Copyright Office

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July 14, 2016

George R. Schultz
Schultz & Associates
5400 LBJ Freeway, Suite 1200
Dallas, TX 75240

**Re: Second Request for Reconsideration for Refusal to Register Transitional Contour Corbel, Transitional Scrolled Corbel, and Queen Anne Corner Leg;
Correspondence IDs: 1-181YOF6, 1-181YOYN, and 1-181YP0E**

Dear Mr. Schultz:

The Review Board of the United States Copyright Office ("Board") has considered Hardware Resources, Inc.'s ("Hardware Resources") second requests for reconsideration of the Registration Program's refusals to register sculpture claims in the works titled Transitional Contour Corbel, Transitional Scrolled Corbel, and Queen Anne Corner Leg ("Works"). After reviewing the applications, deposit copies, and relevant correspondence, along with the arguments in the second requests for reconsideration, the Board affirms the Registration Program's denials of registration.

I. DESCRIPTION OF THE WORKS

The Transitional Contour Corbel is a three-dimensional brace or support bracket, composed of a single block of wood that is roughly shaped like a triangle. The block has two straight, unadorned edges and one carved edge. The outer carved edge of the corbel has been carved into a curved line of alternating semi-circles, accented with two angular protrusions. The sides of the corbel have been recessed to mimic the overall geometric-shape of the work:



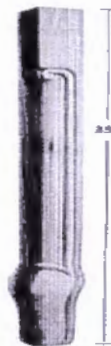
Transitional Contour Corbel

The Transitional Scrolled Corbel is a three-dimensional brace or support bracket, composed of a singular wood block that is roughly shaped like a triangle, with two straight edges and one carved edge with a semicircular element and a rounded protrusion. The sides of the corbel have been recessed and are accented with a scrolled band:



Transitional Scrolled Corbel

The Queen Anne Corner Leg is a furniture leg with squared edges. Two of the sides have been carved, while the remaining two sides remain unadorned. The outer carved edges of the leg have been recessed, with the edges accented by a raised band that comes to a scrolled, or rolled, top. The bottom of the leg bows out in a traditional Queen Anne style:



Queen Anne Corner Leg

Larger depictions of the Works are included as Appendix A.

II. ADMINISTRATIVE RECORD

On January 20, 2014, Hardware Resources filed three applications to register copyright claims in the Works. In letters dated February 25, 2015, a Copyright Office registration specialist refused to register the claims, finding that the Works “lack[ed] the authorship necessary to support a copyright claim.” Letters from Shawn Thompson, Registration Specialist, to George R. Schultz, Schultz & Associates (Feb. 25, 2015).

In letters dated May 21, 2015, Hardware Resources requested that the Office reconsider its initial refusals to register the Works. Letters from George R. Schultz, Schultz & Associates, to U.S. Copyright Office (May 21, 2015) (“First Requests”). After reviewing the Works in light

of the points raised in the First Request, the Office re-evaluated the claims and concluded that the Works were useful articles that contained conceptually separable features but that those features “[did] not reflect a sufficient amount of original and creative authorship necessary to support a copyright registration.” Letters from Stephanie Mason, Attorney-Advisor, to George R. Schultz, Schultz & Associates (Sept. 10, 2015).

In letters dated December 9, 2015, Hardware Resources requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Works. Letters from George R. Schultz, Schultz & Associates, to U.S. Copyright Office (Dec. 9, 2015) (“Second Requests”). In those letters, Hardware Resources argued, *inter alia*, that the Office “failed to recognize all of the separable elements” in the Works, that these separable elements are not familiar symbols or designs, that “[t]here is no authority to suggest that variations of standard shapes are subject to categorical exclusion like common mathematical symbols,” and that the Office failed to “examine[] the Work[s] as a [w]hole.” *Id.* Because these Works share a common nucleus of issues, the Board has consolidated its consideration of the Second Requests into a single response.

III. DISCUSSION

A. The Legal Framework

1) Useful Articles and Separability

The copyright law does not protect useful articles, which are defined as “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. Works of artistic craftsmanship that have been incorporated into a useful article may be eligible for copyright protection if they constitute pictorial, graphic, or sculptural works pursuant to 17 U.S.C. § 102(a)(5). The protection for such works is limited, however, in that it extends only “insofar as [the works’] form but not their mechanical or utilitarian aspects are concerned.” *Id.* at 101. In other words, a design incorporated into a useful article is only eligible for copyright protection to the extent that the design includes artistic “features that can be identified separately from, and are capable of existing independently of, the 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 employs two tests to assess separability: (1) a test for physical separability; and (2) a test for conceptual separability. *See* COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 924.2 (3d ed. 2014) (“COMPENDIUM (THIRD)”); *see also Inhale, Inc. v. Starbuzz Tobacco, Inc.*, 755 F.3d 1038, 1041 n.2 (9th Cir. 2014) (finding that the Office’s interpretation of conceptual separability is entitled to deference); *Custom Chrome, Inc. v. Ringer*, 35 U.S.P.Q.2d 1714 (D.D.C. 1995) (finding that the Office’s tests for physical and conceptual separability are “a reasonable construction of the copyright statute [] consistent with the words of the statute,” existing law and the legislature’s declared intent in enacting the statute).

To satisfy the test for physical separability, a useful article must contain pictorial, graphic, or sculptural features that can be physically separated from the article by ordinary

means. See COMPENDIUM (THIRD) § 924.2(A); see also *Mazer v. Stein*, 347 U.S. 201 (1954) (sculpture of Balinese dancer eligible for copyright protection even though intended for use as lamp base); *Ted Arnold, Ltd. v. Silvercraft Co.*, 259 F. Supp. 733 (S.D.N.Y. 1966) (pencil sharpener casing shaped like a telephone was physically separable from the article's utilitarian function).

To satisfy the test for conceptual separability, a useful article must contain pictorial, graphic, or sculptural features that can be visualized—either on paper or as a freestanding sculpture—as a work of authorship that is separate and independent from the utilitarian aspects of the article and the overall shape of the article. In other words,

... the feature must be [able to be] imagined separately and independently from the useful article without destroying the basic shape of that article. A pictorial, graphic, or sculptural feature satisfies this requirement only if the artistic feature and the useful article could both exist side by side and be perceived as fully realized, separate works—one an artistic work and the other a useful article.

COMPENDIUM (THIRD) § 924.2(B). If the feature is an integral part of the overall shape or contour of the useful article, that feature cannot be considered conceptually separable because removing it would destroy the basic shape of the article. See *id.*; cf. H.R. REP. NO. 94-1476, at 55 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5668 (citing a carving on the back of a chair or a floral relief design on silver flatware as examples of conceptually separable design features).

If the useful article does not contain any features that can be physically or conceptually separated from its utilitarian function, the Office will refuse to register the claim because Congress has made it clear that copyright protection does not extend to any aspect of a useful article that cannot be separated from its utilitarian elements. If the Office determines that the work contains one or more features that can be separated from its functional elements, the Office will examine those features to determine if they contain a sufficient amount of original authorship to warrant registration.

2) Originality

A work may be registered if it qualifies as an “original work[] of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102(a). In this context, the term “original” consists of two components: independent creation and sufficient creativity. See *Feist Publ'ns, Inc. 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.* Only a modicum of creativity is necessary, but the Supreme Court has ruled that some works (such as the alphabetized 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 virtually nonexistent.” *Id.* at 359.

The Office's regulations implement the longstanding requirement of originality set forth in the Copyright Act and described in the *Feist* decision. See, *e.g.*, 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”); *id.* § 202.10(a) (stating “to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form”).

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 test. 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”). A determination of copyrightability in the combination of standard design elements depends 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).

A mere simplistic arrangement of non-protectable elements does not demonstrate the level of creativity necessary to warrant protection. For example, the United States District Court for the Southern District of New York upheld the Copyright Office’s refusal to register simple designs consisting of two linked letter “C” shapes “facing each other in a mirrored relationship” and two unlinked letter “C” shapes “in a mirrored relationship and positioned perpendicular to the linked elements.” *Coach Inc. v. Peters*, 386 F. Supp. 2d 495, 496 (S.D.N.Y. 2005). Likewise, the Ninth Circuit has held that a glass sculpture of a jellyfish consisting of clear glass, an oblong shroud, bright colors, 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).

Similarly, while the Office may register a work that consists merely of geometric shapes, for such a work to be registrable, the “author’s use of those shapes [must] result[] in a work that, as a whole, is sufficiently creative.” COMPENDIUM (THIRD) § 906.1; see also *Atari Games Corp.*, 888 F.2d at 883 (“[S]imple shapes, when selected or combined in a distinctive manner indicating some ingenuity, have been accorded copyright protection both by the Register and in court.”). Thus, the Office would register, for example, a wrapping paper design that consists of circles, triangles, and stars arranged in an unusual pattern with each element portrayed in a different color, but would not register a picture consisting merely of a purple background and evenly-spaced white circles. COMPENDIUM (THIRD) § 906.1.

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.

It cannot be disputed that the corbels and furniture leg are useful articles, not physically separable from the Works' utilitarian functions as support pieces. Nonetheless, the Board agrees with Hardware Resources that each of the Works contain conceptually separable pictorial, graphic, or sculptural features. The Copyright Office previously described the respective conceptually separable elements as follows:

- Transitional Contour Corbel: the line of "alternating semi-circles accented with two rectangular-shaped protrusions" on the outer edge of the corbel and the overall geometric-shape of the work mimicked in the recess of the corbel
- Transitional Scrolled Corbel: the "semi-circle with a rounded rectangular-shaped protrusion" on the edge of the corbel and the "scrolled band" on the sides of the corbel
- Queen Anne Corner Leg: the "raised band that comes to a scrolled or rolled top" on the edges of the leg, and the manner in which the leg "bows out in a traditional Queen Anne style"


Letters from Stephanie Mason, Attorney-Advisor, 3, to George R. Schultz, Schultz & Associates (Sept. 10, 2015). While the Board finds that these descriptions generally capture the conceptually separable elements in each of the Works, it has also analyzed the Works in light of Hardware Resources' alternate descriptions of these features to ensure a complete review of the Works' conceptually separable elements. See Second Requests at 3-5 (identifying, e.g., a scrolled edge, peg, rectangle, and base in the Transitional Contour Corbel; a "stack of blocks" and a "spiral insert" in the Transitional Scrolled Corbel; and the individual parts of a disassembled Queen Anne Corner Leg").

Next, the Board considers whether the above-mentioned conceptually separable elements contain a sufficient amount of original authorship to warrant registration, and finds that they do not. See *Feist*, 499 U.S. at 345. The scroll or spiral forms (also known as "volute"), semi-circles, blocks and similar elements are common geometric shapes not subject to copyright. COMPENDIUM (THIRD) § 906.1 ("There are numerous common geometric shapes, including, without limitation . . . circles [and] rectangles . . . Generally, the U.S. Copyright Office will not register a work that merely consists of common geometric shapes unless the author's use of those shapes results in a work that, as a whole, is sufficiently creative."). Similarly, the Queen Anne style of furniture leg is a familiar design not subject to copyright protection. COMPENDIUM (THIRD) § 906.2. Hardware Resources has argued that these common geometric shapes are not specifically enumerated in section 313.4(J) of the COMPENDIUM (THIRD), which lists a variety of "familiar symbols and designs." Second Request for Second Request for Transitional Contour Corbel at 4-7; Transitional Scrolled Corbel at 5-8; Second Request for Queen Anne Corner Leg at 5-7. This argument is doubly misplaced—not only is this list provided expressly "without limitation," but it specifically describes "[c]ommon architecture moldings, such as the volute used to decorate Ionic and Corinthian columns." COMPENDIUM (THIRD) § 313.4(J).

The question then, for each of the Works, is whether the combination of conceptually separable individual elements, as a whole, is protectable under the legal standards discussed above. The Board finds that, viewed as a whole, the selection, combination, and arrangement of the Work's constituent elements are not sufficient to render the Work original. See *Feist*, 499 U.S. at 358-59; see also COMPENDIUM (THIRD) § 906.2 ("A work that includes familiar symbols or designs may be registered if the registration specialist determines that the author used these elements in a creative manner and that the work as a whole is eligible for copyright protection."). While the Board agrees with Hardware Resources that common geometric shapes may theoretically be combined in a sufficiently creative way to merit copyright protection, it does not agree that the uses of shapes in these instances demonstrate the necessary degree of original authorship. See Second Requests at 11 (citing *Atari Games Corp.*, 888 F.2d at 883); *Satava*, 323 F.3d at 811 ("a combination of unprotectable elements may qualify for copyright protection. . . [b]ut it is not true that *any* combination of unprotectable elements automatically qualifies for copyright protection."). Instead, the placement of shapes here on basic structural support elements is obvious and predictable.

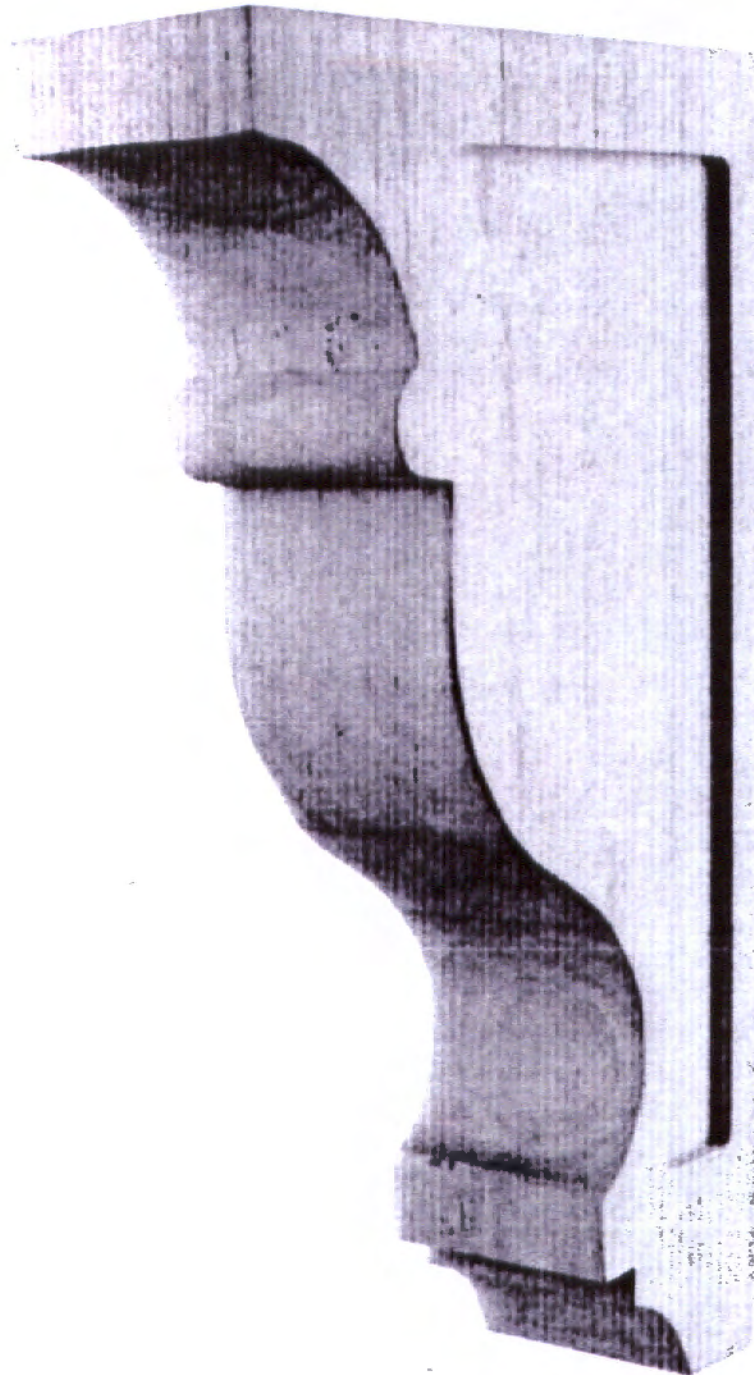
IV. CONCLUSION

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. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action in this matter.

BY: 

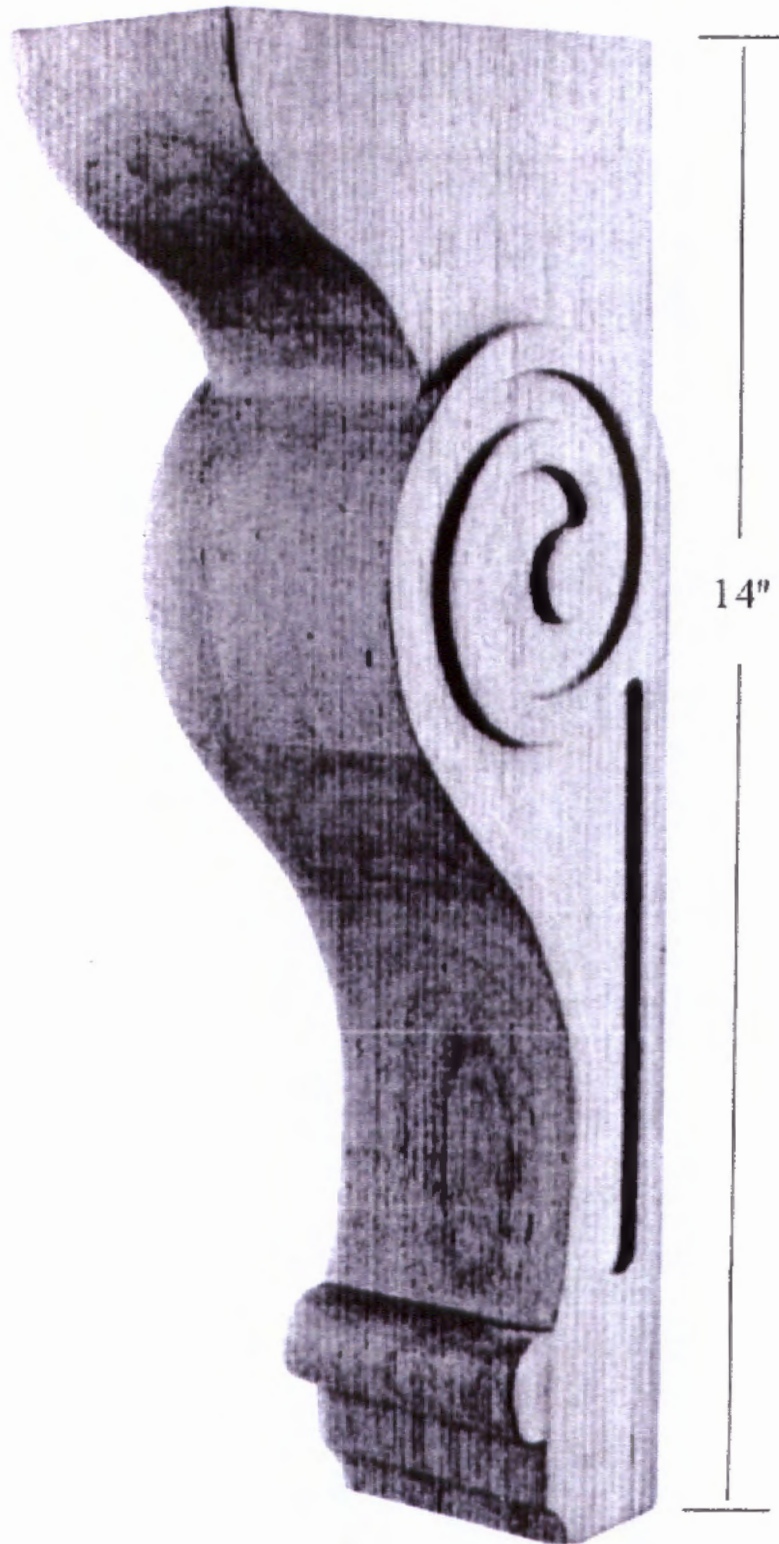
Regan Smith
Copyright Office Review Board

CORW - Transitional Contour Corbel



14"

COR25 - Transitional Scrolled Corbel



CL-2 - Queen Anne Corner Leg

