



**United States Copyright Office**

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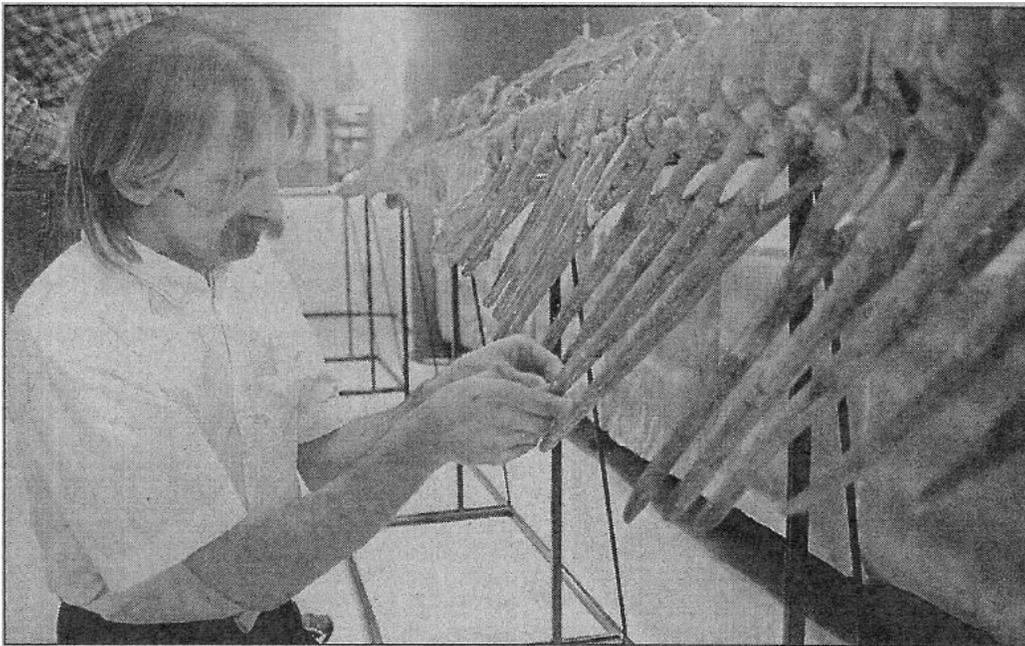
**Re: Second Request for Reconsideration for Refusal to Register Dino Tail and Tail Stand (SR 1-4558668571); Correspondence ID: 1-38N4CXY**

Dear Mr. Amatong:

The Review Board of the United States Copyright Office (“Board”) has considered Kim Lane Hollrah’s (“Hollrah’s”) second request for reconsideration of the Registration Program’s refusal to register a sculpture claim in the work titled “Dino Tail and Tail Stand” (“Work”). After reviewing the application, deposit copies, and relevant correspondence, along with the arguments in the second request for reconsideration, the Board affirms the Registration Program’s denial of registration.

**I. DESCRIPTION OF THE WORK**

The Work is a three-dimensional arrangement of bones and bone replicas assembled into the skeletal structure of the tail of a hadrosaur, that is, a duck-billed dinosaur. The tail is displayed in a straight line on an unobtrusive black stand. The plain iron display stand consists of a base of evenly-spaced rectangular bars connected to triangular bars that support the hadrosaur’s tail. The Work is depicted as follows:



## II. ADMINISTRATIVE RECORD

On March 9, 2017, Hollrah filed one application for the Work, “Dino Tail and Stand,” and two separate applications for, respectively, the stand “Dino Tail Stand,” and the tail “Dino Tail.” In a May 8, 2018, letter, the Copyright Office refused to register all three claims, finding they lacked the “copyrightable authorship needed to sustain a claim to copyright.” Letter from Wilbur King, Registration Specialist, to Alberto Q. Amatong, Jr., Amatong McCoy LLC (May 8, 2018).

In a July 13, 2018 letter, Hollrah requested that the Office reconsider its initial refusal to register “Dino Tail and Stand,” “Dino Tail Stand,” and “Dino Tail.” Letter from Alberto Amatong to U.S. Copyright Office (July 13, 2018) (“First Request”). After reviewing “Dino Tail and Stand,” “Dino Tail Stand,” and “Dino Tail” in light of the points raised in the First Request, the Office affirmed the refusal to register each of the claims. The Office concluded that the stand “is a useful article that does not contain any separable features” and that the tail “does not contain sufficient original and creative authorship to support a claim in copyright.” Letter from Stephanie Mason, Attorney-Advisor, to Alberto Amatong, at 1 (Oct. 18, 2018) (“Second Refusal”). The Office noted that the process by which the dinosaur bones were found and cleaned and the choices made in assembling the Work for display are irrelevant to the determination of whether the tail possesses sufficient creativity to support a registration. *Id.* at 7.

In a January 18, 2019 letter, Hollrah requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Work, “Dino Tail and Stand.” Letter from Alberto Amatong to U.S. Copyright Office (Jan. 18, 2019) (“Second Request”). In that letter, Hollrah clarified his claim to copyright, stating now that the claim is to “unavailable fill-in items and portions of fossil, finishing of fossil, relational assembly fossil, arrangement of fossil, interpretation of fossil, selection of stand parts, coloring of stand parts, relational assembly of stand parts, and arrangement stand parts,” and excludes “naturally occurring unfinished fossil portions.” *Id.* at 2. Hollrah contended that the tail “is not, in fact, a replication of the actual duckbill from which the bones originated,” but rather should be considered “the Author’s interpretation of the collection of remnants retrieved from the dig site.” *Id.* at 6. Hollrah further argued that the aesthetic features of the stand are separable from its “utilitarian features” and at least minimally creative. *Id.* at 5. Finally, Hollrah argues that the “unique linear suspension of the bones,” with “the bones projected outward toward the viewer, and with the bones positioned above the base of the stand,” is “the result of at least a modicum of creativity imparted to the bones, the stand, and the combination.” *Id.* at 9.

## III. DISCUSSION

### A. *The Legal Framework*

#### 1) *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*

*Publications, Inc. 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.* 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 OF U.S. COPYRIGHT OFFICE PRACTICES § 906.1 (3d ed. 2017) (“COMPENDIUM (THIRD)”); *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.

## ***2) Useful Articles and Separability***

Copyright does not protect useful articles as such, which are defined in the Copyright Act 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. Importantly, however, artistic features applied on or incorporated into a useful article may be eligible for copyright protection if they constitute pictorial, graphic, or sculptural works under sections 101 and 102(a)(5) of the Copyright Act. This protection is limited to the “‘pictorial, graphic, or sculptural features’ [that] ‘can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.’” *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1007 (2017) (quoting 17 U.S.C. § 101).

To assess whether an artistic feature incorporated into the design of a useful article is protected by copyright, the Office examines whether the feature “(1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated.” *Id.* at 1007; *see also* COMPENDIUM (THIRD) § 924. This analysis focuses on “the extracted feature and not on any aspects of the useful article that remain after the imaginary extraction [because the] statute does not require the decisionmaker to imagine a fully functioning useful article without the artistic feature.” *Star Athletica*, 137 S. Ct. at 1013. Put another way, while useful articles as such are not copyrightable, if an artistic feature “would have been copyrightable as a standalone pictorial, graphic, or sculptural work, it is copyrightable if created first as part of a useful article.” *Star Athletica*, 137 S. Ct. at 1011; 17 U.S.C. § 113(a) (“[T]he exclusive right to reproduce a copyrighted pictorial, graphic, or sculptural work in copies under section 106 includes the right to reproduce the work in or on any kind of article, whether useful or otherwise.”); *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”).

### ***B. Analysis of the Work***

After carefully examining the Work and applying the legal standards discussed above, the Board finds that the Work lacks the requisite authorship necessary to sustain a claim to copyright.

The Work consists of two parts: the skeleton of a hadrosaur's tail and the display stand. First, the tail is not copyrightable because it is an actual dinosaur skeleton arranged in an entirely naturalistic way. To be protected by copyright, a work must be an original work of authorship, that is, a product of independent creation with sufficient creativity. 17 U.S.C. § 102(a); *Feist*, 499 U.S. at 345. The hadrosaur tail fails both of these requirements, because it was created by, or is intended to duplicate, nature. COMPENDIUM (THIRD) § 309.1. The copyright law protects only “the fruits of intellectual labor” that “are founded in the creative powers of the mind.” *Trade-Mark Cases*, 100 U.S. 82, 94 (1879); *see also Kelly v. Chicago Park District*, 635 F.3d 290, 304 (7th Cir. 2011) (“[a]uthors of copyrightable works must be human; works owing their form to the forces of nature cannot be copyrighted”) (citation omitted).

To be sure, in this last appeal, Hollrah wisely disclaims any copyright interest in the actual fossilized bones that comprise most of the Work. But the replica component parts, too, lack sufficient creativity because these fill-in items, finishings, and fossil replicas—including their length, width, shape, and texture—are not the product of creative choices, but are dictated by the remainder of the prehistoric skeleton, and not the product of human authorship. *See Satava*, 323 F.3d at 810-11 (plaintiff could not prevent others from depicting accurate jellyfish physiology, such as “tendrill-like tentacles,” “rounded bells,” or “bright colors,” even though the plaintiff's creation was not an actual jellyfish, but was a glass-in-glass sculpture); *Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 901 (9th Cir. 1987) (in an infringement case concerning stuffed dinosaur toys, a court “prevent[ed] reliance upon any similarity in expression resulting from . . . the physiognomy of dinosaurs” because to do so would protect the idea of a dinosaur); *Craig Frazier Design, Inc. v. Zimmerman Agency, LLC*, No. C 10-1094 SBA, 2010 U.S. Dist. LEXIS 107170, at \*17 (N.D. Cal. Sept. 27, 2010) (finding that, while the styling and shading of a graphic depiction of a duck's bill was subject to copyright protection, any design elements that “flow from a duck's physiology” were not protected).

Further, the arrangement and combination of the bone and bone replicas cannot support a claim to copyright. The fossils, fill-ins, and replicas are carefully constructed to depict the skeletal structure of what a hadrosaur's tail looked like when duck-billed dinosaurs were alive. *See* First Request at 4. Hollrah claims “that the arrangement of bone and mummified skin for the duckbill (the sculpture) is not, in fact, a replication of the actual duckbill” but rather “the Author's interpretation of the collection of remnants retrieved from the dig site.” Second Request at 6. But this configuration, displayed in a straight line for maximum viewing, is a common one based upon the unprotectable physiognomy of the hadrosaur.<sup>1</sup> Because “there are only so many ways that [Hollrah] can portray a relatively realistic” dinosaur tail, copyright

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<sup>1</sup> *See 70 Million Year Old Hadrosaur Dinosaur Skeleton*, TOUCH OF MODERN, <https://www.touchofmodern.com/sales/fossil-shack-e621a11c-31b4-46ac-82c8-6954ea5a3f17/70-million-year-old-hadrosaur-dinosaur-skeleton?bk=pause> (last visited Aug. 7, 2019); *Sweet Edmontosaurus Vertebra – Hadrosaur*, FOSSILERA, <https://www.fossilera.com/fossils/2-inch-wide-edmontosaurus-vertebra-hadrosaur> (last visited Aug. 7, 2019). Indeed, the hadrosaur is one of the most common of dinosaurs, with a known typical skeletal arrangement. *See, e.g.*, <https://ucmp.berkeley.edu/mesozoic/cretaceous/ptloma.html> (“Most of the dinosaur fossils found in California are isolated bones of hadrosaurs”); <https://simple.wikipedia.org/wiki/Hadrosaur> (Hadrosaurs “were the most common dinosaurs”).

protection is unavailable. *Alpi Intl, Ltd v. Anga Supply, LLC*, 118 F. Supp. 3d 1172, 1178 (N.D. Cal. 2015) (noting “standard, stock, or common” features of farm and ocean animals are not protectable by copyright); *Aliotti*, 831 F.2d at 901, n.1 (noting a Tyrannosaurus “is commonly pictured with its mouth open” and Pterodactyls and Pteranodons were winged creatures commonly displayed as mobiles); *Satava*, 323 F.3d at 811 (noting “jellyfish swim vertically in nature and often are depicted swimming vertically”).

The Board finds that, viewed as a whole, any creative elements contributed to the Work by Hollrah are not numerous enough, nor are the elements’ selection, coordination, or arrangement sufficient to render the Work original. Though the process of excavating, cataloging, organizing, and preparing the Work undoubtedly entailed an enormous amount of work, the Board does not consider the amount of time, effort, or expense required to create a work. *See, e.g., Feist*, 499 U.S. at 352-54, 364 (rejecting the “sweat of the brow” doctrine). While the result of this labor may be of potentially great scientific or historical value, such fidelity to replicating natural phenomena is not the province of copyright. *See Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258, 1269 (10th Cir. 2008) (Gorsuch, J.).

Second, the utilitarian display stand is also not copyrightable. Hollrah agrees that the stand is a useful article. Second Request at 4. But Hollrah focuses on the alleged “aesthetic features” of the stand, citing the “profile and footprint of the base” and the arrangement of the stand pieces, which arguably provide the “illusion that the stand is projecting toward the viewer.” *Id.* The Board, however, finds that none of these elements can be visualized as a work of authorship separate and independent from the Work’s utility. *See Star Athletica* at 1013 (the identified feature must “qualify as a nonuseful pictorial, graphic, or sculptural work.”); *see also id.* at 1010 (“the feature cannot itself be a useful article or ‘[a]n article that is normally a part of a useful article’ (which is itself considered a useful article)”). No elements of the design, which consists of smooth iron braces arranged into rectangles at the base and triangles to hold the tail, can be “imaginatively separated” from the utilitarian aspects of the article. *Id.* at 1014. Instead, the arrangement of the iron braces serves an intrinsic utilitarian function—to bear weight. Indeed, Hollrah admits that the features of the stand that make it useful are “the load bearing characteristics, which require the selection of a material having a certain minimum strength, and the sizing and arrangement of the material into a shape capable of bearing intended load.” Second Request at 4. Because the stand does not contain any features that can be identified separately from, or any features that are capable of existing independently of, the utilitarian aspects of this useful article, the Board finds that the stand is not copyrightable. Moreover, even if the display stand had passed the first step of the *Star Athletica* test, the basic combination of plain iron bars into evenly separated triangles and rectangles appears insufficiently creative. *See Star Athletica* at 1007; 37 C.F.R. § 202.1(a).

Finally, considering the Work as whole, it is still not registrable, as the combination of the unprotectable dinosaur skeleton perched on an unprotectable display stand still does not exhibit sufficient creativity. *See Feist*, 499 U.S. at 358–59; *United States v. Hamilton*, 583 F.2d 448, 451 (9th Cir. 1978) (“Trivial elements of compilation and arrangement, of course, are not copyrightable since they fall below the threshold of originality.”).

#### IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the copyright claim in the Work. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action in this matter.



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**U.S. Copyright Office Review Board**

Karyn A. Temple, Register of Copyrights and  
Director, U.S. Copyright Office

Regan A. Smith, General Counsel and  
Associate Register of Copyrights

Catherine Zaller Rowland, Associate Register of  
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