



Copyright Review Board
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000

January 19, 2024

Timothy D. St. Clair, Esq.
Parker Poe Adams & Bernstein LLP
110 E. Court Street, Suite 200
Greenville, SC 29601

Re: Second Requests for Reconsideration for Refusal to Register Decorative Fence in Vinyl, Multi-Purpose Fence – Shape 3, Decorative Fence 2, Decorative Fence in Steel, Decorative Fence in Wood, Rockdale, Westbrook (SR # 1-10378886501, 1-8895486591, 1-8895596381, 1-8895300271, 1-8895614831, 1-10355993483, 1-10356162501; Correspondence ID: 1-52FHMBZ, 1-4P8HSBG, 1-4P8HS9P, 1-4P8HSM7, 1-4P8HSMJ, 1-583FNMU, 1-583DY85)

Dear Mr. St. Clair:

The Review Board of the United States Copyright Office (“Board”) has considered Origin Point Brands, LLC’s (“Origin Point”) second request for reconsideration of the Registration Program’s refusal to register the sculptural claims in the following works: “Decorative Fence in Vinyl,” “Multi-Purpose Fence – Shape 3,” “Decorative Fence 2,” “Decorative Fence in Steel,” “Decorative Fence in Wood,” “Rockdale,” and “Westbrook” (each individually, a “Work,” and together, the “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 refusals to register each of the Works.

I. DESCRIPTION OF THE WORKS

A. Decorative Fence in Vinyl

Decorative Fence in Vinyl is a fence consisting of white pickets with triangular-shaped points and white horizontal rails. A deposit copy image of the fence is shown on the next page:



B. Multi-Purpose Fence – Shape 3

Multi-Purpose Fence – Shape 3 is a fence consisting of thin metal wires arranged into a grid. At the top and bottom of the panels, two rows of the grid form a triangular outward bend at their connection point. The grid panels feature spiral connectors at the top, in the middle, and at the bottom that attach the panels to posts and a gate latch. Deposit copy images of the fence and its latch are shown below:



C. Decorative Fence 2

Decorative Fence 2 is a fence consisting of metal pickets of alternating heights that are topped with teardrop-shaped finials and connected by horizontal metal rails. Sections of the fence are attached with metal posts that are topped with metal spheres. The fence's gate features an egg-shaped finial atop its latch, and a row of circular bands sit along the bottom. A deposit copy image of the fence is shown on the next page:



D. Decorative Fence in Steel

Decorative Fence in Steel is a fence consisting of metal pickets connected by horizontal rails. Sections of the fence are connected at metal posts that are topped with teardrop-shaped finials; a teardrop-shaped finial also sits atop the latch of the fence's gate. A deposit copy image of the fence is shown below:



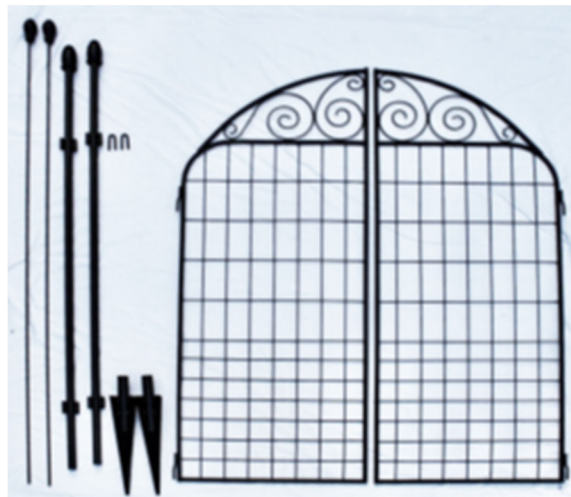
E. Decorative Fence in Wood

Decorative Fence in Wood is a fence consisting of wooden pickets supported by wooden rails. Sections of the fence are attached at vertical metal posts that are topped with a teardrop-shaped finial. A deposit copy image of the fence is shown on the next page:



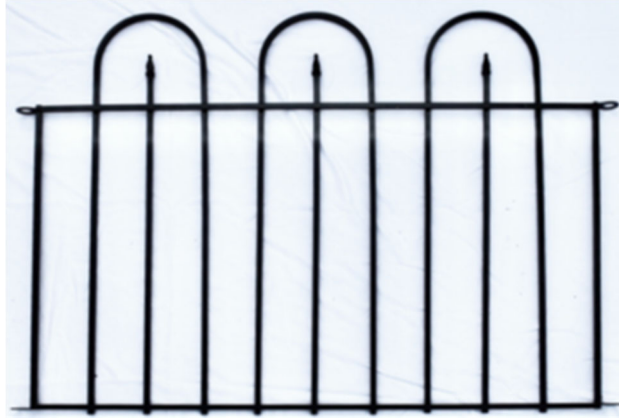
F. Rockdale

Rockdale is a fence consisting of thin metal wires arranged into a grid that is positioned under an arch that extends from the top of the fence's frame. The arch is accented with curlicue designs. Metal posts topped with teardrop-shaped finials are used to attach the grid panels. A deposit copy image of the fence is shown below:



G. Westbrook

Westbrook is a fence consisting of thin metal pickets and horizontal rails. Three small arches extend from the top of the fence's frame and connect the tops of every other picket, while the remaining pickets are topped with teardrop-shaped finials. A deposit copy image of the fence is shown on the next page:



II. ADMINISTRATIVE RECORD

Origin Point filed individual applications to register copyright claims in Multi-Purpose Fence – Shape 3, Decorative Fence 2, Decorative Fence in Steel, and Decorative Fence in Wood on June 3, 2020. Origin Point filed its applications to register copyright claims in Rockdale and Westbrook on April 11, 2021, and in Decorative Fence in Vinyl on April 18, 2021. In separate letters, Copyright Office registration specialists refused to register each of the claims, determining that the Works are useful articles that do not contain separable design elements with sufficient copyrightable authorship to support registration.¹

In separate substantively similar letters, Origin Point requested that the Office reconsider its initial refusals to register the Works.² After reviewing the Works in light of the points raised in the First Requests, the Office again concluded that the Works could not be registered. In its letters addressing the Decorative Fence in Vinyl and Multi-Purpose Fence – Shape 3 claims, the Office refused registration again, explaining that they do not contain any separable non-functional features.³ In its letters addressing the Decorative Fence 2, Decorative Fence in Steel, Decorative Fence in Wood, Rockdale, and Westbrook claims, the Office did find that the Works incorporate separable features. However, the Office concluded that those features consist of

¹ Initial Letter Refusing Registration of Multi-Purpose Fence – Shape 3 from U.S. Copyright Office to Timothy St. Clair at 1 (July 10, 2020); Initial Letter Refusing Registration of Decorative Fence 2 from U.S. Copyright Office to Timothy St. Clair at 1 (July 13, 2020); Initial Letter Refusing Registration of Decorative Fence in Steel from U.S. Copyright Office to Timothy St. Clair at 1 (July 10, 2020); Initial Letter Refusing Registration of Decorative Fence in Wood from U.S. Copyright Office to Timothy St. Clair at 1 (July 10, 2020); Initial Letter Refusing Registration of Rockdale from U.S. Copyright Office to Timothy St. Clair at 1 (Sept. 30, 2021); Initial Letter Refusing Registration of Westbrook from U.S. Copyright Office to Timothy St. Clair at 1 (Sept. 30, 2021); Initial Letter Refusing Registration of Decorative Fence in Vinyl, Beaumont Gate, and Beaumont Fence from U.S. Copyright Office to Timothy St. Clair at 1 (May 7, 2021).

² Letter from Timothy St. Clair re: Multi-Purpose Fence – Shape 3 to U.S. Copyright Office at 1 (Oct. 8, 2020) (“Multi-Purpose Fence – Shape 2 First Request”); Letter from Timothy St. Clair re: Decorative Fence 2 to U.S. Copyright Office at 1 (Oct. 8, 2020); Letter from Timothy St. Clair re: Decorative Fence in Steel to U.S. Copyright Office at 1 (Oct. 8, 2020); Letter from Timothy St. Clair re: Decorative Fence in Wood to U.S. Copyright Office at 1 (Oct. 8, 2020); Letter from Timothy St. Clair re: Rockdale to U.S. Copyright Office at 1 (Dec. 29, 2021); Letter from Timothy St. Clair re: Westbrook to U.S. Copyright Office at 1 (Dec. 29, 2021); Letter from Timothy St. Clair re: Decorative Fence in Vinyl to U.S. Copyright Office at 1 (July 22, 2021) (collectively, the “First Requests”).

³ Refusal of First Request for Reconsideration of Decorative Fence in Vinyl from U.S. Copyright Office to Timothy St. Clair at 1 (Dec. 7, 2021); Refusal of First Request for Reconsideration of Multi-Purpose Fence – Shape 3 from U.S. Copyright Office to Timothy St. Clair at 1 (Mar. 5, 2021).

common and familiar shapes that do not contain the requisite amount of creativity for copyright protection.⁴

After receipt of the Office’s decisions, Origin Point requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusals to register the Works.⁵ In its Second Requests, all of which contained similar arguments, Origin Point asserted that its “creative choices” and the selection, spacing, sizing, proportioning, and arrangement of the features in the Works are combined in distinctive or original ways,⁶ and highlighted the imagery and impression that features of the Works evoke.⁷ In the letters, Origin Point also contended that whether features of the fences (including the pickets and rails) “might have a function with the barrier aspect of fencing is immaterial.”⁸ Further, in its requests to reconsider the refusals to register Rockdale and Westbrook, Origin Point asserted that those Works are not different from several previously registered works that are also “perhaps useful articles.”⁹

III. DISCUSSION

After carefully examining the Works and considering the arguments made in the First and Second Requests, the Board concludes that the Works are useful articles that do not contain the separable creative authorship necessary to sustain a claim.

A. Copyrightability of Useful Articles

Because the Works are fences—barriers that function to enclose or mark a boundary—they are “useful articles” under the Copyright Act and must be analyzed as such. *See* 17 U.S.C. § 101; U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 924.1

⁴ Refusal of First Request for Reconsideration of Decorative Fence 2 from U.S. Copyright Office to Timothy St. Clair at 5 (Mar. 5, 2021); Refusal of First Request for Reconsideration of Decorative Fence in Steel from U.S. Copyright Office to Timothy St. Clair at 5 (Mar. 5, 2021); Refusal of First Request for Reconsideration of Decorative Fence in Wood from U.S. Copyright Office to Timothy St. Clair at 5 (Mar. 5, 2021); Refusal of First Request for Reconsideration of Rockdale from U.S. Copyright Office to Timothy St. Clair at 5 (May 11, 2022); Refusal of First Request for Reconsideration of Westbrook from U.S. Copyright Office to Timothy St. Clair at 5 (May 11, 2022).

⁵ Letter from Timothy St. Clair re: Decorative Fence in Vinyl to U.S. Copyright Office at 1 (Mar. 6, 2022) (“Decorative Fence in Vinyl Second Request”); Letter from Timothy St. Clair re: Multi-Purpose Fence – Shape 3 to U.S. Copyright Office at 1 (June 4, 2021) (“Multi-Purpose Fence – Shape 3 Second Request”); Letter from Timothy St. Clair re: Decorative Fence 2 to U.S. Copyright Office at 1 (June 4, 2021) (“Decorative Fence 2 Second Request”); Letter from Timothy St. Clair re: Decorative Fence in Steel to U.S. Copyright Office at 1 (June 4, 2021) (“Decorative Fence in Steel Second Request”); Letter from Timothy St. Clair re: Decorative Fence in Wood to U.S. Copyright Office at 1 (June 4, 2021) (“Decorative Fence in Wood Second Request”); Letter from Timothy St. Clair re: Rockdale to U.S. Copyright Office at 1 (Aug. 8, 2022) (“Rockdale Second Request”); Letter from Timothy St. Clair re: Westbrook to U.S. Copyright Office at 1 (Aug. 8, 2022) (“Westbrook Second Request”) (collectively, the “Second Requests”).

⁶ *See* Decorative Fence 2 Second Request at 2, 7; Decorative Fence in Steel Second Request at 7–8; Decorative Fence in Vinyl Second Request at 2; Decorative Fence in Wood Second Request at 2, 7; Multi-Purpose Fence – Shape 3 Second Request at 1; Rockdale Second Request at 2; Westbrook Second Request at 2.

⁷ *See, e.g.*, Decorative Fence 2 Second Request at 1–2; Decorative Fence in Wood Second Request at 1–2.

⁸ Decorative Fence in Vinyl Second Request at 8; Multi-Purpose Fence – Shape 3 Second Request at 5; Decorative Fence 2 Second Request at 5; Decorative Fence in Steel Second Request at 6; Decorative Fence in Wood Second Request at 5; Rockdale Second Request at 4; Westbrook Second Request at 5.

⁹ Rockdale Second Request at 2; Westbrook Second Request at 2–3.

(3d ed. 2021) (“COMPENDIUM (THIRD)”) (noting that useful articles have an inherent useful function that is “objectively observable or perceivable from the appearance of the item”). The Copyright Act defines useful articles as those “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 (definition of “useful article”). When determining whether the design of a useful article, such as a fence, is eligible for copyright protection, the Copyright Office examines the item for any separable features that would qualify as a protectable work “if it were imagined separately from the useful article into which it is incorporated.” COMPENDIUM (THIRD) § 924.3 (quoting *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 409 (2017)).

In defining “pictorial, graphic, and sculptural works,” the Act provides that “the design of a useful article . . . [can be] considered a pictorial, graphical, or sculptural work 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.” 17 U.S.C. § 101. As the Supreme Court articulated in *Star Athletica*, a feature incorporated into the design of a useful article can be copyrightable only if that 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.” 580 U.S. at 405.

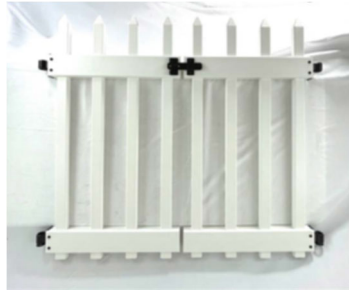
To warrant registration, the separable features must be “original works of authorship.” 17 U.S.C. § 102(a). The Supreme Court has explained that the test for originality requires that the works are independently created and contain “some minimal degree of creativity.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). Only a modicum of creativity is necessary, but some works fail to meet even this low threshold. *Id.* The Court has 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.

In the context of useful articles, the Office must consider whether any separable features satisfy the *Feist* standard for originality. 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 claim. Nevertheless, not every combination or arrangement will be sufficient to meet this test. *See id.* 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, 883 (D.C. Cir. 1989); *Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 498–99 (S.D.N.Y. 2005). A simplistic arrangement of non-protectable elements does not demonstrate the level of creativity necessary to warrant protection. *See Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) (“[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.”).

B. Analysis of the Works

Applying the above framework to the Works, the Board finds that both Decorative Fence in Vinyl and Multi-Purpose Fence – Shape 3 lack separable, non-utilitarian features entitled to copyright protection as sculptural works and affirms refusal on that basis. For the remaining Works—Decorative Fence 2, Decorative Fence in Steel, Decorative Fence in Wood, Rockdale, and Westbrook—the Board finds that they contain separable, non-utilitarian features but that those features do not contain sufficient creativity to be protected under the Copyright Act.

i. *Decorative Fence in Vinyl*



Decorative Fence in Vinyl does not contain any separable features capable of existing independently from the utilitarian aspects of the Work. The white pickets and rails in the Work are typical components of a fence and have an intrinsic utilitarian purpose, which is to combine and form the fence: pickets make up the body of a fence and are connected by rails for support.¹⁰ Neither of these features can be perceived separately from the Work’s utilitarian purpose, which requires both features to form a standing barrier. Recast in another medium, these features would not qualify as a protectable sculptural work. *See* COMPENDIUM (THIRD) § 924.3(F).

Origin Point acknowledges that the pickets function to “provid[e] a barrier” and that the rails have “functionality and [a] utilitarian result,” but argues that its design choices with respect to those features are aesthetic, not purely functional or useful. Decorative Fence in Vinyl Second Request at 5–6 tbl. A. To that end, Origin Point highlights the spacing, width, and height of the “vertical elements” and “horizontal elements”—that is, the fence’s pickets and rails—and the triangular shape of the tops of the pickets, which “evok[e] an overall ‘Norman Rockwell-esque’ visual appeal of historical American culture” and create “a pleasing overall aesthetic effect.” *Id.* at 2; *see also id.* at 5–6 tbl. A.

Origin Point’s arguments are unpersuasive. As an initial matter, these arguments do not refute that the features have essential utilitarian functions or that they comprise the entirety of the Work. *See* COMPENDIUM (THIRD) § 924.3 (“As a general rule, the Office will not consider the originality of the design when applying the first or second part of the separability test.”).

Nor do these arguments establish that the claimed non-utilitarian features would be sufficiently creative had they been separable. Whereas Origin Point focuses on the aesthetic

¹⁰ *See Parts of A Fence: A Puzzle You Didn’t Know You Should Know About Fencing*, NORTHLAND FENCE, <https://www.northlandfence.com/typical-fence-parts/> (last visited Jan. 17, 2024); Brett McCutcheon, *The Anatomy of a Great Fence*, BECK (Feb. 11, 2016), <https://info.beck-fastening.com/blog/the-anatomy-of-a-great-fence>.

appeal of certain features and what it claims the features evoke, the Office uses objective criteria to determine whether a work constitutes copyrightable subject matter and does not consider the author’s inspiration for the work, creative intent, or intended meaning or any meaning or significance that the work may evoke. *Id.* §§ 310.3, 310.5; *see Star Athletica*, 580 U.S. at 422–23. Likewise, the Office does not make aesthetic judgments in evaluating the copyrightability of particular works. *See* COMPENDIUM (THIRD) § 310.2. The attractiveness of a design, the espoused intentions of the author, and the design’s visual effect or its symbolism are not factors in determining whether a design is copyrightable. *See, e.g., Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

Origin Point further argues that its choices as to selection and arrangement of these features are sufficiently creative. *Decorative Fence in Vinyl* Second Request at 9. As discussed above, the features of the Work are arranged like any other standard picket fence. Origin Point itself provided several examples of other white picket fences that combine pickets and rails, including the following:¹¹

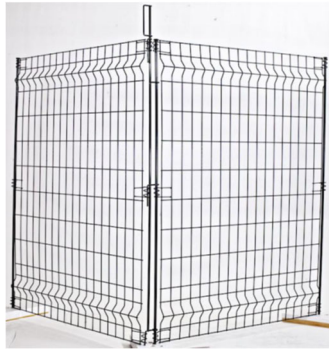


Origin Point’s stated purpose in providing these examples is to demonstrate that other fences “do not include the design choices made with and incorporated into” *Decorative Fence in Vinyl*, such as the spacing, width, height, and shape of the pickets. *Id.* at 2. However, the existence of design alternatives does not make a work copyrightable. COMPENDIUM (THIRD) § 310.8 (“It is not the variety of choices available to the author that must be evaluated, but the actual work that the author created.”). Indeed, Origin Point’s examples corroborate that *Decorative Fence in Vinyl* features a common picket-and-rail fence combination, with only minor variations, such as pickets with differently angled tops or different proportions and heights.

Because *Decorative Fence in Vinyl* does not contain any features that can be identified separately from, or that are capable of existing independently of, the utilitarian aspects of the Work, it is not entitled to copyright protection.

¹¹ *Decorative Fence in Vinyl* Second Request at 2–5 (showing six examples of white picket fences).

ii. Multi-Purpose Fence – Shape 3



Multi-Purpose Fence – Shape 3 also does not contain any features that can be identified separately from, or that are capable of existing independently of, the utilitarian aspects of the Work, and is therefore not entitled to copyright protection.

Origin Point argues that aspects of the Work can be perceived as separate works. Origin Point again focuses on the aesthetic impression or meaning of the features, noting that the equally spaced “vertical elements”—the fencing panel and posts— “create a visual perception of . . . a fence that may not be a boundary,” and “bring[] visual regularity and order to an outdoor plant garden.” Multi-Purpose Fence – Shape 3 Second Request at 3.¹² Origin Point further argues that these separately perceptible features would be protectable works if imagined separately. *Id.* Specifically, it argues that “a two-dimensional work of art providing the same perception as does the Work to an observer, and imagined separately from the Work”—that is, envisioning the fencing panels as framed, two-dimensional artwork—demonstrates that the Work would “pass” the *Star Athletica* test. *Id.* at 3–4.

Each feature that Origin Point describes has an intrinsic utilitarian purpose. Similar to the Decorative Fence in Vinyl pickets, the grid-like panel forms the foundation of the fence itself. Additionally, the posts structurally support the fence, and the connectors and latch are common hardware needed to connect panels and to fasten and connect the fence’s gate.¹³ Contrary to Origin Point’s assertions, these functions are not “immaterial.” *Id.* at 2. These features are normally a part of a fence and are themselves considered useful articles. 17 U.S.C. § 101 (“An article that is normally a part of a useful article is considered a ‘useful article.’”).

Origin Point’s assertion that imagining the fence as a two-dimensional, rather than three-dimensional, work satisfies the second element of *Star Athletica* misinterprets *Star Athletica*’s

¹² Origin Point has also previously attributed the use of “whimsical” curlicue connectors and the size and proportion of the gate latch to its creative choices. Multi-Purpose Fence – Shape 3 First Request at 2.

¹³ See *Parts of A Fence: A Puzzle You Didn’t Know You Should Know About Fencing*, NORTHLAND FENCE, <https://www.northlandfence.com/typical-fence-parts/> (last visited Jan. 17, 2024); *Types of Fence Materials and Hardware*, THE HOME DEPOT, <https://www.homedepot.com/c/ab/types-of-fence-materials-and-hardware/9ba683603be9fa5395fab906d28d357> (last visited Jan. 17, 2024) (describing latches used to fasten); *Spiral Connectors*, EDGE WHOLESALE DIRECT, <https://www.edgwholesaledirect.com/products/spiral-connectors/> (last visited Jan. 17, 2024) (describing connectors used to join panels together).

independent-existence requirement. That requirement queries whether features of the work could exist independently on their own or in another medium without replicating the useful article itself—in this case, whether the three-dimensional sculptural features could exist independently as sculptural works, not as the two-dimensional work that Origin Point imagines. *See Star Athletica*, 580 U.S. at 417. Indeed, in *Star Athletica* the Supreme Court twice notes how a reimagining of a useful article in different forms does not lead to the protectability of that useful article. In one example, the Court states that a cardboard model of a car “could itself be copyrightable, [but] it would not give rise to any rights in the useful article that inspired it.” *Id.* at 415. In other example, the Court distinguishes between a useful article being displayed in its normal three-dimensional form in an art gallery, which is not copyrightable, and a useful article being represented in a drawing, which could be copyrightable. *Id.* at 419 n.2. Whether the features of the fence would be protectable if they were captured in an imagined two-dimensional artwork does not impact whether the useful article is protectable.

Further, as with Decorative Fence in Vinyl above, Origin Point’s aesthetic-focused arguments do not refute that the features have essential utilitarian functions or that they comprise the entirety of the useful article. *See* COMPENDIUM (THIRD) § 924.3. Likewise, were the Board to consider any of the features as separable and assess their creativity, it would not take into account any impression the features might evoke. *See id.* §§ 310.3, 310.5. As a whole, the Work’s arrangement of the features form a common garden fence.¹⁴ Multi-Purpose Fence – Shape 3 is therefore not entitled to copyright protection.

iii. Decorative Fence 2



Though Decorative Fence 2 contains separable elements, those elements do not contain the amount of creativity required for copyrightability.

The separable features that can be perceived in Decorative Fence 2 are the finials, spheres, and circular bands. These separable features are not protectable, however, because they lack, individually or in combination, the requisite minimum degree of creativity required for copyright protection. As set out in the relevant regulations, copyright does not protect standard designs and common geometric shapes, in either two- or three-dimensional form. 37 C.F.R. § 202.1(a) (identifying “familiar symbols or designs” as examples of works not subject to copyright); *see also* COMPENDIUM (THIRD) § 906.1 (noting that common geometric shapes, such

¹⁴ *See, e.g., FXW Decorative Garden Metal Fence Temporary Animal Barrier for Yard*, AMAZON, <https://www.amazon.com/FXW-Decorative-Outdoor-Barrier-Fencing/dp/B09XHKXRGH/> (last visited Jan. 17, 2024); *26.2” H x 30.4” W Black Metal Fencing*, WAYFAIR, <https://www.wayfair.com/outdoor/pdp/gaomon-2-ft-h-x-3-ft-w-metal-fence-panel-gcmo1135.html> (last visited Jan. 17, 2024).

as circles, ovals, and spheres are not protectable). The teardrop- and egg-shaped finials, the round spheres, and the circular bands are standard shapes.

The combination of the individual separable features, including their selection, arrangement, and coordination, is also insufficiently creative to sustain copyright protection. The combination of finials, bulbs, and/or circular bands is a common design arrangement in fences.¹⁵ See COMPENDIUM (THIRD) § 905 (“Merely bringing together only a few standard forms or shapes with minor linear or spatial variations does not satisfy [the creativity] requirement.”). This common arrangement of uncopyrightable features falls short of the Copyright Act’s requirements for protection. See *Satava*, 323 F.3d at 805, 811; COMPENDIUM (THIRD) §§ 312.2, 905.

Origin Point contends that the fence’s tall and short “vertical[] linear members”—that is, the pickets—can be perceived separately from the fence, and that their spacing and proportions evoke certain imagery. *Decorative Fence 2* Second Request at 3. Here, too, Origin Point attempts to classify the pickets as separable features by reimagining the pickets in two-dimensional form. *Id.* at 4. As described in the discussions of *Decorative Fence in Vinyl* and *Multi-Purpose Fence – Shape 3*, pickets, rails, and posts form the central structure and support of the fence and are not separable from the fence’s utilitarian function. Origin Point’s reimagining of the features in two-dimensional form does not impact the separability analysis.

Origin Point also highlights the “further aesthetic appeal” of the finials in the Work. *Id.* at 3. Neither the imagery these features evoke, nor any meaning or impression is relevant to the separability analysis or may be considered in the Office’s evaluation of the Work. COMPENDIUM (THIRD) §§ 310.3, 310.5, 924.3. *Decorative Fence 2* therefore lacks the requisite creativity for copyright protection.

iv. Decorative Fence in Steel and Decorative Fence in Wood



Decorative Fence in Steel



Decorative Fence in Wood

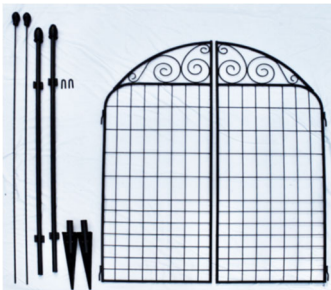
¹⁵ See, e.g., *Decorative Wrought Iron Fences*, AMAZING GATES, <https://www.amazinggates.com/Wrought-Iron-Fence-s/36.htm> (last visited Jan. 17, 2024) (featuring finials and circular bands); *Jerith Liberty*, JERITH, <https://www.jerith.com/us/en/products/liberty> (last visited Jan. 17, 2024) (featuring finials and bulbs); *Gilpin Products Deco 4 x 6 Steel Fence*, MENARDS, <https://www.menards.com/main/building-materials/fencing/metal-fencing/gilpin-products-deco-4-x-6-black-fence/310028d/p-1444431421045-c-5766.htm> (last visited Jan. 17, 2024) (featuring circular bands).

Decorative Fence in Steel and Decorative Fence in Wood also do not contain the amount of creativity required for copyrightability. Both consist of pickets and horizontal rails—made of steel and wood, respectively—with posts that feature teardrop-shaped finials.

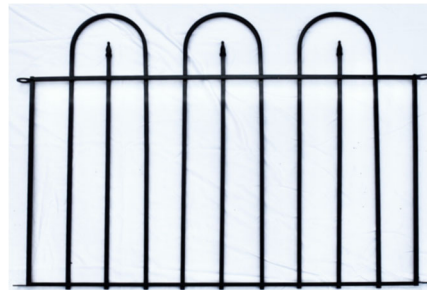
As discussed above, pickets, rails, and posts are intrinsically utilitarian features that are not copyrightable. The separable features in the Works are the teardrop-shaped finials, which are not eligible for copyright protection individually, as they comprise a common geometric shape. *See* COMPENDIUM (THIRD) § 906.1. For the reasons stated above, Origin Point’s argument that the pickets, rails, and posts would be separable features if they were considered in two-dimensional form is unavailing. *See* Decorative Fence in Steel Second Request at 4–5; Decorative Fence in Wood Second Request at 4–5.

The selection, arrangement, and coordination of the Works’ separable features, the finials, are also not sufficiently creative, as their placement atop pickets is common in fences,¹⁶ and they thus fall short of the requirements for protection. *See Satava*, 323 F.3d at 805, 811. Accordingly, Decorative Fence in Steel and Decorative Fence in Wood lack sufficient creative authorship to be protectable by copyright.

v. Rockdale and Westbrook



Rockdale



Westbrook

The Board also upholds the refusals to register Rockdale and Westbrook.

As detailed further above, the grid panels and posts in Rockdale and the pickets and rails in Westbrook are intrinsically utilitarian and are not copyrightable. The finials and arches that protrude above the fence’s frame in both Works, and the curlicue accents in Rockdale are separable features, but they are not copyrightable. As discussed with regard to several Works above, the teardrop-shaped finials are simple shapes that are not eligible for copyright protection. For the same reason, the arches and curlicues are also not protectable. *See* COMPENDIUM (THIRD) § 906.1 (noting that common geometric shapes, such as straight and curved lines, circles, ovals, and spheres are not protectable).

¹⁶ *See, e.g., Capital Railing 4-ft H x 6-ft W Black Aluminum Decorative Metal Pressed-Point Construction Fence Panel*, LOWE’S, <https://www.lowes.com/pd/Capital-Railing/5013710833> (last visited Jan. 17, 2024); *Spartan Steel Fence Panel, 3-Rail – Residential*, HOOVER FENCE CO., <https://www.hooverfence.com/cer-spartan-3-p-centurion-spartan-steel-fence-panel-3-rail-residential> (last visited Jan. 17, 2024).

The combination of these features is also not sufficiently creative to warrant copyright protection. As detailed above, finials are often placed atop posts and pickets in fence designs. Protruding arches and curly ornamental flourishes are also common.¹⁷ While the angling and size of these details may vary, these details are minor variations and do not rise to the level of being copyrightable. *Id.* § 905 (“[m]erely bringing together only a few standard forms or shapes with minor linear or spatial variations” does not provide sufficient amount of creative expression to warrant registration).

Origin Point cites several works that the Office previously registered, arguing that those works, “though perhaps useful articles,” were found to contain separable copyrightable features, and that Rockdale and Westbrook are “not legally different in kind” from the registered works or “countless other registrations.” Rockdale Second Request at 2; Westbrook Second Request at 2–3.

The cited registrations are owned by Origin Point and are significantly different from Rockdale and Westbrook. Origin Point’s prior registrations are for two-dimensional technical drawings featuring the design, dimensions, material composition, differently angled views, and other specifications of outdoor lawn and garden decor, such as trellises in different styles and a gothic-style border.¹⁸ The registrations do not cover the useful articles themselves. Technical drawings and other two-dimensional visual art works undergo different analyses from useful articles, *see* COMPENDIUM (THIRD) § 922, and any resulting registrations do not extend copyright protection to the useful article represented. *See* 17 U.S.C. § 113(b). Previously registered two-dimensional drawings are not relevant to the Office’s refusal to register Rockdale or Westbrook.

Further, the Office’s registration decisions have “no precedential value and [are] not binding upon the Office when it examines any other application.” COMPENDIUM (THIRD) § 309.3. Copyrightability decisions are “made on a case-by-case basis” and the Board does not engage in comparisons between the Works and other works the Office has registered. *Id.*

¹⁷ *See, e.g., Legacy Concord #101 Modified Aluminum Fence Section*, HOOVER FENCE CO., <https://www.hooverfence.com/jerith-concord-101-modified-fence-section> (last visited Jan. 17, 2024) (featuring extended arches); *FOREHOGAR Metal Garden Gate and Fences Outdoor ECG1191*, AMAZON, <https://www.amazon.com/FOREHOGAR-Outdoor-ECG1191-14-75ft-Temporary/dp/B0BR27632V> (last visited Jan. 17, 2024) (featuring extended arches); *Steel Fence - PARIS Style - 8 x 5 Ft*, ALEKO, <https://www.alekoproductions.com/gates-fencing/gates/steel-fence-paris-style-8-x-5-ft/fencepar-ap/> (last visited Jan. 17, 2024) (featuring curled accents); *Ornamental Iron Fences*, LONG FENCE, <https://www.longfence.com/residential/ornamental-iron-fence/> (last visited Jan. 17, 2024) (featuring curled accents).

¹⁸ *See* Reg. No. VA0002098423, Reg. No. VA0001796136, Reg. No. VA0001796138, Reg. No. VA0001796143, Reg. No. VA0002131096, Reg. No. VA0002131093, Reg. No. VA0002131092, Reg. No. VA0001806623.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusals to register the copyright claims in the Works. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action in these matters.



U.S. Copyright Office Review Board
Suzanne V. Wilson, General Counsel and
Associate Register of Copyrights
Maria Strong, Associate Register of Copyrights and
Director of Policy and International Affairs
Mark T. Gray, Assistant General Counsel