



United States Copyright Office

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August 15, 2016

Cary W. Brooks
Brooks Group
48685 Hayes Road
Shelby Township, MI 48315

**Re: Second Request for Reconsideration for Refusal to Register Mini-Keg Growler;
Correspondence ID: 1-P6402Z**

Dear Mr. Brooks:

The Review Board of the United States Copyright Office ("Board") has considered Deep Wood Brew Products, LCC's ("Deep Wood's") second request for reconsideration of the Registration Program's refusal to register a three-dimensional sculpture claim in the work titled "Mini-Keg Growler" ("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 WORKS

The Work is a stainless steel growler (a container used for carrying draft beer) designed in the shape of a traditional beer keg. It consists of a cylindrical base and a conical top leading to a tube-shaped opening closed off with a metal screw-type cap. A metal skirt, or circular sleeve, is attached at the point where the cylindrical base joins the conical top. The skirt has two oval-shaped holes cut out of it, positioned directly opposite one another across the center of the cylinder. Additionally, semi-circles are cut out of the skirt at 90 and 270 degrees around the center from the first oval shaped hole, at the point where the skirt is attached to the cylindrical base. A reproduction of the Work is set forth below.



II. ADMINISTRATIVE RECORD

On November 26, 2013, Deep Wood filed an application to register a copyright claim in the Work. In a June 18, 2014 letter, a Copyright Office registration specialist refused to register the claim, finding that the Work “is a ‘useful article’ which does not contain any separable authorship needed to sustain a claim to copyright.” Letter from Allan Runge, Registration Specialist, to Cary Brooks, Brooks Group (June 18, 2014).

In a letter dated August 21, 2014, Deep Wood requested that the Office reconsider its initial refusal to register the Work. Letter from Cary W. Brooks, Brooks Group, to U.S. Copyright Office (Aug. 21, 2014) (“First Request”). After reviewing the Work in light of the points raised in the First Request, the Office re-evaluated the claims and again concluded that the Work “is a useful article that does not contain any authorship that is both separable and copyrightable.” Letter from Stephanie Mason, Attorney-Advisor, to Cary Brooks, Brooks Group (Dec. 9, 2014).

In a letter dated March 2, 2015, Deep Wood 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 Cary W. Brooks, Brooks Group, to U.S. Copyright Office (Mar. 2, 2015) (“Second Request”). In that letter, Deep Wood claimed that the Work “has pictorial, graphic, or sculptural authorship that is both physically and conceptually separable from the utilitarian aspects of the article.” Second Request at 1.

III. DISCUSSION

A. The Legal Framework: Useful Articles and Separability

The copyright law does not protect useful articles, which are defined 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. Works of artistic craftsmanship that have been incorporated into a useful article may be eligible for copyright protection if they constitute pictorial, graphic, or sculptural works pursuant to 17 U.S.C. § 102(a)(5). The protection for such works is limited, however, in that it extends only “insofar as [the works’] form but not their mechanical or utilitarian aspects are concerned.” *Id.* at 101. In other words, 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, the utilitarian aspects of the article.” *Id.*; 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”).

The Office employs two tests to assess separability: (1) a test for physical separability; and (2) a test for conceptual separability. See COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 924.2 (3d ed. 2014) (“COMPENDIUM (THIRD)”); see also *Inhale, Inc. v. Starbuzz Tobacco, Inc.*, 755 F.3d 1038, 1041 n.2 (9th Cir. 2014) (finding that the Office’s interpretation of conceptual separability is entitled to deference); *Custom Chrome, Inc. v. Ringer*, 35 U.S.P.Q.2d 1714 (D.D.C. 1995) (finding that the Office’s tests for physical and conceptual separability are “a reasonable construction of the copyright statute[]” consistent with the words of the statute, existing law, and the legislature’s declared intent in enacting the statute).

To satisfy the test for physical separability, a useful article must contain pictorial, graphic, or sculptural features that can be physically separated from the article by ordinary means. See COMPENDIUM (THIRD) § 924.2(A); see also *Mazer v. Stein*, 347 U.S. 201 (1954) (sculpture of Balinese dancer eligible for copyright protection even though intended for use as lamp base); *Ted Arnold, Ltd. v. Silvercraft Co.*, 259 F. Supp. 733 (S.D.N.Y. 1966) (pencil sharpener casing shaped like a telephone was physically separable from the article's utilitarian function). To satisfy the test for conceptual separability, a useful article must contain pictorial, graphic, or sculptural features that can be visualized—either on paper or as a free-standing sculpture—as a work of authorship that is separate and independent from the utilitarian aspects of the article and the overall shape of the article. In other words,

... the feature must be [able to be] imagined separately and independently from the useful article without destroying the basic shape of that article. A pictorial, graphic, or sculptural feature satisfies this requirement only if the artistic feature and the useful article could both exist side by side and be perceived as fully realized, separate works—one an artistic work and the other a useful article.

COMPENDIUM (THIRD) § 924.2(B). If the feature is an integral part of the overall shape or contour of the useful article, that feature cannot be considered conceptually separable because removing it would destroy the basic shape of the article. See *id.*; see also H.R. REP. NO. 94-1476, at 55 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5668 (citing a carving on the back of a chair or a floral relief design on silver flatware as examples of conceptually separable design features).

If the useful article does not contain any features that can be physically or conceptually separated from its utilitarian function, the Office will refuse to register the claim because Congress has made it clear that copyright protection does not extend to any aspect of a useful article that cannot be separated from its functional elements. If the Office determines that the work contains one or more features that can be separated from its functional elements, the Office will examine those features to determine if they contain a sufficient amount of original authorship to warrant registration.

B. Analysis of the Work

After carefully examining the Work and applying the legal standards discussed above, the Board finds that the Work is a useful article that does not contain the requisite separable authorship necessary to sustain a claim to copyright.

Deep Wood does not dispute that the Work (a growler for containing beverages) is a useful article. Thus, for there to be any consideration of the copyrightability of the Work's design features, the features must first be determined to be either physically or conceptually separable from the Work's utilitarian function as a container for beverages. See *Norris Indus., Inc. v. Int'l Tel. & Tel. Corp.*, 696 F.2d 918, 922 (11th Cir. 2011); see also *Esquire*, 591 F.2d at 800.

As explained above, under the Office's rule for physical separability, a useful article must contain pictorial, graphic, or sculptural features that can be physically separated from the article by ordinary means. COMPENDIUM (THIRD) § 924.2(A). Deep Wood claims, however, that the Work's design is physically separable because "[t]he entire growler in question is shaped like a traditional keg." Second Request at 2. This argument shows a fundamental misunderstanding of the physical separability test. If there is no difference between the design elements of the Work (the fact that it looks like a beer keg) and its utilitarian aspects (that it holds a beverage), then by definition there can

be no physical separability between the two. If the cylindrical body of the Work, for example, were physically removed, the Work would no longer be useful for containing liquid.

As to conceptual separability, a pictorial, graphic, or sculptural feature of a work satisfies this test “only if the artistic feature and the useful article could both exist side by side and be perceived as fully realized, separate works—one an artistic work and the other a useful article.” COMPENDIUM (THIRD) § 924.2(B). Deep Wood claims that the Work meets this test because “the artistic depiction of a traditional keg is clearly recognizable as a pictorial, graphic, or sculptural work that can be visualized on paper or as a free-standing sculpture, independent of the shape of the growler.” Second Request at 2. Again, that argument misunderstands the conceptual separability test. The relevant question here is whether the Work’s utilitarian and artistic aspects can exist “side by side” with one another. The cylinder, the cone, and the screw top are conceptually inseparable components of the Work because it is impossible to remove the cylindrical body, the cone, and the screw top in such a manner that the Work would still be capable of serving its function of containing and dispensing liquid. See *Inhale, Inc. v. Starbuzz Tobacco, Inc.*, 755 F.3d 1038, 1042 (9th Cir. 2014) (“The shape of a container is not independent of the container’s utilitarian function—to hold the contents within its shape—insofar as the shape accomplishes the function.”). Furthermore, while the skirt is not integral to the Work’s function of containing liquid, it remains utilitarian in that the skirt, with its two oval holes, allows the user to pick up the Work.

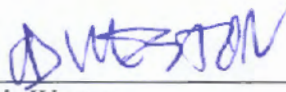
Additionally, Deep Wood argues that “[a] growler . . . may be virtually any shape so long as it defines a cavity for containing fluid,” and “by shaping the growler in question as a tradition [*sic*] keg, Applicant has presented a clearly recognizable pictorial, graphic, or structural work that can be visualized on paper or as a free-standing sculpture, independent of the shape of the article,” Second Request at 2-3. However, “the fact that the article could have been designed differently” is not relevant in evaluating separability. COMPENDIUM (THIRD) § 924.2(C) (citing H.R. REP. NO. 94-1476, at 55 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5668-69). Thus, Deep Wood’s claim that the Work is conceptually separable because growlers could have “virtually any shape” must be rejected.

Because none of the elements of the Work are separable from its utilitarian function, any potential creative authorship in each individual element, or in the selection and arrangement of the elements, need not be analyzed by the Board.

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:



Chris Weston
Copyright Office Review Board