United States Copyright Office
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March 23, 2004

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Re: NEW RELIEF PLATE DESIGN
Control Number: 60-906-4119(O)

Dear Mr. Lieberstein:

The Copyright Office Board of Appeals has reviewed your request to reconsider the Examining Division's denial of a claim to register the NEW RELIEF PLATE DESIGN on behalf of Tablewerks, Inc. After reviewing the materials submitted in support of the claim, the Board has determined that the work cannot be registered because it does not contain the required amount of original sculptural or other artistic authorship.

ADMINISTRATIVE RECORD

On August 17, 2001, you sent on behalf of Tablewerks, Inc., a copyright application along with digital photos and sketch drawings, to register a plate design. By letter dated August 22, 2001, Senior Examiner William Briganti advised you that the claim could not be registered because although the work has features that can be identified as "separable" from the plate, those features are not copyrightable. Letter from Briganti to Lieberstein of 8/22/2001, at 1.

Mr. Briganti explained that a useful article is considered a pictorial, graphic or sculptural work only if it incorporates such design features as can be identified separately from and are capable of existing independently of the utilitarian aspects of the article, citing the definition of useful article in the copyright law. 17 U.S.C. § 101. He went on to relate that separability may be either physical or conceptual. H. R. Rep. No. 94-1476, at 55 (1976). Mr. Briganti further explained that physical separability means separability by ordinary physical means, giving examples of a lamp base of a Balinese dancer, and a pencil sharpener shaped like an antique car. Conceptual separability, he stated, involved authorship that was clearly recognizable as a sculptural work which can be visualized as free-standing sculpture, independent of the shape of the article, without destroying the article's basic shape. Letter from Briganti to Lieberstein of 8/22/2001, at 1.

Mr. Briganti admitted that the work deposited did contain features that can be identified as separable, but noted that separable features that constituted familiar symbols or designs and mere variations thereof are not copyrightable. Measuring those separable features against the originality requirements for pictorial, graphic or sculptural material, however, he found that the work did not qualify for registration.

On October 24, 2001 the Examining Division received your first appeal to reconsider the refusal to register this work, followed by receipt of an actual sample of the work. Commenting on our finding that the work was conceptually separable, you note that the only issue for determination in this case is the work's originality. Your appeal submits that since the New Relief Plate Design incorporates a "unique multiple ridge ring pattern on the top portion of the plate with a multiple wave pattern on the bottom of the plate," the design constitutes copyrightable subject matter. Letter from Lieberstein to Examining Division of 10/24/2001, at 1.

You observe that the Examiner refused registration despite public recognition of the design as "highly innovative and unique" and "the freshest, most original chinaware introduction...in years." Id. at 2. Citing *Bleistein v. Donaldson*, 188 U.S. 239 (1903), and *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340, 349 (1991), you note also that the Supreme Court requires only a modest level of creativity and forbids judgments on the artistic merit of authorship to exclude works from copyrightability. The level of originality contributed by the author need not be novel, you note, but even the act of reproduction, in the form a scaled down miniaturized version was entitled to copyright protection, citing *Alva Studios, Inc. v. Winninger*, 177 F.Supp. 263 (S.D.N.Y. 1959)(reproduction of Rodin's "The Hand of God.") Letter from Lieberstein to Visual Arts Section of 10/24/2002, at 3.

All that is needed to earn copyright protection is something more than a "'merely trivial' variation, something recognizably [the author's] own," according to *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 103 (2d Cir. 1951). And thus, you conclude that the Office failed to distinguish protected expression from commonplace items, asserting that even copies of common elements and copies of items in the public domain may be subject to novel executions and variations, citing *Godinger Silver Art Co., Ltd v. International Silver Co.*, 37 U.S.P.Q. 2d 1453, 1455 (S.D.N.Y. 1995)(Baroque silver pattern) and *Blazon, Inc. v. DeLuxe Game Corp.*, 268 F.Supp 416 (S.D.N.Y. 1965)(hobbyhorse).

Attorney Virginia Giroux, by letter dated March 8, 2002, advised you that, after reviewing the registration materials, including the actual sample, the Visual Arts Section could not register the copyright claim in the plate design. While Ms. Giroux confirmed that the work was "conceptually separable" from the utilitarian function of the plate, and confirmed the *Feist* and *Bell v. Catalda* standard of authorship, she found that the work nevertheless lacked a sufficient amount of original and creative artistic authorship to be registered. Letter from Giroux to

Lieberstein of 3/8/2002, at 1. She explained that the artistic authorship found on the top and bottom surface of the plate–this combination of circles and arrangement of circles–does not rise to the level of authorship necessary to support a copyright registration. They are common and familiar geometric shapes, or minor variations thereof, she said, and because they are in the public domain, they are not copyrightable. *Id.* at 2, citing 37 C.F.R. § 202.1. She also pointed out that "[s]imple variations of standard designs and their simple arrangement may be aesthetically pleasing, but they do not furnish a basis upon which to support a copyright claim." *Id.* (citations omitted). Ms. Giroux affirmed that, in examining a work, the Division does not engage in any appraisal of the work based on the worth of art from an aesthetic point of view, citing *Bleistein*. *Id.* at 4.

She further noted that the decision on registration did not represent a refusal to register work because it incorporates preexisting material, but that "registrability depends on how [preexisting material] had been combined and how much other original artwork (if any) is part of the overall design." Although a design is unique and innovative, that fact does not make it copyrightable, she observed. *Id.* at 3. Ms. Giroux concluded that "[t]his type of artistic authorship does not, in our view, reflect sufficient originality and creativity to support a separate copyright registration as a copyrightable 'work of art'." *Id.* at 2.

After discussing the applicable law and other principles of copyright, Ms. Giroux stated that the elements of the work were related to its utilitarian function or, if separable, did not meet the standard for original or creative authorship, or were "subsumed within the overall shape, contour, and configuration of the work," and there was no authorship that was both separable and copyrightable. *Id.* at 4.

On July 3, 2002, you appealed to this Board, raising essentially the same arguments you raised in your appeal to the Examining Division. In addition to the points highlighted above, you note that the Office did not cite any evidence to supports its position that the authorship did not meet the threshold quantum of originality to render it registrable. Letter from Lieberstein to Board of Appeals of 7/3/2002, at 2. You argue that the letter/declarations of originality are evidence of originality and that the Office has put forward nothing to the contrary. *Id.*

You also assert that case law contradicts the Copyright Office and take particular issue with Ms. Giroux's statement that the works in the cases you cite are of far more complexity than the work at issue. *Id.* at 5. You further state that our dismissal of the case law on this basis is "misplaced, and indicates the excessive subjective nature of the Copyright Office decision...."

You maintain that the originality of this work lies in "a distinctive arrangement of non-functional sculptural elements consisting of uniquely spaced ridges set in a ring pattern, and a distinctive sculptural finger-grip-like wave pattern

for the bottom of the plate" and suggest that the elements constitute more than "elusive" creativity that more than meets the standard set forth in *Feist.* Letter from Lieberstein to Board of Appeals of 7/3/2002, at 3.

While you suggest that novelty is not required for copyrightability, you continue to assert that the Office denied the registration because it has judged the artistic merit of the work based on a narrow or rigid concept of art, citing *Trifari, Krussman & Fishel, Inc. v. Charel Co., Inc.*, 134 F.Supp 551, 553 (S.D.N.Y. 1955).

Relying on a number of pre-1970 cases as well as *Godinger Silver Art Co., Ltd. v. International Silver Co.,* 37 U.S.P.Q. 2d 1453, 1455 (S.D.N.Y. 1995), you assert that decisional law contradicts the Office's position in that it overlooks cases such as those upholding the validity of Baroque tableware designs, model hobbyhorses, and model show dogs, that support the registrability of "novel executions and variations of common place items in the public domain." Letter from Lieberstein to Board of Appeals of 7/3/2002, at 5.

DISCUSSION

The fundamental basis of copyright protection is a work's originality. Originality has two components: independent creation and a certain minimum amount of creativity. *Feist Pubs., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347 (1991). The Copyright Office uses this standard when it considers whether a work is copyrightable. *See* 17 U.S.C. § 102(a). Originality means something more than a trivial variation of elements found in the public domain. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 103 (2d Cir. 1951).

Your appeal principally addresses the second requirement: whether the work displays a minimum amount of creativity. To do so, it must "embody some creative authorship in its delineation or form." 37 C.F.R. § 202.10(a) (2002). As you noted in your appeal, the required amount of creativity is low. Nevertheless, there remains a narrow category of works in which the creative spark is insufficient to support a copyright. *Feist*, 499 U.S. at 359. As a result, though the work may reflect the author's industry, the author's efforts do not lead to copyright protection. Copyright also is not a matter of aesthetics. "The requisite minimal amount of original sculptural authorship necessary for registration in Class VA does not depend upon the aesthetic merit, commercial appeal, or symbolic value of a work." *Compendium of Copyright Office Practices* § 503.02(b) (1984). *See also DBC of N.Y., Inc. v. Merit Diamond Corp.*, 768 F. Supp. 414 (S.D.N.Y. 1991) (some designs simply do not contain sufficient creative expression to support a copyright).

A. The Copyright Office Must Decide Whether a Work Is Copyrightable, and Does Not Make Artistic Judgments.

Before proceeding to the substance of your appeal, we emphasize the role of the Copyright Office. The Copyright Office is charged with drawing the line between works that are sufficiently creative and works that are not. Congress has instructed that material containing copyrightable subject matter shall be given a certificate of registration. 17 U.S.C. § 410(a). Congress has further instructed that if "the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited does not constitute copyrightable subject matter . . . , the Register *shall refuse registration* and shall notify the applicant in writing of the reasons for such refusal." 17 U.S.C. § 410(b) (emphasis added). *See also John Muller & Co. v. N.Y. Arrows Soccer Team, Inc.*, 802 F.2d 989 (8th Cir. 1986). Thus, even though the distinction between copyrightable material and uncopyrightable material may be "elusive," as *Feist* acknowledges, the Copyright Office still must make the distinction. But making that distinction simply cannot be characterized as subjectively judging art, as you suggest in your appeal.

B. The Attorney Advisor's Decision To Deny Registration Was Based On The Best Evidence Available: The Work Itself.

We also wish to clarify the role of the Attorney Advisor for the Examining Division. You state in your appeal that, "[w]ithout any evidence to support its decision, the Copyright Office subjectively deems the ridged ring pattern/wave finger-grip like pattern on the border . . . as insufficiently creative or original, and hence, not copyrightable. This unsupported conclusion is incorrect and is not supported by the facts." Letter from Lieberstein to Board of Appeals of 7/3/2002, at 2. This argument is misplaced. Ms. Giroux reviews the Examiner's decision, reexamines the claim and whatever you and your client decide to present in the way of evidence to decide whether the work is indeed registrable. *Copyright Compendium* § 606.04, *cited in* 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 7.21[B], at 7-212.8 n.18 (2002). In this case, Ms. Giroux had the best possible evidence before her: a physical sample of the plate. It is from that item, and the other material you submitted, that Ms. Giroux concluded that the design was not copyrightable.

C. The Plate Design For Which Copyright Is Sought Does Not Contain Copyrightable Material.

Turning to the substance of your appeal, we conclude that copyright registration was properly denied. As did Ms. Giroux, the Board agrees with your reference to *Thomas Wilson & Co. v. Irving J. Dorfman Co.*, 433 F.2d 409 (2d Cir. 1970) (pansy lace design) and to *Bleistein v. Donaldson Lithographic Co.*, 188 U.S. 239 (1903) (detailed circus posters), that judgment of the artistic merit or style of the

work of authorship plays no part in considering a work's registrability for copyright. The Board also agrees that *Bell v. Catalda Fine Arts, Inc.*, 191 F. 2d 99 (2d Cir. 1951) underscores this point and the Board grants that originality for copyright purposes does not require much more than a trivial variation. Above all, the Office follows the more recent case of *Feist Publications v. Rural Telephone Service Co., Inc.*, 499 U.S. 340 (1991), as the articulation of the Supreme Court regarding the requisite level of creativity for copyright: the Board agrees that such level is very low and that even a slight amount of original authorship will suffice.

It remains the case, however, that there is a narrow group of works that fail to meet the threshold amount of creative authorship necessary for copyright. Component elements of works may be described variously as unique (a patent standard) or distinctive (a trademark standard), but if those elements do not or the work as a whole does not meet the minimal amount originality standard, they cannot be accepted for copyright registration. Contrary to your assertion, *Trifari, Krussman & Fishel, Inc. v. Charel Co., Inc.*, 134 F.Supp. 551, 553 (S.D.N.Y. 1955) and *Godinger Silver Art Co. Ltd. v. International Silver Co.*, 37 U.S.P.Q. 2d 1453, 1455 (S.D.N.Y. 1995) are not inconsistent with the Board's decision. The court in *Trifari* carefully assessed the amount of authorship the work possessed and distinguished between the idea of half-beads, or "cabs" in general, and the execution of the particular "cab" design at issue in the case (a narrow graduated rim of metal which folds around and over parts of the cab to conceal the connecting links). 134 F.Supp. at 553.

Citing *Trifari*, you assert that the Copyright Office confuses the underlying concept of the plate design with its execution. As is discussed below, the Office examined the specific expression in the work before it, both the individual elements and as a whole, in making its determination. And as is evident in *PPS v. Jewelry Sales Representatives, Inc.*, 392 F.Supp. 375, 382-83 (S.D.N.Y. 1975), the idea/expression doctrine is employed to ascertain infringement, that is, substantial similarity between two works, rather than to ascertain whether works contains sufficient authorship in the first place. Thus the Board had no reason to and did not concern itself with abstractions; it focused on the entire expression present in the work before it.

In the end, the cases upon which you rely do not indicate a different result in this case. The court in *Godinger* points out a number of elements– curls, roots, flowers, and scrolls, which were potentially elements to be considered for authorship. Moreover, the court observed decidedly different dimensions and a wider scope for the Godinger design from that of the design from which it was allegedly derived. Indeed, all three cases– *Godinger, Blazon Inc. v. DeLuxe Game Corp.*, 268 F.Supp. 416, 421 (S.D.N.Y. 1965)(hobby horse model), and *F.W. Woolworth v. Contemporary Arts* 193 F. 2d 162, 164 (1st Cir. 1951)(model of cocker spaniel in "show" position)–support the position that expression inspired by preexisting

elements is copyrightable when that expression exhibits a certain minimal amount of creativity. Typically a model cocker spaniel or hobby horse in any detail will usually contain sufficient amount of original creative choice. The same is true for the representations in *PPS v. Jewelry Sales Representatives, Inc.*,392 F.Supp. 375, 383 (S.D.N.Y. 1975) (representations of various types of fruit combined with textual matter met required level of creativity). The *Godinger* court, after detailed examination found that a certain derivative Baroque silver design constituted a distinguishable variation of curls, scrolls, and flowers from flatware that had been previously published. 37 U.S.P.Q.2d at 1456. These works did represent a greater amount of authorship than is present in the instant work. The issue here is whether the circular ridges on the top and bottom of the New Relief Plate amount to enough authorship to be registered as an original work of authorship.

Ms. Giroux described the design as "consist[ing] of a series of multiple concentric circles some of which are raised and thicker than others. The bottom surface of the plate also contains three raised or ridged concentric circles." Letter from Giroux to Lieberstein of 3/8/2002, at 2. She specifically noted that "[t]here is no wave pattern as you suggested in your letter." *Id.* In your appeal you state that the plate design consists of a "multiple ridged ring pattern on the top border portion of the plate with a multiple wave finger grip-like pattern on the bottom portion of the plate." Letter from Lieberstein to Board of Appeals of 7/3/2002, at 2.

In determining whether a useful article is entitled to registration, the Copyright Office follows a two-part analysis. First, it determines whether there are any design elements that are separable from the function of the useful article. In this case, Ms. Giroux agreed that the design was "conceptually separable from the utilitarian aspects of the work." Letter from Giroux to Lieberstein of 3/8/2002, at 1. In general, the Board does not disturb that conclusion. You refer, however, to a wave-like pattern on the bottom of the plate. Perhaps you are referring to the shape of the bottom of the plate.

1. Physically or Conceptually Separable Authorship is Required for the Shape of a Useful Article to be Considered as Sculpture.

Congress drew a clear line between copyrightable works of applied art and works of industrial design which are not subject to copyright protection. It did so by withholding protection from the shape of an industrial product - even though it might be aesthetically satisfying and valuable - unless the shape contains some elements that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article. Specifically, the House Report accompanying the current copyright law states that:

> In adopting this amendatory language, the Committee is seeking to draw as clear a line as possible between

> copyrightable works of applied art and uncopyrighted works of industrial design ... . [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 automobile, airplane, ladies' dress, food processor, television set, or any other 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 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.

H.R. Rep. No. 1476, at 55 (1976) (emphasis added).

Physical separability exists when artistic or sculptural features can be physically separated from the utilitarian portion of the work. No one has asserted that separable sculptural authorship can be physically separated from the shape of this plate. The landmark case of *Mazer v. Stein*, 347 U.S. 201 (1954), involved an easily recognizable separable work of sculpture of a Balinese dancing figure. And since *Mazer*, numerous cases have clarified that aesthetically pleasing and popular industrial designs which lack separable artistic authorship cannot support a copyright claim.

Conceptual separability exists when artistic "or sculptural features, ... can be visualized... as free-standing sculpture... 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 of Copyright Office Practices II, Compendium II* § 505.03 (1984). If the artistic features can be imagined separately and independently from the useful articles without destroying its basic shape, those features may be conceptually separable. *Compendium II* provides a useful example: "Thus, carving on the back of a chair, or pictorial matter engraved on a glass vase, could be considered for registration." *Id.* Section 505.03.

See Norris Industries v. International Tel. & Tel. Corp., 696 F.2d 918, 924 (11th Cir. 1983), *cert. denied*, 464 U.S. 818(1983), and *Custom Chrome, Inc. v. Ringer*, 35 U.S.P.Q.2d 1714, 1718 (D. D.C. 1995). In *Norris Industries*, the work

was a wire-spoked wheel cover, and in *Custom Chrome*, the works were 23 ornamental motor cycle parts. In both cases the admittedly utilitarian works were aesthetically pleasing, and the courts affirmed the refusal of the Copyright Office to register the designs.

As previously stated, the useful article aspects of this work can be considered copyrightable only if the work contains authorship that is physically or conceptually separable from the utilitarian aspects of the work. The finger-grip slope of the plate cannot be considered as sculptural authorship because nothing about this shape can be identified as physically or conceptually separable from its utilitarian aspects. Indeed, in your own description of the copyrightable authorship alleged here, you describe the "finger grip-like pattern" on the underside of the plate, apparently unable to describe the work without resort to using a descriptor of its function, *i.e.* grip. It may serve some tactile or other functional purpose and may even possess an aesthetic appearance, however, shape is ineligible for copyright unless sculptural authorship obviously distinct from the shape of the plate is present.

2. De Minimis Authorship

Even if the Board were to conclude that the ridges and "wave-like" pattern were conceptually separable from their utilitarian aspects, we would still need to ask whether the separable part of the work rises to the level of authorship required by law. *See* 17 U.S.C. § 102(a). The Board concludes that it does not.

That common geometric shapes cannot be copyrighted has been confirmed by courts ruling on the matter in numerous types of media. For example, in *OddzOn Products, Inc. v. Oman*, 924 F.2d 346 (D.C. Cir. 1991), the plaintiff challenged the Copyright Office's refusal to register a sphere, marketed as a KOOSH ball. The sphere consisted of "hundreds of floppy, wiggly, elastomeric filaments radiating from a core." *Id.* at 347. The Copyright Office concluded that the filaments "'basically define a sphere, and there is no copyrightable authorship in producing such a familiar shape.'" *Id.* (quoting Board opinion). The District of Columbia Court of Appeals concluded that the Copyright Office did not abuse its discretion in rejecting the application.

Moreover, in *Jon Woods Fashions, Inc. v. Curran*, 8 U.S.P.Q. 2d 1870, 1872 (S.D.N.Y. 1988), the court deferentially affirmed the Register's finding that a fabric design consisting of a grid pattern superimposed upon stripes did not meet the minimal level of creative authorship necessary for copyright.

In the chinaware field, where the Register of Copyrights refused to register a design pattern for china consisting of familiar shapes and symbols, and simple variations of basic geometric designs, the court upheld the Register of Copyrights' finding that the work was not registrable, refusing to consider commercial success,

expense and artistic recognition of the design. *Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q. 2d 1074, 1075-76 (D.D.C. 1991), citing *Feist's* enunciation, at 499 U.S. at 359-60, that "originality, not 'sweat of the brow,' is the touchstone of copyright protection."

The Copyright Office explains the copyrightability of common geometric figures and shapes as follows:

> Copyrightability is based upon the creative expression of the author, that is, the manner or way in which the material is formed or fashioned. . . . [I]t is not possible to copyright common geometric figures or shapes in three-dimensional form such as the cone, cube, or sphere. The mere fact that a work of sculpture embodies uncopyrightable elements, such as standard forms of ornamentation or embellishment, will not prevent registration. *However, the creative expression capable of supporting copyright must consist of something more than the mere bringing together of two or three standard forms or shapes with minor linear or spatial variations.*

Copyright Compendium § 503.02(b) (emphasis added). A simple combination of simple elements is insufficient to earn copyright protection. *See Florabelle Flowers, Inc. v. Joseph Markovits, Inc.*, 296 F. Supp. 304, 307 (S.D.N.Y. 1968) (no copyright when work is an "aggregation of well-known components [that] comprise an unoriginal whole" which "falls short of the easy standard of originality required for a copyright").

Here the top portion of the plate design consists of multiple concentric circles. The bottom side also contains three raised or ridged concentric circles. The fact that some are raised or thicker than others is a minor variation of the shape. Although the three ridged concentric circles might make it easier for the fingers to "grip"the plate, that fact is a utilitarian benefit, not an artistic one. There is nothing undulating, or wave-like about the uniform ridges on the underside rim of the plate. With respect to the slope of the bottom of the plate, even if we assumed conceptual separability, the same analysis would apply that this slope does not constitute original, i.e. sufficient creative, sculptural authorship. Cf. *Kieselstein-Cord v. Accessories By Pearl, Inc.*, 632 F.2d 989, 990 (1980) (sculpted design found separable "on a razor's edge of copyright law"), H.R. Rep. No. 94-1476, at 55 (1976).

You hold up the authorship in *Alva v. Winninger* 177 F.Supp. at 265, 266 (scale reproduction of a sculptural work) as support for the copyrightability of your client's work. A reproduction of a work of art can be copyrightable if something of

the author's own has been added. There the author applied great detail in delineating the reproduction of Rodin's "The Hand of God" in a smaller but exactly proportional version of the original sculpture. *Id.* That reproduction required sculptural artisanship which constitutes creativity in the re-creation of the work. Executing a miniature version of a work may or may not constitute copyrightable authorship, depending on the amount of authorship contributed to the new version. The court in *Alva* determined that the amount of sculptural workmanship demonstrated by the scale reproduction of Rodin's sculpture was a more than sufficient contribution of authorship. *Id.* at 267.

You point out in several places in your appeal that the design was "unique" and "novel." Neither of these considerations affect whether the work is an original work of authorship pursuant to the copyright statute. You state that the design was "'the freshest, most original chinaware introduction that they have seen in years,'" and that "prominent customers . . . exclaimed that the design was 'highly innovative and unique." Innovation and uniqueness are not copyright considerations. They belong to the inquiry of whether an item can be patented or trademarked. Thus, public acclaim, enthusiastic comments and critical success are irrelevant. *See Copyright Compendium* § 503.02(b).

A recent case is closely on point. In *Paul Morelli Design, Inc. v. Tiffany & Co.*, 200 F. Supp. 2d 482, 487 (E.D. Pa. 2002), the court rejected a post-trial objection to an instruction that "commercial success and substantial efforts" should not be considered in deciding whether the work was original. It noted that in *Feist*, commercial success was never addressed in defining what "originality" required. *Id.* at 488. After citing several cases in which commercial success was rejected in determining copyrightability, the court stated:

> We do not leave our common sense at the courthouse door. Works may experience commercial success even without originality and works with originality may enjoy none whatsoever. Nothing has been presented to us showing any correlation between the two. Moreover, under Morelli's theory a work may not be copyrightable at one point when it enjoys no sales but may later become copyrightable if it experiences an upswing in economic fortune. This cannot be. A work is either original when created or it is not. Evidence of commercial success simply does not have "any tendency to make the existence of any fact that is of consequence to the determination of [copyrightability] more probable or less probable than it would be without the evidence."

Id. at 488-89 (quoting Fed. R. Evid. 401) (alteration in original).

Finally it is possible for the selection and combination of elements in a work to be copyrightable even when the individual elements, standing alone, would not be. *Feist*, 499 U.S. at 363. This is not one of those cases. Though a work should be reviewed in its entirety, rather than solely judging its individual elements separately, *Atari Games Corp. v. Oman*, 888 F.2d 878 (D.C. Cir. 1989), when a combination of individual elements taken as a whole lacks sufficient creative expression, copyright registration may be denied. The issue is not the possibility of available choices, but whether the particular resulting expression contains copyrightable authorship. Here, the claimed features (irregular circular ridges on the top and bottom of a circular plate) do not, either individually or in combination, constitute copyrightable expression.

In sum, the Board has concluded that, even assuming conceptual separability of elements, and considering the design elements individually and the overall design as a whole, because the plate design does not meet the *Feist* standard of originality and creativity, registration was properly denied.

CONCLUSION

For the reasons stated above, the Copyright Office Board of Appeals concludes that the NEW RELIEF PLATE DESIGN cannot be registered for copyright. This decision constitutes final agency action.

Sincerely,

/s/

Jule L. Sigall
Associate Register for Policy
and International Affairs
U.S. Copyright Office
for the Appeals Board