**United States Copyright Office**
Library of Congress · 101 Independence Avenue SE · Washington, DC 20559-6000 · www.copyright.gov

October 21, 2009

Ms. Sylvia A. Petrosky, Esq.
2273 Smith Road
Akron, OH 44333

**RE: METALLIC HAMMERED BOUQUET HOLDER**
**METALLIC TWIST BOUQUET HOLDER**
**Control No.: 61-401-2249(P)**

Dear Ms. Petrosky:

I am writing on behalf of the Copyright Office Review Board in response to your letter dated May 18, 2006, requesting reconsideration of a refusal to register works entitled "Metallic Hammered Bouquet Holder" and "Metallic Twist Bouquet Holder" on behalf of your client, the Smithers-Oasis Company. We apologize for the delay in responding. The Board has carefully examined the applications, the deposits and accompanying materials, and all correspondence in this case concerning these two works and affirms the denial of registration of these works.

## I. DESCRIPTION OF THE WORKS

The two works in question are torch-shaped metallic objects which you have described as 3-dimensional sculptures. The "hammered" holder has a handle with a small ball on the bottom; the handle itself is contoured; several small balls in a circle appear around the top of the handle; and a further top piece consists of an open, cup-like shape which is fluted on its edges and which holds a styrofoam ball surrounded on its surface by plastic segments for what appears to be the holding- in- place and separation of flowers. The entire outer surface of the work gives the appearance of hammered metal. The "twist" holder has a small ball at the bottom of the handle; the handle itself is covered by straight, linear striations which fan out along the cup-like shape at the top of the bouquet holder; there is a small, saucer-shaped ridge where the handle is separated into two; and the very top piece, again, consists of an open, cup-like shape which is straight on its edges and which holds a styrofoam ball surrounded on its surface by plastic segments for what appears to be the holding- in- place and separation of flowers. The cup-like top portion has an octagonal outer edge; and, again, the entire surface has vertical lines following the contour of the work.

The exact structures of these works will best be communicated by reproducing images of the two works here.



**METALLIC HAMMERED BOUQUET HOLDER**



**METALLIC TWIST BOUQUET HOLDER**

## II. ADMINISTRATIVE RECORD

### A. Initial submission and Office refusal to register

On April 6, 2005, the Copyright Office received two Form VA applications from you on behalf of your client, the Smithers-Oasis Company, to register metallic bouquet holders as 3-dimensional sculptural works. In a letter dated July 14, 2005, Visual Arts Examiner Wilbur King refused registration for these works because they are useful articles that contained no physically or conceptually separable design elements. Citing the copyright law, 17 U.S.C. § 101, et seq., as well as the *Compendium of Copyright Office Practices II* (1984) (*Compendium II*), Mr. King explained that the design of a useful article is considered copyrightable only to the extent that the design incorporates a pictorial, graphic, or sculptural feature that is physically or conceptually separable from the utilitarian aspects of the article. He concluded that none of the design features of the holders can be identified as separable. Letter from King to Sylvia Petrosky of 7/14/2005, at 1 - 2.

**B. Applicant first request for reconsideration; Office second refusal to register**

On October 14, 2005, the Office received your first request to reconsider our refusal to register the two bouquet holders at issue here. You asserted that the designs contain elements that are conceptually separable from the utilitarian function of the useful articles. In support of your request, you compared the holders to other bouquet holders and to belt buckles and watch designs, the latter of which courts have held protectible. Letter from Petrosky to Examining Division of 10/13/05, at 2 - 3, citing *Kieselstein-Cord v. Accessories By Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980); *Severin Montres, Ltd. v. Yidah Watch Co.*, 997 F. Supp. 1262 (C.D. Cal. 1997). You also noted that the Copyright Office has registered a different model of the applicant's bouquet holder in the past. Letter from Petrosky of 10/13/05, at 4.

In a letter dated February 21, 2006, Attorney Advisor Virginia Giroux-Rollow of the Examining Division replied that she had reviewed your client's works in light of the points raised in your request for reconsideration dated October 13, 2005, and determined that no copyright registration could be made because the works "are useful articles that do not contain any authorship that is **both** separable **and** copyrightable." Letter from Giroux-Rollow to Petrosky of 2/21/06, at 1(emphasis in original). She also explained that "it is not the material of which a work is made that determines copyrightability. Therefore, the fact that this work is composed of metal...does **not** contribute to the copyrightability of the work." *Id.* (emphasis in original)

Ms. Giroux-Rollow then set forth the definition of a useful article under the Copyright Act and the extent to which such a work is copyrightable. She explained that the Office examines useful articles first to determine whether the work contains any pictorial, graphic, or sculptural authorship that is physically or conceptually separable from the work's utilitarian aspects and, if so, whether that authorship is copyrightable within the meaning of the statute and settled case law. Letter from Giroux-Rollow of 2/21/2006, at 1-2.

Applying the test the Copyright Office uses to evaluate conceptual separability, as set forth in *Compendium II*, § 505.03, and confirmed in *Esquire, Inc. v. Ringer*, 591 F.2d 796 (D.C. Cir. 1978), she concluded that there were no elements of these works that were conceptually separable. She also found that even if there were separable elements, such elements did not rise to the level of copyrightable authorship needed to support a copyright registration. Letter from Giroux-Rollow of 2/21/2006, at 3. Finally, Ms. Giroux-Rollow distinguished the bouquet holders at issue from the belt buckles in *Kieselstein-Cord* and from another bouquet holder that the Copyright Office had registered. She noted that the belt buckles of *Kieselstein* were "[F]anciful shapes separately identifiable from the overall functional design of the belt buckles" and also noted that the Copyright Office does not follow the *Severin* decision because the separable feature of the watch, the letter 'G,' does

not constitute copyrightable authorship in itself. The Office has cancelled the registration for that work. Concerning the previously submitted bouquet holder, the Office, in that case, had found that the work exhibited a clearly conceptually separable leaf design that was also copyrightable. Letter from Giroux-Rollow of 2/21/2006, at 3.

**C. Applicant second request for reconsideration**

In a letter dated May 18, 2006, you again requested reconsideration of the Office's refusal to register the bouquet holders.

You acknowledge that the two bouquet holders at issue here are useful articles and assert that they contain elements that are separable and sufficiently original to support copyright registration. You state that the "essential structural elements of a bouquet holder are only two: a handle for a person to grip and a receptacle to carry the bouquet." Letter from Petrosky of 5/18/2006, at 2. Specifically, you note for the "hammered holder" that the conceptually separable elements include "(1) the bowl and handle contoured to present one overall continuous arc; (2) a stylized flange visually separating the bowl and handle; (3) a stylized bulb at the end of the handle opposite the bowl; (4) a perimeter for all elements...having multiple planar segments (*i.e.* faceting); and (5) striated chasing on the exterior of all elements." *Id.* With regard to the "twist" holder, you note "similar features where the overall contouring has undulations, the bowl and handle separator is a collar whose styling is beading, the perimeter of all elements have multiple arcuate segments (*i.e.*, scalloped striations), and the bowl has a scalloped lip." *Id.*[1]

You also assert that it is not the individual separable elements that you claim are sufficiently original, but the "overall stylized sculptural expression of the works." Letter from Petrosky of 5/18/2006, at 5. Further, your second request for reconsideration states that you are not asserting that the materials from which the works at issue are made render the works copyrightable; you also state that you are not asserting that the processes by which these two works are made is the subject of a request for registration. *Id.* at 3.

After setting out the statutory definition of 'useful article' along with the limitations found in the statute for protection of such articles, you refer to the Office's discussion of *Compendium II*'s guidelines [Letter from Giroux-Rollow of 2/21/2006, at 2 - 3 ]; you disagree with *Compendium II*'s analysis. You state, again, that the overall stylized sculptural expression found in these two bouquet holders meets the separability test; you

---

[1] Although your descriptions of the bouquet holders in your 5/18/2006 letter seem to be erroneously interchanged, *i.e.*, what you are describing as exhibiting a 'collar whose style is beading,' we have as a deposit photo for the 'hammered' holder rather than the 'twist' holder for which you describe it. Such an interchange, however, does not make a difference in our analysis of the claims at issue here. We have made that analysis based on what we see in the deposit materials, not on any specific title for a work. This will become evident as you read this letter.

take the position that the expression of each work is not in the public domain. Letter from Petrosky of 5/18/2006, at 5. You proceed to comment that the two bouquet holder works at issue here are "unique" to the Applicant and that registration of the two designs "will not diminish Congress' purpose whatsoever." *Id.* at 6.

Having commented that these bouquet holder works are, as stated in the first request or reconsideration, meant to be carried and thus operate as a form of adornment for the person, for example, like [the *Kieselstein*] jewelry, [Letter from Petrosky of 5/18/2006, at 4], you then cite *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991) as the standard for the low level of creativity needed for a work to be copyrightable. Your opinion is that the two works in question here are copyrightable; you juxtapose photos of the *Kieselstein* belt buckles to photos of the two works at issue here and conclude that the bouquet holders, when compared to the belt buckles, "demonstrate[s] that Applicant's designs contain at least the same level of 'separable copyrightable applied art' or that the two bouquet holders at issue here 'contain the slight 'separable copyrightable applied art'" required by *Feist* for copyrightability." Letter from Petrosky of 5/18/2006, at 6 - 7. You also state the *Severin* court's decision of recognition of the concept of basic functional elements of a watch as distinguishable from the unique appearance of the artistic design, as was the case in *Kieselstein*. Letter from Petrosky of 5/18/2006, at 7.

## III. DECISION

After reviewing the applications and the arguments you presented, the Copyright Office Review Board affirms the Examining Division's refusal to register the Metallic Hammered Bouquet Holder and Metallic Twist Bouquet Holder because, although each contains elements that are conceptually separable from the utilitarian aspects or function of each work, those elements do not contain a sufficient amount of original and creative authorship under *Feist* to support a copyright registration, either individually or together.

### A. Useful articles and separability

#### 1. Compendium II

A useful article may be entitled to copyright protection if it contains 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 (definition of pictorial, graphic or sculptural works) (emphasis added)

The Copyright Office uses a separability test set forth in § 505 of the *Compendium of Copyright Office Practices II*. The general principle is stated in § 505.02:

> Registration of claims to copyright in three-dimensional useful articles can be considered only on the basis of separately identifiable pictorial, graphic, or sculptural features which are capable of independent existence apart from the shape of the useful article. Determination of separability may be made on either a conceptual or physical basis.

You do not dispute that the bouquet holders at issue here are useful articles; you state, however, that the "artistic aspects" of the designs are "separable from the underlying useful aspects of the works" and that "those separable designs are copyrightable." Letter from Petrosky of 5/18/2006, at 4. The Board acknowledges that protection is being sought only for the conceptually separable elements which you have described as the "overall stylized, sculptural expression" and that this expression is not in the public domain. *Id.* at 5. Therefore, the Review Board must determine whether any pictorial, graphic or sculptural features of either holder are conceptually [NOTE: you have not argued physical separability] separable from the work's utilitarian function.

*Conceptual Separability*. Conceptual separability exists when pictorial, graphic, or sculptural features are "clearly recognizable as a pictorial, graphic, or sculptural work which can be visualized on paper... independent of the shape of the useful article, *i.e.*, the artistic features can be imagined separately and independently from the useful article without destroying the basic shape of the useful article." *Compendium II*, § 505.03. Section 505.03 provides a useful example: "Thus, the carving on the back of a chair, or pictorial matter engraved on a glass vase, would be considered for registration. The test of conceptual separability, however, is not met by merely analogizing the general shape of a useful article to works of modern sculpture, since the alleged 'artistic features' and the useful article cannot be perceived as having separate, independent existences."

**2. Appellant arguments; Office analysis**

Your reasoning for exactly why the two bouquet holders in question here exhibit conceptually separable authorship is not persuasive.

Stating that there are only two essential elements to a bouquet holder–a handle for a person to grip and a receptacle to carry a bouquet–you present illustrations of this principle in your May 18, 2006, letter by offering a drawing of two small objects, each of which consists of a perpendicular thin rectangle topped, in one instance by a vertical, thicker rectangle and, in the other instance, by a similarly thick rectangle with two of the sides slightly angled to the bottom side [a 'truncated cone, or frustum' as you described it in your Letter.] See immediately below. You argue that the various elements of the actual bouquet

holders are separable because the features you have enumerated are "readily imaginable and conceptually separable from their underlying articles without impacting, let alone structurally destroying, the works." Letter f rom Petrosky of 5/18/2006, at 2. By "underlying articles" we understand you to mean the elementary drawings of a bouquet holder you have provided.



Fig. 1 Fig. 2
SEPARATED UTILITARIAN ARTICLES

This argument is not persuasive, given the *Compendium*'s conceptual separability test. The two small drawings in your May 18, 2006, letter are not the works at issue here; they are not even the works submitted for registration and conceptually stripped of their separable features. The items depicted in the drawings are supposedly the two works for which registration is sought with their artistic features conceptually separated out, and imagined as isolated, from the useful articles. We point out that the actual useful articles submitted for registration are those reproduced within 'section I' of this letter. *Compendium II* does not intend a useful article to have as its Platonic ideal, or generic counterpart, an "underlying article" such as you have suggested. The test for separability as found in *Compendium II* is one that requires the alleged artistic features of an article and the useful article itself to be perceived as having separate, independent identities which can exist side by side and be perceived as fully realized, separate works, one an artistic work and the other a useful article. *Compendium II*, § 505.03. If you were to conceive of the putative separable features which you have listed–flange or small circles separating bowl and handle, bulb at end of the handles, perimeter of the bowls–most of these aspects of the bouquet holders are, indeed, essential portions of the overall configuration of the bouquet holders themselves. Conceptual removal of most of these features would destroy the bouquet holders as entities; conceptual removal of these features would NOT, however, result in the bare-bones, elementary-like, stick-figured holders that appear in your July 18 letter and are reproduced above.

Your May 18, 2006, letter also contains reproductions of the *Kieselstein-Cord* belt buckles and juxtaposes those photos to photos of the two bouquet holders at issue here. You

have stated that a "comparison of the 'separable copyrightable applied art'" in the belt buckles with the bouquet holders "demonstrates that Applicant's bouquet holder designs contain at least the same level of 'separable copyrightable applied art'" as is present in the buckles; or "at the very least Applicant's designs contain the slight 'separable copyrightable applied art' required by *Feist*." Letter from Petrosky of 5/18/2006, at 7. You have not presented the reason why you have concluded that the protectible authorship in the belt buckles is the equivalent of the authorship in the bouquet holders–either as both the buckles and the holders possessing the same level of separable and copyrightable authorship or as the holders possessing the "slight" quantum of 'separable copyrightable applied art' required by *Feist*.

We do not consider *Feist* as precedent relevant to separability issues. The *Feist* Court was solely focused on the issue of the originality that is required for authorship to be considered copyrightable. The Court, in analyzing authorship, stated that the "mere fact that a work is copyrighted does not mean that every element of the work may be protected. 499 U.S. at 348. This principle would easily lead to the further principle, codified in the current copyright law, that a useful article is protected only to the extent that its design incorporates features that can be identified separately from, and are capable of existing independently of, the useful article itself. In its *Feist* analysis, however, the Court did not undertake any comment on the topic of separability because the work at issue in *Feist* [telephone directory] was not a useful article but, rather, fell under the category of 'literary work' covered by 17 U.S.C. § 102(a)(1). The juxtaposition in your May 18, 2006, letter of the photos of *Kieselstein-Cord* belt buckles and the bouquet holders at issue here, accompanied by the conclusory statement, without more discussion or argumentation, that all these works exhibit the same level of separable authorship to support registration, is not persuasive to the Board.

We further comment on your statement that the Applicant for registration here "claims the overall stylized sculptural expression" of these bouquet holders "which... meets the conceptual separability test." Letter from Petrosky of 5/18/2006, at 5. You go on to say that these bouquet holder designs are "unique to Applicant with no others like them being sold on the market. *Id.* at 6. Because you focus on the "overall stylized sculptural expression" of these bouquet holders, we stress again the generalized shape of a useful article is not the appropriate subject of copyright. In its considerations of the 1976 law–the current copyright law which extensively revised the previous statute–Congress explained that:

> [A]lthough 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. Unless the shape of an . . . industrial product contains some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted under the bill. The test of

> separability and independence from "the utilitarian aspects of the article" does not depend upon the nature of the design – that is, even if the appearance of an article is determined by esthetic (as opposed to functional) considerations, only elements, if any, which can be identified separately from the useful article as such are copyrightable. And, even if the three-dimensional design contains some such element (for example, a carving on the back of a chair or a floral relief design on silver flatware), copyright protection would extend only to that element, and would not cover the over-all configuration of the utilitarian article as such.

H.R. Rep. No. 94-1476, at 55 (1976).

In *Esquire, Inc. v. Ringer*, 591 F.2d 796 (D.C. Cir. 1978), *cert. denied,* 440 U.S. 908 (1979), the Court explained 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." *Id., at 800.* In that case, the Office had refused to register an outdoor lighting fixture which arguably contained non-functional, purely aesthetic features. The court upheld the Office's refusal, noting that "Congress has repeatedly rejected proposed legislation that would make copyright protection available for consumer or industrial products." *Id.*[2] Similarly in *Norris Industries, Inc. v. International Telephone & Telegraph Corp.*, 696 F.2d 918, 924 (11th Cir. 1983), *cert. denied*, 464 U.S. 818 (1983), the court held that a wire-spoked wheel cover was not entitled to copyright protection because it was a useful article used to protect lugnuts, brakes, wheels and axles from damage and corrosion, and it did not contain any sculptural design features that could be identified apart from the wheel cover itself.

Even if additional discussion of conceptual separability were provided, the Review Board, as we have stated above, sees most of the design elements in the holders as inextricable parts of the articles themselves. Such portions of the holders represent portions of the object itself– the handle without which one could not pick up / hold the object; the cup portion which provides a place in which to put the flowers; something to provide the manner in which the flowers are held in place within the cup. The two bouquet holders at issue here may be more aesthetically pleasing than others, but this does not mean that copyright protection attaches to them in their overall shape or their overall appearance. The Board agrees with you, however, that each holder contains a few elements that are

---

[2] Although *Esquire* was decided under the 1909 version of the Copyright Act, its reasoning is, nevertheless, applicable to cases arising under the 1976 Act. "[T]he 1976 Act and its legislative history can be taken as an expression of congressional understanding of the scope of protection for utilitarian articles under the old regulations." 591 F.2d at 803.

conceptually separable. In the case of the "hammered" holder: the bulb / sphere at the bottom of the handle; the beaded collar; and the scalloped indentations along the surface of the holder are conceptually separable. These features can be visualized on paper side by side with the overall article and also remain independent of the overall shape of the useful article. Removal of those elements will not destroy the basic shape of the useful article. *Compendium II*, § 505.03 (1984). The lip of the cup and overall contouring, however, are inextricably tied to the shape of the holder and, as such, are not conceptually separable. Similarly, in the case of the "twist" holder: the bulb / sphere at the bottom of the handle; the saucer-like flange at mid-point; the striated surface are conceptually separable, but the contouring or shape of the holder as a whole is not. The Board will now consider the copyrightability of the separable elements we have identified.

**B. De minimis authorship in separable features**

**1. Feist**

Having determined the presence of design elements that are separable from the function and overall shape or configuration of the useful articles, we now turn to the copyrightability of such separable elements. As mentioned above, the Board concludes that there are elements of each holder that are conceptually separable. However, the Board also concludes that those elements, each in itself as well as taken together, constitute only *de minimis* authorship and, therefore, are not copyrightable.

Copyright protection is only available for "original works of authorship." 17 U.S.C. § 102(a). The Supreme Court has stated that originality consists of two elements, "independent creation plus a modicum of creativity." *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 346 (1991). *See also, e.g., Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d Cir. 1951) ('Original' in reference to a copyrighted work means that the particular work 'owes its origin' to the 'author.' No large measure of novelty is necessary.); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884). The Review Board accepts that Applicant's bouquet holders satisfy the independent creation prong of originality. However, although the level of creativity required by law is very modest, as discussed below, the *de minimis* level of creativity in the separable elements in each work, individually and as a whole, is insufficient to satisfy the second prong of creativity.

Any "distinguishable variation" of a work constitutes sufficient originality as long as it is the product of an author's independent efforts, and is "more than a 'merely trivial' variation." *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903) (A very modest grade of art has in it something "irreducible, which is one man's alone.") However, at the same time that the Supreme Court reaffirmed, in *Feist*, the long-standing precedent that only a modicum of originality is required for a work to be copyrightable, it also

emphasized that there are works in which the "creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Feist* at 359. Such works are incapable of sustaining copyright protection. *Id.*, citing 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, § 2.01[B] (2002). 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," *Feist* at 363, and that there can be no copyright in works in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359. A work that reflects an obvious arrangement fails to meet the low standard of minimum creativity required for copyrightability. *Id.* at 362-363. An example would be alphabetical listings in white pages of telephone directories, the type of work at issue in *Feist*, which the Supreme Court characterized as "garden variety...devoid of even the slightest trace of creativity." *Id.* at 362.

### 2. Office registration practices

Copyright Office registration practices have long recognized that some works of authorship exhibit only a *de minimis* amount of authorship and, thus, are not copyrightable. *See Compendium II,* § 202.02(a). With respect to pictorial, graphic and sculptural works, which are Class VA [visual arts] works, § 503.02(a) of *Compendium II* states that a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." Further, Office regulations state that there is no protection for familiar symbols, designs or shapes such as standard geometric shapes. 37 CFR § 202.1. *Compendium II* essentially provides detailed instructions for Copyright Office registration procedures and reflects the principle that creative expression is the basis for determining whether a work is copyrightable, not an assessment of aesthetic merit. Section 503.02(a) of *Compendium II* states that:

> Copyrightability depends upon the presence of creative expression in a work, and not upon aesthetic merit, commercial appeal, or symbolic value. Thus, registration cannot be based upon the simplicity of standard ornamentation such as chevron stripes, the attractiveness of a conventional fleur-de-lys design, or the religious significance of a plain, ordinary cross. Similarly, it is not possible to copyright common geometric figures or shapes such as the hexagon or the ellipse, a standard symbol such as an arrow or a five-pointed star. Likewise, mere coloration cannot support a copyright even though it may enhance the aesthetic appeal or commercial value of a work. ... The same is true of a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations.

Section 503.02(a) reflects one of the most fundamental principles of copyright law: commonplace shapes, symbols, and designs, and minor variations of those, may not be copyrighted because that could limit the availability of these authorship building blocks to the general populace. These basic shapes and symbols lie in the public domain for use by all; claiming such shapes and symbols for copyright protection would give a [perhaps] unintended monopoly which would prevent the further production of creative works using such fundamental authorship elements.

Case law confirms these principles. *See Forstmann Woolen Co. v. J.W. Mays Inc.*, 89 F. Supp. 964 (E.D.N.Y. 1950)(label with words "Forstmann 100% Virgin Wool interwoven with standard *fleur-de-lis* could not support a copyright claim without original authorship); *Bailie v. Fisher*, 258 F.2d 425 (D.C. Cir. 1958) (cardboard star with two folding flaps allowing star to stand for retail display not copyrightable work of art); *Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc.*, 634 F. Supp. 769 (W.D. Pa. 1986) (envelopes with black lines and words "gift check" or "priority message" did not contain minimal degree of creativity necessary for protection); *Tompkins Graphics, Inc. v. Zipatone, Inc.*, 222 U.S.P.Q. 49 (E.D. Pa. 1983) (collection of various geometric shapes not copyrightable).

Given the considerable case law sustaining Copyright Office decisions of refusal to register simple designs, the Office nevertheless recognizes that the use of public domain elements and/or commonly known shapes can result in a copyrightable work as long as the overall resulting design or overall pattern, taken in its entirety, constitutes more than a trivial variation of such elements. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 103 (2d Cir. 1951); *see Compendium II*, § 503.02(a). The Board applies this standard by examining a work to determine whether it contains elements, either alone or taken as a whole, on which a copyright can be based.

The Board does not dispute that the overall design, *i.e.*, the Metallic Hammered Bouquet Holder and Metallic Twist Bouquet Holder in their entirety, were independently authored by the artist Stephen P. Santore on behalf of your client, the Smithers-Oasis Company; thus, the sole issue left for the Board to decide is whether the separable elements contain a modicum of creativity, alone or in combination, necessary to meet the *Feist* requirement.

### 3. Separable design elements lack the necessary minimum creativity

You describe the elements in the "hammered" holder as "(1) the bowl and handle contoured to present one overall continuous arc; (2) a stylized flange visually separating the bowl and handle; (3) a stylized bulb at the end of the handle opposite the bowl; (4) a perimeter for all elements...having multiple planar segments (*i.e.*, faceting); and (5) striated chasing on the exterior of all elements." Letter from Petrosky of 5/18/06, at 2. With regard to the "twist" holder, you note "similar features where the overall contouring has

undulations, the bowl and handle separator is a collar whose styling is beading, the perimeter of all elements have multiple arcuate segments (*i.e.*, scalloped striations), and the bowl has a scalloped lip." *Id.*

The Board concurs with Ms. Giroux-Rollow and finds that the Metallic Hammered Bouquet Holder and Metallic Twist Bouquet Holder separable design features consist of common and familiar geometric shapes: spheres, circles, and lines–whether parallel and vertical lines with identical spacing; criss-crossed, 90-degree angled lines [of plastic in the bulb portion to hold the styrofoam]; or parallel, vertical lines with some small difference of spacing at the top of the lines where they meet the mid-point collar of the bouquet holder. The overall pattern in each of these bouquet holders results from a mere bringing together of standard shapes with minor variations thereof; such a combination fails to rise to the level of creativity required to support a copyright registration. As stated in *Compendium II*, § 503.02(a): "It is not possible to copyright . . . a simple combination of a few standard symbols such as a circle, a star, and a triangle with **minor linear or spatial variations**." (emphasis added)

The Board notes that, in theory, an author creating any work has an unlimited choice of alternatives. However, it is not the possibility of choices that determines copyrightability, but whether the resulting expression in itself contains copyrightable authorship. *See, e.g., Florabelle Flowers, Inc. v. Joseph Markovits, Inc.*, 296 F. Supp. 304, 307 (S.D.N.Y. 1968) (an "aggregation of well known components [that] comprise an unoriginal whole" cannot support a claim to copyright). The Board concludes that the holders here, upon examination of the designs elementally and as a whole, do not contain a sufficient amount of original and creative authorship to sustain a copyright claim. The round bulbs at the bottom of each bouquet holder are simple spheres, as is the beading on the "hammered" holder. The striations on the "twist" holder are merely straight lines, and the hammered effect on the surface of the "hammered" holder are overlapping circles with no distinguishing characteristics from any other "circle" design.

As such, the Metallic Hammered Bouquet Holder and Metallic Twist Bouquet Holder consist of simple variations of standard shapes and simple arrangements, which, while aesthetically pleasing, do not contain the minimal amount of original artistic authorship to support a copyright registration; the courts have consistently upheld the Office's refusal to register such works. *John Muller & Co. v. N.Y. Arrows Soccer Team, Inc.*, 802 F.2d 989 (8th Cir. 1986)(logo consisting of four angled lines forming an arrow, with the word "Arrows" in cursive script below, found not copyrightable); *Jon Woods Fashions, Inc. v. Curran*, 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988)(upholding Copyright Office's refusal to register design consisting of striped cloth over which was superimposed a grid of 3/16" squares); and *Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q.2d 1074 (D.D.C. 1991)(upholding Copyright Office's refusal to register chinaware design pattern).

The cases you have cited do not compel a different conclusion. The belt buckles in *Kieselstein*, having been found separable by the Court, are distinguishable in that they did not merely employ common geometric shapes. We do not see support for registration of the two bouquet holders in *Kieselstein*. *Kieselstein*, as you know, involved two belt buckles, registered by the Copyright Office, which incorporated ornamental features consisting of geometric shapes with "several surface levels" and wavy lines. 632 F.2d at 990. We further note that the Winchester and Vaquero belt buckles reflected sculpted, contoured lines which could not fairly be said to be co-extensive with the entire shape of the buckles; and, cannot fairly be said to be comparable to the commonplace and few design shapes found separable within these bouquet holders. The example you cite of an entire chair covered all over with the same artistic carvings as not vitiating the copyrightability of the design [Letter from Petrosky of 5/18/2006, at 5] may be useful for illustrating conceptual separability. However, having conceded separability for these several design elements, such an example does not provide evidence or guidance as to the threshold for minimum creativity of those separable elements.

We further note that the prior registration of a different bouquet holder design does not compel the Office to register all bouquet holder designs. Each work is examined on its own merits and thus judged as to its particular registrability. *Compendium II*, §§ 108.03;108.04. The Board sees no inconsistency between the previous registration of a bouquet holder, based upon a clearly separable as well as copyrightable leaf design, and its refusal to register the two bouquet holder works at issue here.

For the reasons stated herein, the Copyright Office Review Board affirms the refusal to register the Metallic Hammered Bouquet Holder and Metallic Twist Bouquet Holder. This decision constitutes final agency action in this matter.

Sincerely,

/s/

Nanette Petruzzelli
Associate Register
Registration & Recordation Program
for the Review Board
United States Copyright Office