United States Copyright Office
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May 26, 2005

Jack B. Hicks, Esq.
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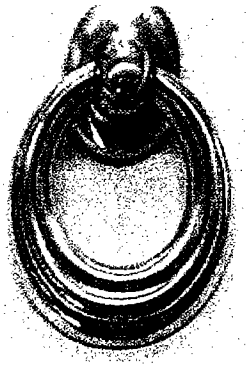
300 North Greene Street, Suite 1900
Greensboro, NC 27401

Re: Bogart Collection Open Oval Drawer Pull (-427)
Copyright Office Control Number: 61-224-5585(W)
Your Reference Number: 01029.0443.5

Dear Mr. Hicks:

I write on behalf of the Copyright Office Review Board ("Board") in response to your letter dated October 11, 2004 in which you requested the U.S. Copyright Office ("Office") to reconsider for a second time its refusal to register a design incorporated into a furniture drawer pull entitled "Bogart Collection Open Oval Drawer Pull (-427)."[1] The Board has carefully examined the application, the deposit and all correspondence concerning this application. Although it is persuaded by some of the arguments you have advanced, the Board ultimately must affirm the denial of registration for this work due to its lack of sufficient copyrightable authorship.

I. DESCRIPTION OF WORK



You have stated that the applicant seeks to register only the sculptural design that resides on the surface of the drawer pull as well as the center element that connects the pull to its base plate, not the structural form of the drawer pull itself nor the actual base plate. (Letter from Hicks to Board of 10/11/04, at 2, n.1 and at 3.) The design at issue follows the contours of the oval portion of the pull. It consists of one raised oval resting on top and in the middle of another oval, creating the visual appearance of concentric, contiguous, multi-tiered ovals. Each oval is slightly elongated, so that the width of the material outlining each open oval is slightly thicker at the bottom of the design than at the top. The top of the ovals features a single, bulbous, smooth, perpendicular "U" which connects the oval drawer pull to the base plate.

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[1] The Board notes that in your first request for reconsideration, dated March 8, 2004, you asked to amend the name of the work to read "Bogart Collection Open Oval Design." However, for purposes of clarity and continuity in this reconsideration process, the Board refers to the subject work by the title stated on the subject application.

II. ADMINISTRATIVE RECORD

A. Initial Application and the Office's Refusal to Register

On October 9, 2003, the Office received a Form VA application from you on behalf of your client, Thomasville Furniture Industries, Inc., to register the "Bogart Collection Open Oval Drawer Pull (-427)."[2] In a letter dated December 8, 2003, Visual Arts Section Examiner Wilbur King refused registration of this work because he determined it is a useful article that does not contain separable or copyrightable authorship as needed to sustain a claim to copyright. (Letter from King to Hicks of 12/08/03, at 1.)

Mr. King explained that the copyright law protects pictorial, graphic or sculptural works, including works of artistic craftsmanship insofar as their form, but not as to their mechanical or utilitarian aspects. (*Id.*) He stated that the design of a "useful article" is considered a pictorial, graphic or sculptural work only if and to the extent such features can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article. (*Id.*) (citing 17 U.S.C. § 101 (2003) and H.R. Rep. No. 94-1476, at 55 (1976)). He noted that separability can exist physically or conceptually, and explained the meaning of and gave examples for each mode. (*Id.* at 1-2) (citing *Compendium II: Compendium of Copyright Office Practices* §§ 500 *et seq.* (1984) ("*Compendium II*")). He further explained that the copyright law does not protect familiar symbols, designs or shapes nor any idea, concept, system or process. (*Id.* at 2) (citing 37 C.F.R. § 202.1 (2004) and 17 U.S.C. § 102(b)). Mr. King concluded that because any design elements in the work are related to utilitarian functions, subsumed within the work's overall shape or consist of non-copyrightable elements or minor variations thereof, the work does not possess physically or conceptually separable elements with sufficient original authorship to support a copyright registration. (*Id.* at 2.)

B. First Request for Reconsideration

In a letter dated March 8, 2004, you requested reconsideration of the Office's refusal to register the subject work. (Letter from Hicks to Chief, Receiving and Processing Division of 3/8/04, at 1.) You explained that your client in conjunction with representatives of the Bogart family commissioned artisans to prepare the design for the work to "invoke the style and elegance of Hollywood's most romantic era," "the time in which Humphrey Bogart created classic films." (*Id.* at 1.) You noted that the furniture collection that incorporates this work is "highly successful." (*Id.*)

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[2] Although you simultaneously submitted four other applications for registration, each of which the Office rejected, you have requested reconsideration of only this one work. (Letter from Hicks to Chief, Receiving and Processing Division of 3/8/04, at 3.)

You described the work as:

> a graceful oval shape, containing recesses of varying radius, contours and thicknesses. The upper portion of the sculpture begins as a thin, bunched strand, and expands gracefully to culminate in a more robust, complex multi-tiered shape near the lower loop. The rounded edges and cascading surface layers create a distinctive and attractive design. These ornamental features give the piece depth and grace that is evocative of fine fashion, jewelry and artwork of the Hollywood lifestyle that Humphrey Bogart helped define.

(*Id.* at 2.) You noted that although this design resides on a drawer pull in the present application, your client plans to incorporate this same design into chandelier pendants as well as jewelry. (*Id.*)

After summarizing the prior procedural history, you criticized the examiner's rejection of the subject application. You claimed that he did not provide specific bases for rejecting this application, but rather grouped it with the other four applications that you submitted concurrently on your client's behalf. (*Id.* at 3.)

You contended that the subject work does contain both separable and sufficiently original authorship. (*Id.* at 4.) You stressed that the required amount of originality is small, and cited case law and 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.08[B][2] (2002) ("*Nimmer on Copyright*") in support of this proposition. You argued that the "flowing, multi-level surfaces and contours contained within this design" meet the low threshold associated with original authorship. (*Id.*) You also argued that this design is separable, similar to the designs featured on belt buckles in *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir.1980). (*Id.* at 4-5.)

C. Examining Division's Response to First Request for Reconsideration

In response to your request, Attorney Advisor Virginia Giroux of the Examining Division reexamined the application. She noted your criticism of the prior examiner's articulation of his analysis, but assured you that the examiner referred to appropriate statutory and regulatory prohibitions in rejecting this claim. (Letter from Giroux to Hicks of 6/15/04, at 1.)

Addressing the work itself, Ms. Giroux determined that this work is a useful article that does not contain any authorship that is both separable and copyrightable. (*Id.*) She explained that the fact that the drawer pull may be adapted to serve as a chandelier pendant or piece of jewelry does not exclude it from the useful article category. An article that is part of a useful article is itself considered a useful article. (*Id.*)

She explained that the design of a useful article can be copyrightable only if and to the extent it can be identified separately from the utilitarian aspects of the article without destroying the article's basic shape. (*Id.* at 2.); (*Id.* at 3-4) (citing H.R. Rep. No. 94-1476, at 55). After setting forth the test for conceptual separability, Ms. Giroux concluded that the work is not copyrightable because she did not believe "that any of the design elements, to which you refer, can be conceptually perceived as separable from the drawer pull itself without destroying its basic shape." (*Id.* at 3.) Ms. Giroux distinguished *Kieselstein-Cord* due to the fanciful shapes which were separately identifiable from the overall design of the belt buckles at issue. She found no authorship comparable to that of the belt buckles in the design of the subject drawer pull. (*Id.*) She further determined that even if the oval sculptural elements were separable, they are common and familiar shapes within the public domain and therefore not copyrightable by themselves or in their present combination. (*Id.*) (citing 37 C.F.R. § 202.1). She also noted that "examiners do not make aesthetic judgments; nor are they influenced in any way by the attractiveness of a design, its visual effect or appearance, its uniqueness, its symbolism, the time, effort and expense it took to create, or its commercial success in the marketplace during the examining process." (*Id.* at 2) (citing *Compendium II, supra,* § 505.03); (*Id.* at 3.)

D. Second Request for Reconsideration

In a letter dated October 11, 2004, you asked the Office to reconsider for a second time its refusal to register the claimed copyright in the Bogart Collection Open Oval Drawer Pull. (Letter from Hicks to Board of 10/11/04, at 1.) You reiterated much of the background information and arguments set forth in your prior correspondence. You clarified that the applicant seeks registration only for the decorative art work that resides on the drawer pull, not for the pull's base plate nor for the pull itself. (Letter from Hicks to Board of 10/11/04, at 2, n.1 and at 3.) You described the artwork as covering the outer contours of the drawer pull, but also amenable to covering a loop style earing. (*Id.* at 3.) "Hence, Applicant seeks copyright protection in the design of a graceful, draped sculpture of varying radii, contours, and thicknesses, offset by a center bulbous element." (*Id.*)

You argued that the design is separable from the utilitarian aspects of the drawer pull, as evidenced by the applicant's use of the same design for chandelier pendants and jewelry ornamentation. You analogize the subject design to a carving on the back of a chair or engraving on a glass vase. You provided photographs and physical samples of two basic oval-shaped drawer pulls to demonstrate that the subject design's contoured, multi-tiered elements can be conceptually removed from the drawer pull without destroying the pull's shape or function. (*Id.* at 3-4.)

You reiterated your comparison of the subject work to the original authorship embodied in the belt buckles at issue in *Kieselstein-Cord.* (*Id.* at 4-5.) You stated that the required amount of originality is small and that copyrightability does not depend upon the fancifulness of the design. (*Id.* at 4.) You argued that the fact the design incorporates the common shape of an oval does not nullify copyrightability, citing *Mattel, Inc. v. Goldberger Doll Manufacturing Co.*, 365 F.3d 133 (2d Cir. 2004) in support. (*Id.*)

III. DECISION

A. Useful Articles

As a general proposition, copyright protection does not extend to a useful article, defined 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. A drawer pull qualifies as a useful article. 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 their form but not their mechanical or utilitarian aspects are concerned." *Id.* § 101. The design of the useful article will be protected "only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." *Id.*; *see also*, H.R. Rep. No. 94-1476, at 55. The requisite separability can be physical or conceptual.

In response to Ms. Giroux's letter of June 15, 2004, you have clarified that the applicant does not seek copyright registration of the oval drawer pull itself, its overall shape or the base plate, but rather only the sculptural elements residing on the surface of the oval pull and the bulbous center element. (Letter from Hicks to Board of 10/11/04, at 3.) With respect to the bulbous center element, the Board finds no separable authorship to exist. It is a smooth, perpendicular "U" whose function is to connect the drawer pull to the base plate, leaving sufficient space between them to permit the drawer pull to be elevated at various angles for use or rest. This center element contains no ornamentation or other potentially copyrightable authorship. Therefore, it is not a matter of whether a design is separable from the U-shaped connector, because there simply is no design about which to contemplate separability. Any design element arguably existing in this portion of the work is necessarily part of the general contours of the functional connector and subsumed by its overall shape. Copyright is not available for this utilitarian center element because it contains no physically or conceptually separable authorship. *See, Esquire, Inc. v. Ringer*, 591 F.2d 796, 800 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 908 (1979) (copyright protection is not available for the "overall shape or configuration of a utilitarian article, no matter how aesthetically pleasing that shape may be.").

With respect to the oval loop, the Board recognizes that it does contain a design element on its surface. You have provided contrasting physical samples of other oval drawer pulls, which feature the same overall shape and serve the same utilitarian function as the subject pull even though their surfaces do not include any ornamentation. The Board is persuaded by these examples that the subject surface design is conceptually separable from the functional aspects of the drawer pull. However, conceptual separability is not sufficient to support a claim of copyright. The separable design must also be sufficiently original.

B. Original Works of Authorship

Regardless of utility, all copyrightable works, be they drawer pulls, chandelier pendants or jewelry, must qualify as "original works of authorship." 17 U.S.C. § 102(a). The term "original" consists of two components: independent creation and sufficient creativity. *Feist*, 499 U.S. at 345. First, the author must have independently created the work, *i.e.*, not copied it from another work. You have stated that your client commissioned the work from artisans, (letter from Hicks to Board of 10/11/04, at 1), and the application for registration indicates your client obtained any copyrights in the work by written assignment. The Office accepts these statements as satisfying the first prong of the originality analysis. Second, the work must possess sufficient creativity. In determining whether a work embodies a sufficient amount of creativity to sustain a copyright claim, the Board adheres to the standard set forth in *Feist*, 499 U.S. at 345, where the Supreme Court held that only a modicum of creativity is necessary.

You properly note that the requisite level of creativity to sustain a copyright is extremely low (letter from Hicks to Board of 10/11/04, at 4; letter from Hicks to Chief, Receiving and Processing Division of 3/8/04, at 4), but the Feist Court also ruled that some works (such as the work at issue in that case) fail to meet the standard. 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," 499 U.S. at 363, and that there can be no copyright in work in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359; *see also*, 37 C.F.R. § 202.10(a) ("In order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form."); *Nimmer on Copyright*, *supra*, § 2.01(b) ("[T]here remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright.").

Even prior to the Feist Court's decision, the Office recognized the modest, but existent, requisite level of creativity necessary to sustain a copyright claim. *Compendium II* states, "Works that lack even a certain minimum amount of original authorship are not copyrightable." *Compendium II*, *supra*, § 202.02(a). With respect to pictorial, graphic and sculptural works, *Compendium II* states that a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." *Id.* § 503.02(a).

In implementing this threshold, the Office and courts have consistently found that standard designs, figures and geometric shapes are not sufficiently creative to support a copyright claim. *Id.* § 503.02(a) ("[R]egistration cannot be based upon the simplicity of standard ornamentation . . . . Similarly, it is not possible to copyright common geometric figures or shapes . . . .").[3] Moreover,

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[3] *See also, id.* § 202.02(j) ("Familiar symbols or designs, and mere variations of typographic ornamentation, lettering, or coloring, are not copyrightable."); *Id.* § 503.03(b) ("No registration is possible where the work consists solely of elements which are incapable of supporting a copyright claim. Uncopyrightable elements include common geometric figures or symbols, such as a hexagon, an arrow, or a five-pointed star . . . ."); 37 C.F.R. § 202.1(a)

making minor alterations to these otherwise standard shapes will not inject the requisite level of creativity. *Id.* § 503.02(a) ("[Registration cannot be based upon] a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations.").

Of course, some combinations of common or standard forms contain sufficient creativity with respect to how they are combined or arranged to support a copyright. *See, Feist*, 499 U.S. at 358 (the Copyright Act "implies that some 'ways' [of compiling or arranging uncopyrightable material] will trigger copyright, but that others will not"; determination of copyright rests on creativity of coordination or arrangement). However, merely combining non-protectable elements does not automatically establish creativity where the combination or arrangement itself is simplistic. For example, the Eighth Circuit upheld the Register's refusal to register a simple logo consisting of four angled lines which formed an arrow and the word "Arrows" in cursive script below the arrow. *John Muller & Co. v. New York Arrows Soccer Team*, 802 F.2d 989 (8th Cir. 1986). *See also*, *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) ("It is true, of course, that a *combination* of unprotectable elements may qualify for copyright protection. [Citations omitted.] 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.") (emphasis in the original). In light of the above-described legal framework and after re-examining the design on the loop of the drawer pull, the Board has determined that this work does not embody sufficient creativity to support a copyright registration.

The design on the loop portion of the pull consists of a single, raised oval. Although you describe the design as a "bunched strand" and a "complex, multi-tiered surface sculpture," this is merely a visual effect when the work is viewed in a two-dimensional photograph or from a straight-on vantage point. A close inspection of the physical item reveals that the "inside" and "outside" ovals are simply the underlying, functional, oval drawer pull itself, for which you appropriately note the applicant does not seek copyright registration (Letter from Hicks to Board of 10/11/04, at 3.) and which, in any event, is not protectible since it is the shape of the useful article and is, when all is said and done, an oval. The only other element of the loop is one raised oval that rests on top and in the center of the underlying, functional drawer pull. This oval is a common shape within the public domain, and therefore cannot be afforded copyright protection as explained in detail above. The Board does recognize that the width of the material outlining the open oval is narrower at the top of the loop than at the bottom, but minor variations to common geometric shapes will not by themselves inject the requisite amount of creativity, especially where such variation appears to be dictated by factors other than artistic concerns (*e.g.*, to follow the contours of the underlying, functional pull). Even if one views the loop as three (or four) concentric ovals rather than one oval

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("[F]amiliar symbols or designs" are "not subject to copyright and applications for registration of such works cannot be entertained.").

on top of the functional pull, the analysis and result remain the same. Common geometric shapes with minor variations are simply not eligible for copyright protection. Section 503 of *Compendium II* states, "If the work consists entirely of uncopyrightable elements, registration is not authorized."

You argue that works containing common shapes are not necessarily barred from copyright protection, and cite *Kieselstein-Cord* and *Mattel* in support. (Letter from Hicks to Board of 10/11/04, at 4.) The Board agrees, and the Office regularly registers works whose particular expression of a common design element or arrangement of common elements embodies a sufficient amount of creativity. For example, the Office did indeed register the belt buckles at issue in *Kieselstein*[4] and the dolls at issue in *Mattel*. In those cases, the common elements could be expressed in innumerable ways, and the respective authors embodied sufficient creativity in the actual expression that they created. However, the subject design on the drawer pull is not comparable. There are limited ways to express an oval, and therefore it is unlikely (if not impossible) for an author to incorporate a sufficient amount of his own creativity in expressing this common geometric shape. Copyright law cannot be used to secure a monopoly over such a basic building block within the public domain. Even when the constituent design elements of the drawer pull are viewed in combination, the design consists only of one or three (depending how viewed) oval(s) set on top of an underlying, functional drawer pull connected to a center bulbous element. Such a simplistic arrangement of non-protectible shapes cannot rise to the requisite level of creativity. *See, Compendium II, supra,* § 503.02(b) ("[T]he creative expression capable of supporting copyright must consist of something more than the mere bringing together of two or three standard forms or shapes with minor linear or spatial variations.").

The present design, regardless whether it is evaluated as a whole or by constituent elements, consists entirely of non-protectible shapes in an insufficiently creative arrangement. Therefore, copyright protection is simply not available for this work.

C. Other Considerations

Several other factors that you argue, while perhaps important on personal or commercial levels, have no bearing on the Board's determination of whether or not copyright registration is available for this work. For example, you state that the Humphrey Bogart Collection is "highly successful," and that the success of the final designs demonstrates in part that "the creations invoke the style and elegance of Hollywood's most romantic era," "the time in which Humphrey Bogart created classic films." (Letter from Hicks to Board of 10/11/04, at 1; Letter from Hicks to Chief, Receiving and Processing Division of 3/8/04, at 1; *see also* Letter from Hicks to Board of 10/11/04, at 2; Letter from Hicks to Chief, Receiving and Processing Division of 3/8/04, at 2) ("The rounded

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[4] Please note that although the Office determined the belt buckles embodied sufficient creativity in order to sustain registrations, the court expressly declined to address the issue of originality in its opinion. *Kieselstein-Cord*, 632 F.2d at 991.

edges and cascading surface layers create a distinctive and attractive design. These ornamental features give the piece depth and grace that is evocative of fine fashion, jewelry and artwork of the Hollywood lifestyle that Humphrey Bogart helped define.") While these statements may well be true, aesthetic value or commercial appeal of a work cannot be considered in determining whether a work is copyrightable. *See, Compendium II, supra*, § 503.02(b) ("The requisite minimal amount of original sculptural authorship necessary for registration in Class VA does not depend upon the aesthetic merit, commercial appeal, or symbolic value of a work.") The potential distinctiveness of a design also does not bear upon whether copyright is available for a particular work.

You also state that you clients incurred "substantial expense" in commissioning skilled artisans to prepare the design. (Letter from Hicks to Board of 10/11/04, at 1.) However, just as *Feist* confirmed that the time and effort invested in the creation of a work is immaterial to a copyrightability analysis, so too is any monetary investment. *See, Feist,* 499 U.S. at 359-60.

IV. CONCLUSION

For the reasons stated herein, the Copyright Office Review Board affirms the refusal to register the work entitled "Bogart Collection Open Oval Drawer Pull (-427)." This decision constitutes final agency action on this matter.

Sincerely,

David O. Carson,
General Counsel
For the Review Board
United States Copyright Office