United States Copyright Office
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August 19, 2014

Rader, Fishman & Grauer, PLLC
Attn: Michael B. Stewart
39533 Woodward Ave., Suite 140
Bloomfield Hills, MI 48304

Re: L405 Land Rover Vehicle Design
Correspondence ID: 1-GQBLRF

Dear Mr. Stewart:

The Review Board of the United States Copyright Office (the "Board") is in receipt of your second request for reconsideration of the Registration Program's refusal to register the work entitled: *L405 Land Rover Vehicle Design.* You submitted this request on behalf of your client, Land Rover, on January 23, 2014.

The Board has examined the application, the deposit copies, and all of the correspondence in this case. After careful consideration of the arguments in your second request for reconsideration, the Board affirms the Registration Program's denial of registration of this copyright claim. The Board's reasoning is set forth below. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action on this matter.

I. DESCRIPTION OF THE WORK

L405 Land Rover Vehicle Design (the "Work") is an automobile design that includes the spacing and shaping of the automobile's side profile, back profile, front profile, spoiler, rear tail lights, profile near the door jamb, lower body panel, headlights, and grill. The below images are photographic reproductions of the Work from the deposit materials:

II. ADMINISTRATIVE RECORD

On April 2, 2013, the United States Copyright Office (the "Office") issued a letter notifying Land Rover (the "Applicant") that it had refused registration of the above mentioned Work. *Letter from Robin Jones, Registration Specialist, to Michael B. Stewart* (Apr. 2, 2013). In its letter, the Office stated that it could not register the Work because it is a useful article that does not contain any separable authorship necessary to sustain a claim to copyright. *Id.*

In a letter dated July 2, 2013, you requested that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusal to register the Work. *Letter from Michael B. Stewart to Copyright RAC Division* (July 2, 2013) ("First Request"). Upon reviewing the Work in light of the points raised in your letter, the Office affirmed that the Work "is a useful article that does not contain any authorship that is both separable and copyrightable" and again refused registration. *Letter from Stephanie Mason, Attorney-Advisor, to Michael B. Stewart* (July 2, 2013).

Finally, in a letter dated January 23, 2014, you 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 Michael B. Stewart to Copyright R&P Division* (Jan 23, 2014) ("Second Request"). At the outset of your letter, you claim the Office has denied the Applicant "due process of law in connection with the decision to withhold copyright protection." *Id.* at 1. You base this claim on the fact that whole of *The Compendium of U.S. Copyright Office Practices, Second Edition* ("*Compendium II*"), is not available on the Copyright Office website and your assertion that "a telephone voice mail message" and "an email" seeking a copy of *Compendium II* were "unreturned and ignored." *Id.*

Regarding the Work's copyrightablitiy, your letter agrees with the Office's determination that the Work is a useful article but objects to its conclusion that the Work does not include design features that are both separable and sufficiently creative to warrant registration. Specifically, you argue that the Work possesses pictorial and sculptural design elements that are conceptually separable from its utilitarian aspects and include at least the minimum amount of creativity required to support registration under the low standard for originality. *Second Request, passim*; *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991) (setting forth the current originality standard). Additionally, your argument references several cases in support of the general principle that design elements found to be conceptually separable from a work's utilitarian aspects are entitled to copyright protection. *Id.* at 3-7 (citing several cases related to copyright separability, including *DC Comics v. Towle*, No. CV 11-3934 RSWL (OPx), 2013 WL 541430 (C.D. Cal. Feb. 7, 2013).

Lastly, you conclude that there is "no legitimate basis in fact" for the Board to uphold the Office's prior determinations that the Work's design features are not separable from its utilitarian function and assert that the Board "ought to take into account the overlap between copyright and design patent protection." *Second Request* at 7.

III. DECISION

A. *The Legal Framework*

(1) Separability

Copyright protection does not generally extend to useful articles, *i.e.*, "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. However, works of artistic authorship, 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 [the designs'] form but not their mechanical or utilitarian aspects are concerned." *Id.* at § 101.

To be clear, a design incorporated into a useful article is only eligible for copyright protection to the extent that the design includes "pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, utilitarian aspects of the article." *Id.*; *see also Esquire, Inc. v. Ringer,* 591 F.2d 796, 800 (D.C. Cir. 1978), *cert. denied,* 440 U.S. 908 (1979) (holding copyright protection is not available for the "overall shape or configuration of a utilitarian article, no matter how aesthetically pleasing that shape may be"). The Board employs two tests to assess separability: (1) a test for "physical separability"; and, (2) a test for "conceptual separability." *Id.; see also Custom Chrome, Inc. v. Ringer*, 35 U.S.P.Q. 2d 1714 (D. D.C. 1995) (finding that the Copyright Office's tests for physical and conceptual separability are "a reasonable construction of the copyright statute" consistent with the words of the statute, present law, and the legislature's declared intent in enacting the statute); *and see Inhale, Inc. v. Starbuzz Tobacco, Inc.*, 739 F.3d 446, 449 n.2 (9th Cir. 2014) (characterizing the deference owed to the Office's interpretation of "separability" as follows: "We think § 101 is sufficiently ambiguous to justify deference to administrative interpretations.").

To satisfy the test for "physical separability," a work's pictorial, graphic, or sculptural features must be able to be physically separated from the work's utilitarian aspects, by ordinary means, without impairing the work's utility. *See, e.g., Mazer v. Stein*, 347 U.S. 201 (1954) (holding a sculptured lamp base depicting a Balinese dancer did not loose its ability to exist independently as a work of art when it was incorporated into a useful article); *and see, Ted Arnold, Ltd. v. Silvercraft Co.*, 259 F. Supp. 733 (S.D.N.Y. 1966) (upholding the copyright in a sculpture of an antique telephone that was used as a casing to house a pencil sharpener because the sculpture was physically separable from the article without impairing the utility of the pencil sharpener). To satisfy the test for "conceptual separability," a work's pictorial, graphic, or sculptural features must be able to be imagined separately and independently from the work's utilitarian aspects without destroying the work's basic shape. *See, e.g.,* H.R. REP. NO. 94-1476, at 55 (1976), *reprinted in* U.S.C.C.A.N. 5659, 5668 (indicating a carving on the back of a chair or a floral relief design on silver flatware are examples of conceptually separable design features). A work containing design features that fail to qualify as either physically or conceptually separable from the work's intrinsic utilitarian functions are ineligible for registration under the Copyright Act.

(2) Originality

All copyrightable works must qualify as "original works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a). As used with respect to copyright, the term "original" consists of two components: independent creation and sufficient creativity. *See Feist*, 499 U.S. at 345. 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.* While only a modicum of creativity is necessary to establish the requisite level, the Supreme Court has ruled that some works (such as the telephone directory at issue in *Feist*) fail to meet this 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 nonexistent." *Id.* at 359.

The Office's regulations implement the long-standing requirements of originality and creativity set forth in the law and, subsequently, the *Feist* decision. *See* 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"); *see also* 37 C.F.R. § 202.10(a) (stating "[i]n order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form").

Of course, 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 grade. *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"). Ultimately, the determination of copyrightability in the combination of standard design elements rests 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. D.C. 1989).

To be clear, the mere simplistic arrangement of unprotectable elements does not automatically establish the level of creativity necessary to warrant protection. For example, the Eighth Circuit upheld the Copyright Office's refusal to register a simple logo consisting of four angled lines which formed an arrow and the word "Arrows" in a cursive script below the arrow. *See John Muller & Co., Inc. v. NY Arrows Soccer Team, Inc.*, 802 F.2d 989 (8th Cir. 1986). Likewise, the Ninth Circuit held that a glass sculpture of a jellyfish that consisted of elements including clear glass, an oblong shroud, bright colors, proportion, 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 court's language in *Satava* is particularly instructional:

> [i]t 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) (emphasis in original).

Finally, Copyright Office Registration Specialists (and the Board, as well) do not make aesthetic judgments in evaluating the copyrightability of particular works. They are not influenced by the attractiveness of a design, the espoused intentions of the author, the design's uniqueness, its visual effect or appearance, its symbolism, the time and effort it took to create, or its commercial success in the marketplace. *See* 17 U.S.C. § 102(b); *see also Bleistein v. Donaldson*, 188 U.S. 239 (1903). The fact that a work consists of a unique or distinctive shape or style for purposes of aesthetic appeal does not automatically mean that the work, as a whole, constitutes a copyrightable "work of art."

A. Analysis of the Work

After carefully examining the Work and applying the legal standards discussed above, the Board finds that *L405 Land Rover Vehicle Design* does not possess elements that are *both* separable from the Work's utilitarian functions and sufficiently creative to support a claim to copyright. Accordingly, we affirm the Registration Program's decision to deny registration.

A "useful article" is defined by statute 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 (2007). The Board accepts the general principal that design features incorporated into utilitarian articles are not, *per se*, disqualified from copyright registration. However, as discussed above, the law requires that, to be eligible for registration, such design features must be either physically or conceptually separable from the utilitarian aspects of the industrial product. *See Esquire,* 591 F.2d at 800.

Here, it is undisputed that the Work (an automobile design) is a useful article. Thus, for there to be any consideration of the Work's design features, the features must be either physically or conceptually separable from the Work's utilitarian functions. *See Esquire,* 591 F.2d at 800. In the *Second Request,* you argue that the Work's overall design, including the spacing and shaping of the automobile's side profile, back profile, front profile, spoiler, rear tail lights, profile near the door jamb, lower body panel, headlights, and grill are conceptually separable from its utilitarian functions. *Second Request passim.* We find your arguments to be unpersuasive. Specifically, we find it impossible to imagine a way to physically or conceptually separate these design elements from the Work without destroying its configuration as an automobile. Indeed, in arguing that the above elements are separable, you are essentially claiming the work's overall shape and form is distinguishable from its intended function. It is well settled that copyright protection is not available based on the "overall shape or configuration" of a utilitarian article "no matter how aesthetically pleasing that shape or configuration might be." *Esquire,* 591 F.2d at 800; *see also* H.R. REP. NO. 94-1476, at 54-55 (1976) (explaining that "although the shape of an industrial product may be aesthetically

satisfying and valuable, the Committee's intention is not to offer it copyright protection under the bill").

The Board finds your reliance on *DC Comics v. Towle* to be misplaced. *DC Comics v. Towle*, No. CV 11-3934 RSWL (OPx), 2013 WL 541430 (C.D. Cal. Feb. 7, 2013). We agree with the *DC Comics* court's general holding that a work cannot be, *ipso facto*, denied registration simply because it is an automobile. *Id.* at *16. However, we do not agree that the court's holding (which lends significant weight to the court's determination that the work at issue, the "Batmobile," is a fully realized fictional character; highlights the batmobile's fantastical, bat-shaped design features and overall character-driven theme; and, expressly distinguishes the Batmobile from other automobiles) supports registration of the Work at issue. *Id.* at *13-18 (stating "Defendant's argu[e] that extending copyright protection to the Batmobile will open the door for the copyrighting of other automobiles. However, the Batmobile is *sui generis*. The unique elements that Plaintiff seeks to protect make the Batmobile the famous vehicle that it is. Thus, the Court finds that the Batmobile is subject to copyright protection.").

Finally, there is nothing in the Code of Federal Regulations or the Copyright Act that requires the Office to register a work based on an assertion that the Work would qualify for protection based on its patentability under the United States patent laws. Thus, the Board disagrees with your argument that the Office "ought to take into account the overlap between copyright and design patent protection" in determining whether the Work qualifies for protection under the Copyright Act. *Second Request* at 7.

B. Due Process Argument

Regarding your claim that the Office has denied the Applicant "due process of law in connection with the decision to withhold copyright protection," the Board finds that it is neither authorized nor equipped to make determinations on constitutional challenges. *Id.* at 1. Pursuant to 37 C.F.R. § 202.5, the Board's authority is limited to administrative review of the Office's prior refusal to register a claim to copyright.

Nevertheless, even if the Board were to consider your denial of due process argument, we would likely find it to be without merit. The Code of Federal Regulations provides the following information regarding obtaining copies of the Office's various administrative staff manuals:

> (7) The Copyright Office maintains administrative staff manuals referred to as its "Compendium of Office Practices I" and "Compendium of Office Practices II" for the general guidance of its staff in making registrations and recording documents. The manuals, as amended and supplemented from time to time, are available for purchase from the National Technical Information Service (Compendium I) and the Government Printing Office (Compendium II). They are also available for public inspection and copying in the Records Research and Certifications Section. As the Office updates and revises certain chapters of Compendium II, it will make the

> information available on the Copyright Office's Web site. This information is also available for public inspection and copying in the Records Research and Certifications Section.

37 C.F.R. § 201.2(b)(7). Accordingly, the Board rejects your assertion that the Office "has made a determination that no copyright may issue, relying on a purportedly controlling standard from a document that is inaccessible." *Second Request* at 2.

IV. CONCLUSION

In sum, the Board finds that the *L405 Land Rover Vehicle Design* does not include design elements that are both separable from the Work and possess the requisite amount of copyrightable authorship to warrant registration.

Thus, for the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the work entitled: *L405 Land Rover Vehicle Design*. This decision constitutes final agency action on this matter. 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

BY: _____
William J. Roberts, Jr.
Copyright Office Review Board