



**United States Copyright Office**

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Howard & Howard PLLC  
Attn: Daniel H. Bliss  
450 West Fourth Street  
Royal Oak, MI 48067

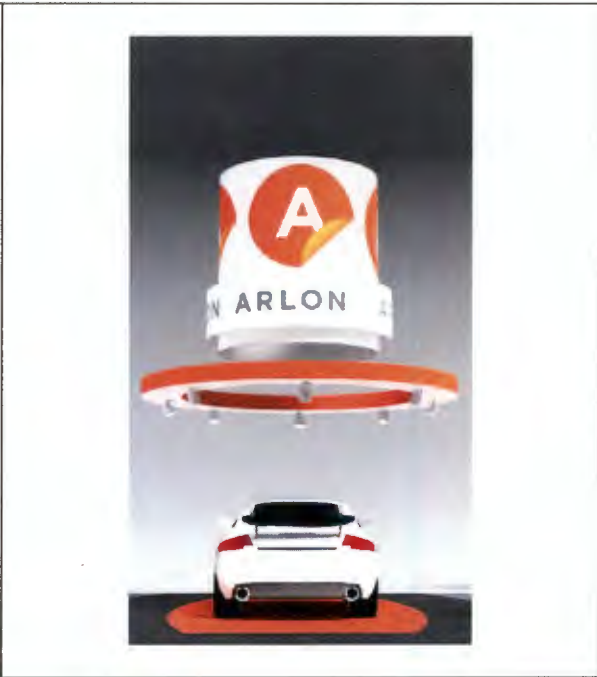
**Re: Second Request for Reconsideration of Refusal to Register “Arlon FESPA/ISA 2014 Trade Show”; Service Request #: 1-2384254132; Correspondence ID: 1-1G9CIT3**

Dear Mr. Bliss:

The Review Board of the United States Copyright Office (“Board”) has considered Team One Display Services Inc.’s (“Team One”) second request for reconsideration of the Registration Program’s refusal to register a “3-D work of artistic craftsmanship” claim in the work titled “Arlon FESPA/ISA 2014 Trade Show” (“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 is a three-dimensional trade show booth comprised of multiple display elements, including two kiosks, two seating areas, and a vehicle-display platform. A white car is placed in the center of the booth, flanked by two semi-circle seating arrangements—on one side, chairs around a circular coffee table abutting a white couch and two square end tables, and on the other, a rectangular glass table surrounded by six office chairs. A television screen is mounted above each seating area. The kiosks hold various advertising and, at least on one side, a sheaf of color swatches. In its application, Team One has made clear that it is attempting to claim the work as a single work, rather than a collection of component works. The Work is depicted from various points of view below.



## II. ADMINISTRATIVE RECORD

On May 14, 2015, Team One filed an application to register a copyright claim in the Work as a “3-D Work of Artistic Craftsmanship.” Ten graphic images depicting a three-dimensional trade show booth from various vantage points were submitted as the deposit material. In a May 18, 2015 letter, a Copyright Office registration specialist refused to register the claim, finding that it did “not contain any original 3-D authorship” eligible for copyright protection, noting in particular that copyright cannot protect an “idea or concept” for “the arrangement of materials in a trade show booth.” Letter from Guy Messier, Registration Specialist, to Daniel Bliss (May 18, 2015) (“First Refusal”).

In a letter dated August 17, 2015, Team One requested that the Office reconsider its initial refusal to register the Work. Letter from Daniel Bliss to U.S. Copyright Office (Aug. 17, 2015) (“First Request”). Team One claimed to seek registration of “[t]he arrangement and particular visual aesthetic appearance of the trade show booth” as opposed to an idea or concept of a booth. *Id.* Noting that copyright protects “works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects” as well as the design of useful articles “to the extent that[] such design incorporates pictorial, graphic, or sculptural features” that are separable from the useful article, Team One contended that “the visual aesthetic appearance and arrangement of materials in a trade show booth” was eligible for copyright. *Id.* at 1-2.

After reviewing the Work in light of the points raised in the First Request, the Office concluded it was “still unable to register a copyright claim in this [W]ork, a useful article, because it does not contain any separable, copyrightable features.” Letter from Stephanie Mason, Attorney-Advisor, to Daniel Bliss at 1 (Feb. 25, 2016) (“Second Refusal”). While the Office concluded that the logo and name accenting the booths were separable, it concluded that those elements were insufficiently creative for copyright protection. *Id.*

On May 20, 2016, Team One requested that the Office reconsider for a second time its refusal to register the Work. Letter from Daniel Bliss to U.S. Copyright Office (May 20, 2016) (“Second Request”). Team One reasserted that the “design or appearance of the trade show booth is a 3-dimensional work of artistic craftsmanship” that is conceptually separable from the utilitarian aspects of the trade show booth and is, therefore, “eligible for copyright registration.” Second Request at 3. In support, Team One relied heavily on the Sixth Circuit’s decision in *Varsity Brands, Inc. v. Star Athletica, L.L.C.*, 799 F.3d 468 (6th Cir. 2015). Team One claimed that “the design concept consists of original combinations, positioning, and arrangement of materials” and that the artistic judgment of the Team One designers was “not constrained by functional considerations concerning how a trade show booth would be eventually made.” Second Request at 2. It noted that “[t]hese designs could be applied to other trade show booths.” *Id.* Team One further stated that “[c]ertain artistic features [of the Work] are non-functional or could have been designed differently;” for example, “the columns and platforms could be any appearance such as round, rectangular, etc.” *Id.* at 3.

Following a review of the record, the Review Board sent a letter to Team One on January 24, 2017 “in order to clarify the nature of the Work and the elements for which Team One [sought] copyright registration.” Letter from Rachel Fertig, Attorney-Advisor, to Daniel Bliss at 1 (Jan. 24, 2017) (“Fertig Letter”). In particular, because the images submitted as deposit



material appear to be renderings of a booth design rather than photographs, the letter asked whether Team One intended to register “a full-size three-dimensional version of the trade show booth, a less than life-size three-dimensional replica of the trade show booth, or the two-dimensional images submitted as deposit materials themselves.” *Id.* The letter also asked whether Team One sought “registration for any or all of the two-dimensional artwork . . . depicted on the . . . trade show booth.” *Id.* The letter requested a response from Team One postmarked within “60 calendar days from the date [of the letter,]” and advised that if a timely response was not received, the Board would “review the Work as seeking registration for the copyrightable elements, if any, of the full-scale trade show booth itself.” *Id.* at 4.

The clarification letter gave Team One until March 24, 2017 to reply. To date, the Board has not received any response from Team One. This letter, accordingly, proceeds to resolve Team One’s second request for reconsideration by evaluating the Work as a claim for copyrightable, three-dimensional authorship incorporated into an actual trade show booth, as opposed to a model replica.

### III. DISCUSSION

#### A. *The Legal Framework*

##### 1) *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. Artistic features applied on or incorporated into a useful article, however, 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. 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”).

## **2) Distinction Between Ideas and Expression**

Section 102(b) of the Copyright Act provides that copyright protection for expressive works of authorship does not extend to “any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” 17 U.S.C. § 102(b). Section 102(b) codifies the longstanding principle, known as the idea-expression dichotomy, that copyright law protects the original expression of ideas, but not the underlying ideas themselves. The Supreme Court in 1879 held that the copyright in a book describing a bookkeeping system, with blank forms and ruled lines and headings, did not give the copyright owner the right to prevent others from using the book-keeping system described nor “the exclusive right to make, sell, and use account-books prepared upon the plan set forth in such book.” *Baker v. Selden*, 101 U.S. 99, 102–04 (1879). Though the Office is permitted to register a sufficiently original artistic description, explanation, or illustration of an idea, procedure, process, system, method of operation, concept, principle, or discovery, *see* H.R. Rep. No. 94–1476, at 56 (1976), “the registration would be limited to the copyrightable literary, musical, graphic, or artistic aspects of the work . . .” COMPENDIUM (THIRD) § 313.3(A); *see* 37 C.F.R. § 202.1(b) (barring copyright protection for “[i]deas, plans, methods, systems, or devices, as distinguished from the particular manner in which they are expressed or described in a writing.”).

Copyright’s merger doctrine, which states that idea and expression merge together when the expression cannot be separated from the idea, is a closely related principle that bars copyrightability of certain works. *See Baker*, 101 U.S. at 103 (explaining that if the “art” that a book “teaches cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the public”); *CCC Info. Servs., Inc. v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61, 68 (2d Cir. 1994) (“[W]hen the expression is essential to the statement of the idea, the expression also will be unprotected, so as to insure free public access to the discussion of the idea.”).

## **3) Originality**

A work may be registered if it qualifies as an “original work[] of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102(a). In this context, the term “original” consists of two components: independent creation and sufficient creativity. *See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). First, the work must have been independently created by the author, *i.e.*, not copied from another work. *Id.* Second, the work must possess sufficient creativity. *Id.* Only a modicum of creativity is necessary, but the Supreme Court has ruled that some works (such as the alphabetized telephone directory at issue in *Feist*) fail to meet even this low threshold. *Id.* The Court observed that “[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity.” *Id.* at 363. It further found that there can be no copyright in a work in which “the creative spark is utterly lacking or so trivial as to be virtually nonexistent.” *Id.* at 359.

The Office's regulations implement the longstanding requirement of originality set forth in the Copyright Act and described in the *Feist* decision. *See, e.g.*, 37 C.F.R. § 202.1(a) (prohibiting registration of "[w]ords and short phrases such as names, titles, slogans; familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering, or coloring"); *id.* § 202.10(a) (stating "to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form"). Some combinations of common or standard design elements may contain sufficient creativity with respect to how they are juxtaposed or arranged to support a copyright. Nevertheless, not every combination or arrangement will be sufficient to meet this test. *See Feist*, 499 U.S. at 358 (finding the Copyright Act "implies that some 'ways' [of selecting, coordinating, or arranging uncopyrightable material] will trigger copyright, but that others will not"). A determination of copyrightability in the combination of standard design elements depends on whether the selection, coordination, or arrangement is done in such a way as to result in copyrightable authorship. *Id.*; *see also Atari Games Corp. v. Oman*, 888 F.2d 878 (D.C. Cir. 1989).

A mere simplistic arrangement of non-protectable elements does not demonstrate the level of creativity necessary to warrant protection. For example, the United States District Court for the Southern District of New York upheld the Copyright Office's refusal to register simple designs consisting of two linked letter "C" shapes "facing each other in a mirrored relationship" and two unlinked letter "C" shapes "in a mirrored relationship and positioned perpendicular to the linked elements." *Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 496 (S.D.N.Y. 2005). Likewise, the Ninth Circuit has held that a glass sculpture of a jellyfish consisting of clear glass, an oblong shroud, bright colors, vertical orientation, and the stereotypical jellyfish form did not merit copyright protection. *See Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003). The language in *Satava* is particularly instructive:

It is true, of course, that a *combination* of unprotectable elements may qualify for copyright protection. But it is not true that *any* combination of unprotectable elements automatically qualifies for copyright protection. Our case law suggests, and we hold today, that a combination of unprotectable elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.

*Id.* (internal citations omitted).

### ***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 separable and creative authorship necessary to sustain a claim to copyright.

1. As an initial matter, the Board notes that Team One did not respond to the Board's letter seeking clarification as to whether Team One sought to register a model replica of a trade show booth, the two-dimensional layout design of the booth, and/or the two-dimensional artwork on the tradeshow booth, compared to the particular arrangement of an actual trade show booth. *See Fertig Letter*. Based on the administrative record, the Board interprets Team One's claim in



the Work as seeking registration for any separable 3-D artistic authorship incorporated into an actual trade show booth.<sup>1</sup> *See, e.g.*, Application (describing the work as “3-dimensional”); Fertig Letter at 4 (stating if a response was not received, the Board would “review the Work as seeking registration for the copyrightable elements, if any, of the full-scale trade show booth itself.”).

The Board also concludes, as an initial matter, that Team One is not seeking to register any two-dimensional authorship in the graphics applied to the surface of the trade-show booth structures.<sup>2</sup> To start, Team One’s application only sought three-dimensional authorship. Moreover, in its requests for reconsideration, Team One explains that “[t]he design concept consists of original combinations, positioning, and arrangement of materials” but that “[t]hese designs could be applied to other trade show booths” because the “particular visual appearance of the trade show booth can have any suitable artistic features.” Second Request at 2-3 (noting that the “color, writing, and appearance of the artwork applied to the trade show booth . . . could be any appearance”); *accord* First Request at 2. In fact, this adaptable approach is touted on Team One’s blog, which advertises the ability to apply “custom graphics” to rented display pieces.<sup>3</sup> Accordingly, the Board interprets these statements to mean that the Team One’s claim does not include the two-dimensional graphics depicted on the various parts of the booth.

2. In considering whether the three-dimensional trade show booth is copyrightable, the Office must focus on the fixed, expressive elements of the Work, as opposed to unprotectable interior design concepts. Although Team One ostensibly denies seeking protection for the “idea or concept” of a trade show booth, the requests include arguably contrary statements such as: the “arrangement and design of the particular visual aesthetic appearance of the trade show booth is conceptual”; “[t]he design concept consists of original combinations, positioning, and arrangement of materials”; and that “[t]hese designs could be applied to other trade show booths.” First Request at 1; Second Request at 1-2. But copyright only protects works “fixed in

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<sup>1</sup> To the extent Team One wishes to seek registration of the Work as a model or two-dimensional designs, it may do so by submitting a new application, deposit, and fee. Although interior design concepts are not copyrightable, copyright law can protect the drawings or renderings of the design as two-dimensional artwork. *See Ale House Mgmt. v. Raleigh Ale House*, 205 F.3d 137 (4th Cir. 2000) (drawings of a floor plan are copyrightable). But under 17 U.S.C. § 113(b), the ability to prohibit the reproduction of the drawings themselves would not extend to prohibit someone from recreating the selection and arrangement of items illustrated in the drawings. *Cf. Ultraflo Corp. v. Pelican Tank Parts, Inc.*, 845 F.3d 652, 658 (5th Cir. 2017). Similarly, although models of a useful article, such as a toy car, may be eligible for protection under the Copyright Act, such protection would be limited to the model itself, as opposed to a useful article depicted by the model. *See* 17 U.S.C. 113(b); *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. at 1010-1011; H.R. REP. NO. 94-1476, at 105 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5668, 5720-21 (“[C]opyright in a pictorial, graphic, or sculptural work, portraying a useful article as such, does not extend to the manufacture of the useful article itself.”).

<sup>2</sup> Additionally, to the extent that any of the two-dimensional graphics depicted in the deposit material are eligible for registration, it appears that these graphics belong to Team One’s client, Arlon. *See Restoring a VW Micro Bus for a Trade Show Wrap*, TEAM ONE DISPLAYS, <https://teamonedisplays.wordpress.com/2010/07/14/restoring-a-vw-bus-for-a-trade-show-wrap/> (last visited Nov. 1, 2017). *See also* COMPENDIUM (THIRD) § 618.2 (“A registration only covers the new material that the author contributed to the work . . . [and] does not extend to any unclaimable material” such as “[c]opyrightable material that is owned by another party.”).

<sup>3</sup> *Why Rent? Unlimited Options and Flexibility, That’s Why!* TEAM ONE DISPLAYS, <https://teamonedisplays.wordpress.com/page/2/> (last visited, Nov. 1 2017) (“Team One’s rental inventory consists of a wide variety of pre-built shapes. Wall panels, kiosks, curved walls, storage areas, graphic panels, and more all can be easily mixed and matched to suit the needs of a particular show” and “can be completely outfitted with custom graphics” making it possible for “panels [to] be switched out and updated at any time, giving the client the flexibility to easily make changes to their display.”).

[a] tangible medium of expression,” and in no case can copyright protection extend “to any idea . . . concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied.” 17 U.S.C. § 102(a)-(b); *see Meribear Prods. Inc. v. Vail*, No. 2:14-cv-00454-DMG-E, 2014 WL 12507609 (Aug. 5, 2014) (discussing fixation requirement in relation to photographs of interior design work). For example, unfixed “design concepts” such as color schemes, a table surrounded by six chairs, or a semi-circle seating area flanked by a sofa, are not elements that are eligible for copyright protection. *See Ale House Mgmt v. Raleigh Ale House*, 205 F.3d 137, 143 (4th Cir. 2000) (noting that the idea of using an island shaped bar to bisect a seating area which has booths on one side and stool seating on the other was not entitled to copyright protection). Thus, to the extent Team One seeks to protect a modular design that can be adjusted to place discrete pieces into a variety of dimensions and spaces, this “design concept” lacks the requisite fixation required for copyright. The Board thus affirms the Registration Program’s refusal to grant protection for the Work as a design concept.

3. The next question is whether the exact three-dimensional Work depicted in the deposit can qualify as a protectable pictorial, graphic, or sculptural work. In its submissions, Team One repeatedly suggests that the trade show booth is a “useful article,” which is defined in the Copyright Act 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; *see* Second Request at 1-3; First Request.<sup>4</sup> The Board therefore examines the Work to determine whether any separable, copyrightable features are present and eligible for registration. To do so, the Office applies the Supreme Court’s test stated in *Star Athletica*, affording copyright protection only to such features that “(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.” *Star Athletica*, 137 S. Ct. at 1007. As explained further below, the Board finds that the Work does not meet this test.

Although Team One repeatedly asserts that the Work is conceptually separable from the trade show booth, it does not identify any particular three-dimensional features that could stand on their own as works of art apart from the trade show booth. For example, the Work includes two display kiosks with panels for exhibiting posters, color swatches, etc. The kiosks, if removed from the overall trade show booth, are still useful articles. *See* 17 U.S.C. § 101 (“An article that is normally a part of a useful article is considered a ‘useful article.’”); *Star Athletica*, 137 S. Ct. at 1010-1011 (“If the feature is not capable of existing as a pictorial, graphic, or sculptural work once separated from the useful article, then it was not a pictorial, graphic, or sculptural feature of that article, but rather one of its utilitarian aspects.”). The same is true of the Work’s vehicle-display platform, television monitors, stanchions, and seating areas. Team One does allege that the booth includes various columns and platforms for which there are a limitless number of design alternatives. *See* First Request at 2; Second Request at 3. But the images provided depict only basic circular poles and structural platforms, and Team One identifies no aesthetic aspects of these poles or platforms. Simply because a useful article could be designed in different ways does not make it any less of a useful article. For example,

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<sup>4</sup> Although Team One also sometimes refers to the Work as a “work of artistic craftsmanship,” *see, e.g.*, Second Request at 2, in context, it is clear that the gravamen of its argument is that the Work encompasses separable sculptural features of a useful article.



although the overall design of a car may be guided by aesthetic choices, Congress did not intend cars to be protectable under copyright, although a particular artistic feature, such as a hood ornament or a creative paint job, could qualify. *See* H.R. REP. NO. 94-1476, at 55 (1976), *reprinted in* 1976 U.S.C.C.A.N. at 5668-69 (“Unless the shape of an automobile . . . contains some element that . . . can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted under the bill.”). In an analogous case, the Ninth Circuit held that display folders of a commercial carpet business lacked “any artistic feature identifiable separately from the utilitarian aspects of the article.” *Fabrica Inc. v. El Dorado Corp.*, 697 F.2d 890, 894 (9th Cir. 1983). Like the display folders, no element of the work could stand alone as an artistic work, and thus, the Work here is not registrable.

Further, while Team One claims that the overall trade show booth could be “visualized as a free-standing sculpture or statuette,” the overall design and configuration of useful articles is not eligible for copyright protection. First Request at 2. *See* 17 U.S.C. 101 (protection is available for “pictorial, graphic, or sculptural *features*” that are “*incorporate[d]*” into the design of useful articles (emphases added)); *Star Athletica*, 137 S. Ct. at 1007 (“Congress has provided for limited copyright protection for certain features of industrial designs.”); H.R. Rep. No. 94-1476, at 55 (1976) (noting that copyright protection does “not cover the over-all configuration of the utilitarian article as such”).

To be sure, the computer-generated renderings submitted as deposit material may not show every three-dimensional feature of the Work in sufficient detail; it is for this reason that the Board wrote Team One to clarify whether it was claiming specific three-dimensional features. *See* Fertig Letter at 2-3 (asking for additional information regarding whether Team One was claiming “four rotating cubes” in a kiosk panel, “cut-outs for plants,” “exterior display cases” or “car display elements”). But without additional information, which Team One has declined to provide, the Board cannot conclude that the features depicted in the graphic images are anything but utilitarian aspects of the useful article itself. Ultimately, the Board cannot identify any three-dimensional features that “can be perceived as a . . . three-dimensional work of art separate from the useful article.” *Star Athletica*, 137 S. Ct. at 1007. Accordingly, the Board affirms the Registration Program’s finding that the “[W]ork, a useful article, . . . does not contain any separable, copyrightable features.” Second Refusal at 1.

#### 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.

BY:



Regan A. Smith

Copyright Office Review Board