



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

February 23, 2024

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**Re: Second Request for Reconsideration for Refusal to Register Light-Up Planetarium Crate (SR # 1-10047821981; Correspondence ID: 1-4XGR3Y9)**

Dear Mr. Gates:

The Review Board of the United States Copyright Office (“Board”) has considered KiwiCo, Inc.’s (“KiwiCo”) second request for reconsideration of the Registration Program’s refusal to register a copyright claim in the work titled “Light-Up Planetarium Crate” (“Work”). After reviewing the application, deposit copy, 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 consists of printed instructions, a printed newsletter, photographs, and sculptural pieces which are to be assembled to create a semi-hemispheric dome similar to a planetarium.

As discussed further below, KiwiCo seeks reconsideration of refusal to register the sculptural elements of the Work. The assembled sculptural elements of the Work are depicted below, and a deposit excerpt relating to the sculptural elements is attached in Appendix A.



## II. ADMINISTRATIVE RECORD

On January 6, 2021, KiwiCo filed an application to register written materials, a photograph and 2-D artwork, and sculptural materials using the unit of publication option.<sup>1</sup> On January 12, 2021, a Copyright Office registration specialist contacted KiwiCo and informed them that the “planetarium and 3-dimensional pieces [] do not possess enough original creative authorship to support a claim in ‘sculpture.’” Email from U.S. Copyright Office to Lisa Hom (Jan. 12, 2021). Because the specialist found that “there is copyrightable content in the other materials that make up th[e] unit of publication,” they asked KiwiCo to authorize removal of a claim for sculptural authorship in order to register the remaining aspects of the Work. *Id.* KiwiCo responded on January 19, 2021, stating it did “not authorize removal of the claim in ‘sculpture,’” and arguing that “[w]hile copyright protection may be thin, we conclude that copyright protection is available” for sculptural elements of the planetarium. Email from Ian Gates to U.S. Copyright Office (Jan. 19, 2021).

Because KiwiCo refused to disclaim the claim for sculptural authorship, the registration specialist refused to register the Work. In the letter setting out the decision, the Office explained that “the sculptural elements in this work will not support a claim to copyright.” Initial Letter Refusing Registration from U.S. Copyright Office to Ian Gates at 1 (Feb. 2, 2021). And in email correspondence, the registration specialist explained that the registration was refused because KiwiCo “d[id] not authorize removal of the claim in ‘sculpture.’” Email from U.S. Copyright Office to Ian Gates (Feb. 2, 2021).

On February 25, 2021, KiwiCo requested that the Office reconsider its initial refusal to register the Work, arguing that the Work is “a fun and attractive craft with whimsical and creative elements that will attract children of an appropriate age,” and that “each element of Applicant’s *Light-Up Planetarium* work [was] intentionally expressed to be attractive to an appropriately-aged child.” Letter from Ian Gates to U.S. Copyright Office at 1 (Feb. 25, 2021) (“First Request”). With respect to the sculptural authorship, KiwiCo argued that:

the large bolts, the bracket pairs, the wooden dowel, the hubs, the material selection, the colors, etc. were all creatively designed to create a scientific, yet industrial engineering aesthetic that is attractive to children in the appropriate age group. Moreover, perhaps most notably and as discussed above, the dome’s hemisphere includes indicia representative of various constellations together with additional representations of stars that are creatively placed on the dome to provide an overall aesthetically pleasing representation of a night sky.

*Id.* at 3. After reviewing the Work in light of the points raised in the First Request, the Office reevaluated the claims and again concluded that the sculptural aspects of the Work could not be registered. The Office explained that “[t]he planetarium, in its assembled form, is comprised primarily of basic geometric shapes—circles, a semicircle, spots.” *See* Refusal of First Request

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<sup>1</sup> *See* 37 C.F.R. § 202.3(b)(4); U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES §§ 1103–1103.4(L) (3d ed. 2021) (“COMPENDIUM (THIRD)”). As explained in section 1103 of the Compendium, this option “allows an applicant to register a number of works that were physically packaged or bundled together as a single unit by the claimant and first published on the same date.” To use this option, “[a]ll of the copyrightable elements must be recognizable as self-contained works.” COMPENDIUM (THIRD) § 1103.2.

for Reconsideration from U.S. Copyright Office to Ian Gates at 4 (Aug. 5, 2021). Moreover, “[e]ach of the[] component parts [of the disassembled planetarium] is a common geometric shape, or a minor variation thereof, none of which individually is copyrightable.” *Id.* at 5. In addition, the Office found that the assembled planetarium, as a whole, was not copyrightable. The Office noted that the assembled shape “is entirely typical for a planetarium. Indeed, it is exactly what one would expect to see in a planetarium design, and it is so commonplace that it would be expected as a matter of course.” *Id.* (quoting *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 363 (1991) (internal quotations omitted)).

On September 17, 2021, KiwiCo requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Work. Letter from Ian Gates to U.S. Copyright Office (Sept. 17, 2021) (“Second Request”). The Second Request was largely identical to the First Request with a few additional paragraphs arguing that the Office should find the sculptural aspects of the Work as a whole protectable because the assembled Work has a “scientific, yet industrial engineering aesthetic” that looks different from “third party planetariums” that employ “alternative expressions of children’s planetariums.” *Id.* at 3. KiwiCo submitted several photographs of these third party planetariums for comparison, which are attached in Appendix B. Among the images of other planetariums submitted with the Second Request, KiwiCo included an image of a cylindrical planetarium that, like the Work here, is assembled after purchase for comparison.



*The Work*



*Third-Party Example*

### III. DISCUSSION

After carefully examining the Work and applying the relevant legal standards, the Board finds that the Work does not contain sufficient sculptural authorship to receive copyright protection.

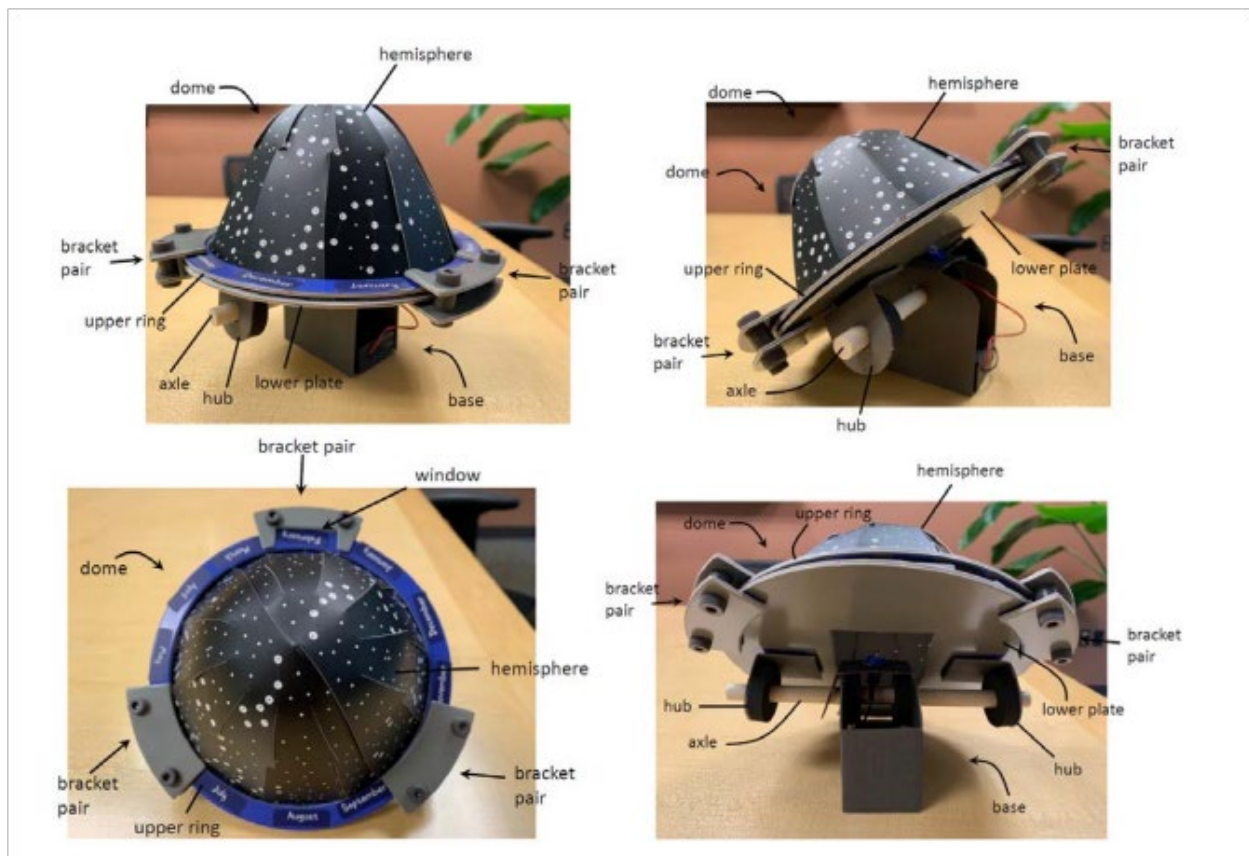
A work may be registered if it qualifies as an “original work[] of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102(a). To be “original,” a work must possess sufficient creativity. *Feist*, 499 U.S. at 345; see 37 C.F.R. § 202.10(a) (“to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form”). Only a modicum of creativity is necessary, but some works fail to meet even this low threshold. *Feist*, 499 U.S. at 358–59. For example, because familiar shapes and designs are not protected by copyright, works containing only those elements will generally not satisfy the creativity requirement, unless those elements are arranged in a sufficiently original way. See 37 C.F.R. § 202.1(a) (“familiar symbols or designs” are not protected by copyright); COMPENDIUM (THIRD) § 906.1 (explaining that the 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”).

The Work before the Board is a work of artistic craftsmanship because it “merely portray[s its] own appearance or the item that the work represents.” COMPENDIUM (THIRD) § 910 (discussing registration guidelines for objects such as toys and dolls); see also *id.* § 925.1 (explaining that works of artistic craftsmanship are “intrinsically aesthetic in nature” and “primarily portray[ their] own appearance”). The Copyright Act provides that copyrightable sculptural works “include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned.” 17 U.S.C. § 101 (definition of “pictorial, graphic, and sculptural works”); see also *Incredible Tech., Inc. v. Virtual Tech., Inc.*, 400 F.3d 1007, 1012 (7th Cir. 2005) (because “functional elements are also excluded from copyright protection,” if “the novel elements [of a work] are functional, the item cannot be copyrighted”). Though the term “works of artistic craftsmanship,” is not defined in the Act, the Supreme Court has described these works as “works of art that might also serve a useful purpose.” *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1011 (2017) (discussing Copyright Office regulations as considered in *Mazer v. Stein*, 347 U.S. 201 (1954)). When evaluating works of artistic craftsmanship, the Office applies the “mirror image” of the *Star Athletica* test for useful articles: the Office excludes the “mechanical or utilitarian aspects” of the work while considering the remainder for registration. COMPENDIUM (THIRD) § 925.2. In evaluating these elements, the Office “will consider both the component elements of the design and the design as a whole,” which may include surface decoration, such as engraving, as well as the selection and arrangement of various elements such as shape and color. *Id.* § 908.3.

Because the Work was submitted as a single unit of publication, KiwiCo may use its application to register all copyrighted works “that [are] physically packaged or bundled together as a single unit.” *Id.* § 1103. But because this registration option is a “narrow” exception to the normal rule that separate works must be registered separately, *id.* § 1103.1(A), applicants like KiwiCo must follow all requirements for eligibility, including that “[a]ll of the copyrightable elements must be recognizable as self-contained works.” *Id.* § 1103.2. Because KiwiCo seeks to register photographic authorship, two-dimensional artwork, sculptural authorship, technical drawings, and text, the Work must contain copyrightable authorship of each. Because the Office previously determined that the Work contains protectable photographs, two-dimensional art, technical drawings, and text, the only issue before the Board is whether the Work contains sufficient sculptural authorship to be protected by copyright—and thus can be registered using the unit of publication option. If the Work lacks protectable sculptural authorship, it is ineligible for registration as a unit of publication unless the sculptural claim is removed.

After carefully examining the Work and considering the arguments made in Second Request, the Review Board affirms the refusal of registration. The Board finds that the Work lacks sculptural elements that are sufficiently creative to be protected by the Copyright Act. The Work is therefore ineligible for registration as a unit of publication containing sculptural authorship.

While KiwiCo argues that that the Work contains sculptural authorship in its “unassembled and assembled forms,” Second Request at 1, the Board concludes that neither version meets the statutory requirement. The assembled version of the Work takes the overall shape of a hemisphere—a common geometric shape that is not protected by copyright. *See* COMPENDIUM (THIRD) § 906.1. KiwiCo also points to other elements beyond the overall hemispherical shape, such as “the large bolts, the bracket pairs, the wooden dowel, the hubs, the material selection, [and] the colors” as being creatively designed “to create a scientific, yet industrial engineering aesthetic.” Second Request at 3. KiwiCo provided additional pictures of these elements in its Second Request, shown below.



*Id.* at 2.

Because these are functional elements of the Work, they are not protected by copyright. The large bolts and bracket pairs, for example, attach the upper ring and lower plate to one another and ensure the dome remains in its proper shape. Similarly, the wooden dowel functions as an axle that allows the planetarium to rotate. Because these are functional elements, they cannot be the basis for copyright protection. *See* 17 U.S.C. § 101 (the “mechanical or utilitarian

aspects” of works of artistic craftsmanship are not protected by copyright); *Spinmaster, Ltd. v. Overbreak LLC*, 404 F. Supp. 2d 1097, 1104 (N.D. Ill. 2005) (“the mechanical parts of the Ultralite [flying saucer toy]—the motor and main propeller—are not entitled to copyright protection”). And the choices of material or color are not sufficiently creative enough to satisfy the statutory standard. *See* COMPENDIUM (THIRD) §§ 310.9 (“As a general rule, the materials used to create a work have no bearing on the originality analysis”), 906.3 (“[m]ere coloration or mere variations in coloring alone are not eligible for copyright protection”).<sup>2</sup>

Similarly, while KiwiCo does not substantively discuss the unassembled version of the Work, that version also consists entirely of unprotectable common shapes and variations thereof. The unassembled work consists of flat variations of common shapes, such as circles, squares, and curved rectangles. Many components of the unassembled work are also functional in nature, such as the metal brackets, which are shaped to match the curvature of the upper ring and lower plate, which are both circular. These functional, mechanical parts are not protectable. *See Spinmaster*, 404 F. Supp. 2d at 1104. Therefore, for the same reasons noted above, the unassembled version of the Work falls outside the space Congress intended to protect under copyright.

KiwiCo asks the Board to compare the Work to works granted registration in previous Board decisions.<sup>3</sup> Second Request at 6–7. Prior Board decisions have “no precedential value and [are] not binding upon the Office when it examines any other application.” COMPENDIUM (THIRD) § 309.3. That said, the prior Board decisions KiwiCo cites are distinguishable.<sup>4</sup> None of those decisions involved a single unit of publication. Additionally, in each of the cited cases, the works contained more creative elements than the Light-Up Planetarium Crate.<sup>5</sup>

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<sup>2</sup> KiwiCo further submits that because the Work is distinct from several examples of third party planetariums provided for comparison in the Second Request, *see* Appendix B, the Work’s design choices are “not inevitable.” Second Request at 3. The Board gives no evidentiary weight to these examples, however, in assessing the Work’s copyrightability, which is done on a case-by-case basis. *See* COMPENDIUM (THIRD) § 309.3. Moreover, “[a]s a general rule, the Office will not consider possible design alternatives that the author may have considered when he or she created the work.” *Id.* § 310.8.

<sup>3</sup> U.S. Copyright Office Review Board, *Decision Reversing Refusal of Registration of Design Cube* (Nov. 22, 2016), <https://copyright.gov/rulings-filings/review-board/docs/design-cube.pdf>; U.S. Copyright Office Review Board, *Decision Reversing Refusal of Registration of Motion Induced Tetrahedral Derivative* (Dec. 4, 2018) (“Motion Induced Tetrahedral Derivative Decision”), <https://copyright.gov/rulings-filings/review-board/docs/motion-induced-tetrahedral-derivative.pdf>; U.S. Copyright Office Review Board, *Decision Reversing Refusal of Registration of Store Front Sculpture* (June 8, 2020) (“Store Front Sculpture Decision”), <https://copyright.gov/rulings-filings/review-board/docs/store-front-sculpture.pdf>.

<sup>4</sup> In the case of the Motion Induced Tetrahedral Derivative, the Board pointedly noted that the copyright would be thin. Motion Induced Tetrahedral Derivative Decision at 2. In the Store Front Sculpture decision, the Board stressed that its decision “relates only to the Work as a whole, and does not extend individually to any of the standard and common elements depicted in the Work.” Store Front Sculpture Decision at 3.

<sup>5</sup> KiwiCo also asks the Board to consider two court decisions that discuss works that were granted registration. These cases did not involve Board decisions. Moreover, upon review, the Board declines to consider them as persuasive authority on the question of copyrightability. The Board notes that in *Arthur v. American Broadcasting Cos., Inc.*, 633 F. Supp. 146 (S.D.N.Y. 1985), cited by KiwiCo, the court briefly acknowledged the Office’s registration but did not discuss copyrightability. Moreover, the court found no infringement, thus making any consideration of copyrightability moot. In *Kellman v. Coca Cola Co.*, 280 F. Supp. 2d 670 (E.D. Mich. 2003), also cited by KiwiCo, the defendant conceded the validity of the copyright and the court did not discuss the issue. 280 F. Supp. 2d at 676.



Because the Work claims to contain sculptural authorship but lacks protectable sculptural elements, the Work cannot be registered as a single unit of publication. And because KiwiCo refuses to amend its claims in sculpture, the Registration Program correctly refused registration. KiwiCo is welcome to file a new application to register the Work as a unit of publication that does not claim sculptural authorship.

#### 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**

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

## APPENDIX A

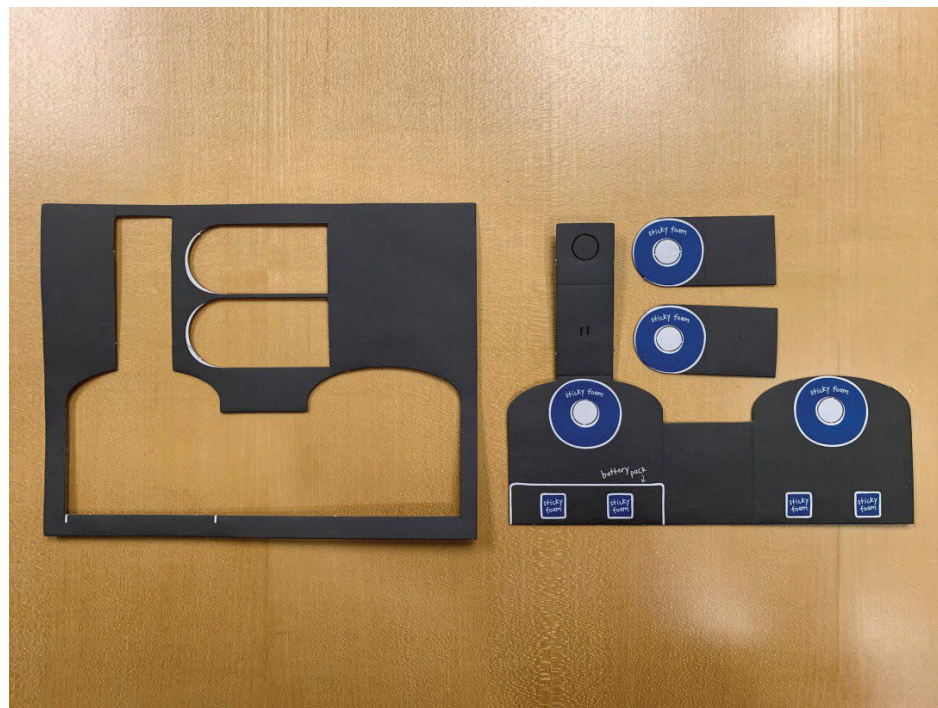
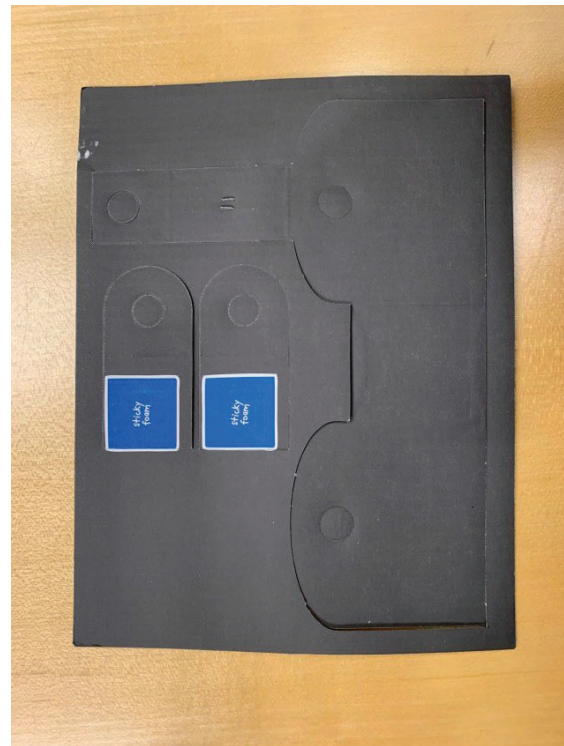
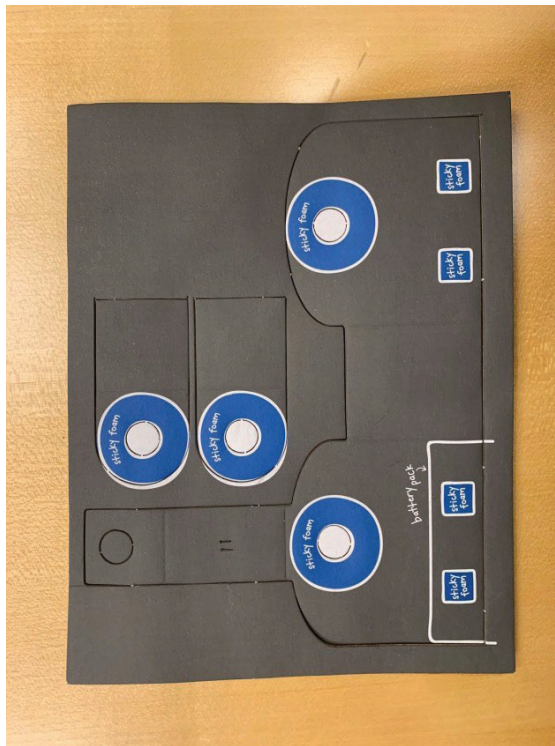


# Light-Up Planetarium Crate (Unit of Publication)



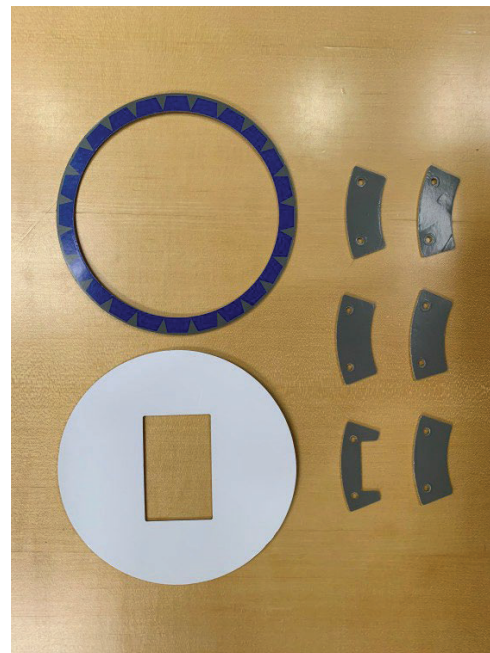
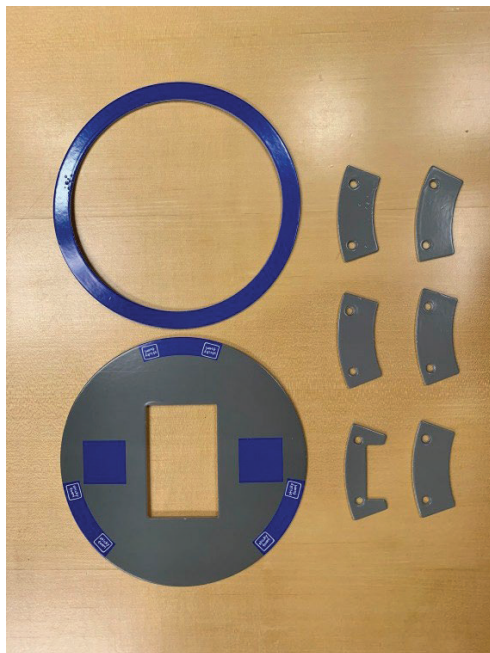
# (1) Light-Up Planetarium (Disassembled)





(1) Light-Up Planetarium (Disassembled)





(1) Light-Up Planetarium (Disassembled)





(1) Light-Up Planetarium (Disassembled)

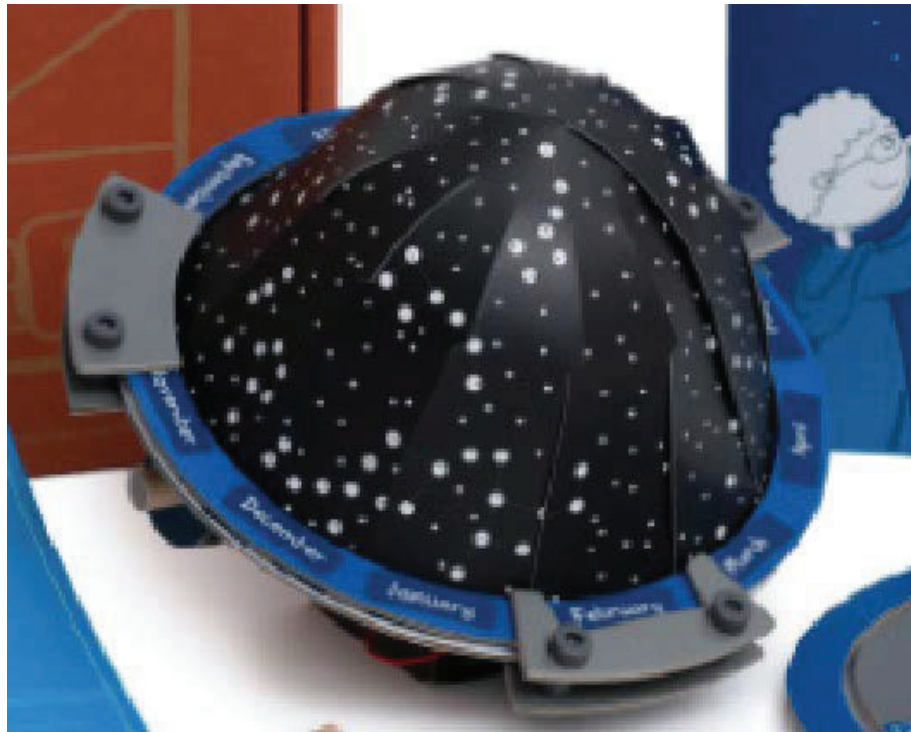




(1) Light-Up Planetarium (Disassembled)



# (1) Light-Up Planetarium (Assembled)



(1) Light-Up Planetarium (Assembled)

APPENDIX B

