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May 28, 2004

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International Centre
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Re: CAKE MOLD - STAR DESIGN
CAKE MOLD - BAVARIA DESIGN
Copyright Office Control No. 61-210-993. (N)

Dear Mr. Nikolai:

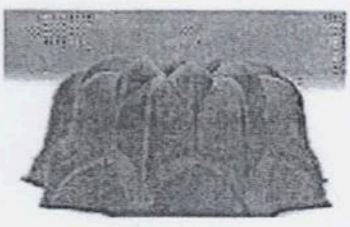
I write on behalf of the Copyright Office Board of Appeals ("Board") in response to your letter dated September 5, 2003 in which you requested reconsideration of a refusal to register two works entitled "Cake Mold - Star Design" and "Cake Mold - Bavaria Design." The Board has carefully examined the applications, the deposits and all correspondence concerning these applications, and affirms the denial of registration of these works.

I. DESCRIPTION OF WORKS

Each of the two subject works is essentially a domed, circular bundt cake pan. The two edges of each mold consist of a small circle set in the middle of and on the same plane as a larger circle. A sheet of material, presumably metal although the exact material is irrelevant to this analysis, arches from one circle to the other thereby creating the bulk of the circular, domed mold. The Bavaria design features approximately eight, parallel, equidistant, slightly-curved, diagonal ridge protrusions which repeat as alternating mirror images eight times around the dome. At the eight points where the diagonal protrusions meet their mirror images, the ridges create a "V" shape, either right-side up or up-side down. Immediately above the outer edge of the pan, small triangular protrusions in a vertical orientation ring the bottom of the dome.



With respect to the Star design, the outer edge of the mold is a modified circle that features ten, equidistant triangular protrusions. The tip of each of these triangles forms the beginning of a vertical ridge which continues to the top of the dome. Approximately three-quarters of the way up these long ridges, an additional shorter parallel



ridge rises between each of the longer ridges and continues down into the center of the mold. Along the bottom of the dome, quarter-circles rise vertically from the sides of each of the triangular protrusions. These quarter circles are parallel to the sides of the long, vertical ridges. A somewhat perpendicular arc connects the quarter circles to the sides of the ridges. These arcs slope to meet at the tip of the triangular protrusions that encircle the base.

II. ADMINISTRATIVE RECORD

A. Initial Applications and Office's Refusal to Register

On July 16, 2002, the Copyright Office ("Office") received two Form VA applications from James T. Nikolai of your firm on behalf of your client, Northland Aluminum Products, Inc., to register two cake molds. In a letter dated November 15, 2002, Visual Arts Section Examiner Colleen Kearney refused registration of these works because she determined that each was a useful article that did not contain any separable authorship as necessary to sustain a claim to copyright. (Letter from Kearney to Nikolai of 11/15/02, at 1.)

Ms. Kearney explained that although copyright law protects works of artistic craftsmanship insofar as their form, this protection does not extend to such works' mechanical or utilitarian aspects. She further explained that protection of a useful article's design will arise only if such design incorporates pictorial, graphic or sculptural authorship that is either physically or conceptually separable from the utilitarian aspects of the article. After describing several examples in which physical or conceptual separability did exist, Ms. Kearney concluded that "[b]ecause all of the elements of the works you deposited are either related to the utilitarian aspects or function, or are subsumed within the overall shape, contour, or configuration of the article, there is no physically or conceptually separable authorship as such." (*Id.* at 2.) Ms. Kearney noted that designs for useful articles may be entitled to protection under federal patent laws. (*Id.*)

B. First Request for Reconsideration

In a letter dated December 16, 2002, you requested reconsideration of the Office's refusal to register the works. After summarizing the general legal propositions relating to conceptual separability for utilitarian articles, you argued that the "inverted V-shaped protrusions which are stacked on top of one another" around the circumference of the Cake Mold - Bavaria Design are conceptually separable because they serve no functional purpose, form a unique and distinct ornamental pattern and constitute graphic or sculptural authorship within a three-dimensional sculpture. (Letter from Nikolai to Kearney of 12/16/02, at 1.) You argued that the Cake Mold - Star Design also contains purely ornamental features, as evidenced by the fact that it "has a series of protrusions along its circumference," has an uneven bottom which "gives the appearance of a

mountain range or some structure other than a cake mold," and when viewed from the top, "has an ornamental shape of a star or flowers." (*Id.* at 1-2.) Comparing the ornamental designs on the circumferences of both cake molds to a carving on the back of a chair or a floral design on flatware, you concluded that registration of these works should be granted. (*Id.* at 2.)

C. Examining Division's Response to First Request for Reconsideration

In response to your request and in light of the points raised in your letter of December 16, 2002, Attorney Advisor Virginia Giroux of the Examining Division reexamined the applications and determined that both cake molds were useful articles that did not contain any separable authorship which was copyrightable. Ms. Giroux explained in a letter dated June 11, 2003 that with respect to a useful article, which by definition has an intrinsic utilitarian function that is not merely to portray the appearance of the article, the design is copyrightable:

> only if and to the extent that such design incorporates pictorial, graphic, or sculptural features that can be identified separately from and are capable of existing independently of the utilitarian aspects of the article without destroying its basic shape.

(Letter from Giroux to Nikolai of 6/11/03, at 1.) She noted that this separability could exist either physically or conceptually. Ms. Giroux explained that conceptual separability occurs when the pictorial, graphic or sculptural features of the work can, for example, be visualized on paper or as a free-standing sculpture, independent of the shape of the utilitarian article, without destroying the basic shape of the article, such as with respect to a carving on the back of a chair or pictorial matter engraved on a glass vase. (*Id.* at 1, 2 and 4) (citing *Esquire, Inc. v. Ringer*, 591 F.2d 796 (D.C. Cir. 1978), *cert. denied,* 440 U.S. 908 (1979), *Compendium II: Compendium of Copyright Office Practices* § 505.03 (1984) ("*Compendium II*") and H.R. Rep. No. 94-1476, at 55 (1976)).

She explained, however, that conceptual separability and copyrightability do not automatically exist simply because an element within a useful article is not dictated by utilitarian concerns. Even if certain features are non-functional or could be designed differently, Ms. Giroux noted that no copyright registration is possible where such features are an integral part of the overall shape or contour of the useful article. She then recounted the holding in *Esquire* wherein the court upheld the Office's refusal to register the shape of a utilitarian outdoor lighting feature, even though it did contain some aesthetically pleasing features. In further support of the limits imposed on the copyrightability of useful articles, she also cited *Norris Indus., Inc. v. International Tel. & Tel. Corp.*, 696 F.2d 918 (11th Cir. 1983), *cert. denied,* 464 U.S.818 (1983) (holding a wire-spoke wheel cover was not copyrightable because it did not contain any separable sculptural design). Ms. Giroux cautioned that the test for conceptual separability cannot be met

merely by analogizing the general shape of a useful article to a work of modern sculpture, since the artistic features would not be perceived as having a separate existence.

Finally, Ms. Giroux referenced several factors that do not bear upon the Office's determination of copyrightability, including a work's aesthetics, uniqueness, visual impression and commercial success. (*Id.* at 2.) Citing Section 102(b) of 17 U.S.C. §§ 101 *et seq.* (2003) ("Copyright Act"), Ms. Giroux also noted that copyright protection does not extend to any idea, process or method of operation. (*Id.* at 1.)

Evaluating the two cake molds at issue, Ms. Giroux concluded that they were useful articles that did not contain any design elements that could be physically or conceptually separated from the cake pans without destroying the molds' basic shapes. Specifically, she found that the "V"-shaped and other protrusions were part of the overall shape of the useful articles themselves and therefore not subject to copyright protection. She stated that even if some portion of these designs were conceptually separable, such elements consisted of common shapes in the public domain which were consequently not sufficiently creative, in and of themselves or in combination, to sustain a copyright under the threshold articulated in *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991). Based on the reasoning discussed above, Ms. Giroux refused copyright registration for these two works.

D. Second Request for Reconsideration

In a letter dated September 5, 2003, you requested the Office to reconsider for a second time its refusal to register the copyright claims in the two cake molds. (Letter from Nikolai to Giroux of 9/5/03, at 1.) You argued that the cake molds were not useful articles because "[t]he function of the molds in question is only to portray the appearance generated by the molds." (*Id.*) You continued that without the Star or Bavaria designs, the molds would not serve their intended purpose to create an artistic shape. (*Id.* at 2.) You also stated that the works were applied art or models, and that they were works of artistic craftsmanship as to their form. You argued that the originality of the molds evidenced their artistic craftsmanship, and that the shape and contours of the molds met the originality test set forth in *Feist*. (*Id.* at 1-2.)

You proceeded to argue in the alternative that even if the works were useful articles, their sculptural features could be conceptually separated from their utilitarian aspects without destroying the works' basic shapes. Although you reiterated the same legal propositions that Ms. Giroux explained in her letter, you reached the opposite conclusion that the decorative patterns could be conceptually separated from the molds and even visualized on paper as a drawing or viewed as free-standing sculptures. (*Id.* at 2.) You argued that the Star and Bavaria designs, as separated from the cake molds, were independently entitled to copyright protection because they were fixed in a tangible medium, not copied from another work, and met the low threshold for originality.

You supported your originality argument by noting that "[t]he Star mold's uneven protrusion[s] provide a purely ornamental feature to the mold which represents a mountain range or some structure other than a cake mold. Likewise, the ornamental protrusions on the Bavarian mold give the impression of a flower, waves or some structure other than a cake mold." (*Id.* at 3.)

You also reiterated Ms. Giroux's comments that the Office should not consider a work's aesthetics, attractiveness, appearance, visual effect, time, effort, expense or commercial success when determining copyrightability. (*Id.* at 2-3.)

III. DECISION

A. Useful Articles and Separability

1. Legal Framework for Useful Articles and Separability

As a general proposition, copyright protection presumptively does not extend to a useful article, defined 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. However, works of artistic craftsmanship, 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 their form but not their mechanical or utilitarian aspects are concerned." *Id.* § 101. The design of the useful article will be protected "only if, and only to the extent that, such design incorporates 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.* This separability can be physical or conceptual. Congress has 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.

Physical separability means that the subject pictorial, graphic or sculptural features must be able to be separated from the useful article by ordinary means. *Compendium II, supra,* § 505.03. For example, a statuette that also serves as a lamp base can be ordinarily separated from the functional portion of the lamp by unscrewing the bulb and shade. Thus, the statuette can qualify as physically separable. *See, Mazer v. Stein*, 347 U.S. 201 (1954).

Conceptual separability means that the subject features are "clearly recognizable as a pictorial, graphic, or sculptural work which can be visualized on paper, for example, or as a free-standing sculpture, as another example, 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. The artistic features 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 II, supra,* § 505.03. For example, while a carving on the back of a chair cannot readily be physically separated from the chair, it can easily be conceptually separated because one could imagine the carving existing as a drawing. The chair, meanwhile, would still remain a useful article having retained its basic shape, even absent the carving. The carving would therefore qualify as conceptually separable.

However, just because a feature is not necessary to or dictated by the utilitarian concerns of an article does not mean that the feature is automatically conceptually separable. If removing such features would destroy the useful article's basic shape, namely because the features are an integral part of the overall shape or contour of the useful article, then the features would not qualify as conceptually separable.

Additionally, as explained in *Esquire*, 591 F.2d at 800, copyright protection is not available for the "overall shape or configuration of a utilitarian article, no matter how aesthetically pleasing that shape may be." 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.*[1] Similarly in *Norris Indus.*, 696 F.2d at 924, 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 axels from damage and corrosion, and it did not contain any sculptural design features that could be identified apart from the wheel cover itself.

After examining the two subject cake molds and in light of the above-described legal framework, the Board has determined that both of the subject works are intrinsically useful articles that do not contain any separable authorship.

2. The Molds are Useful Articles

As self-evident from their titles, "Cake Mold - Bavaria Design" and "Cake Mold - Star Design" are molds for cakes. Their intrinsic use is to hold liquid cake batter until it has fully cooked and solidified into a particular shape. An industrial product qualifies as a "useful article" as long as it has "an intrinsic utilitarian function." In this circumstance, the subject works do not just have an intrinsic utilitarian function, their only function is inherently utilitarian.

However, seizing on the definition's qualifying clause that a work is not a "useful article" if its useful function is merely to portray the appearance of the article, you argue that these cake molds do not qualify as useful articles because their function is "only to portray the appearance generated by the molds." (Letter from Nikolai to Giroux of 9/5/03, at 1.) This argument is unpersuasive for three reasons. First, it misconstrues the analysis for copyrightability which examines the appearance and/or use of the actual article for which registration is sought, not the appearance of any by-product (*e.g.*, a cake) that such article may generate. Second, Section 102(b)[2] of the Copyright Act bars protection of any process or method of operation that is embodied in a work, even if a process generates a by-product with an aesthetically pleasing appearance. Third, the purpose of the qualifier is to exempt from the definition of useful articles those sculptures whose only function is of course to portray their own appearance. You argue that these works could be viewed as "sculptural works of art." (*Id.* at 2.) Although the Board does not consider aesthetics in determining copyrightability, which both you and Ms. Giroux duly

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[1] Although *Esquire* was decided under the 1909 version of the Copyright Act, its reasoning is still 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 803. Since pre-1976 case law in part formed the basis for the 1976 Act, the reasoning of these earlier cases remains relevant to cases arising under the later Act.

[2] "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. § 102(b).

noted,[3] merely analogizing a useful article to a sculpture of modern art cannot create copyrightability where it otherwise does not exist. *See, Compendium II*, *supra,* § 505.03. If this were the case, all useful articles and industrial products could be subject to copyright protection as modern sculpture, a situation Congress made clear it did not intend. H.R. Rep. No. 94-1476, at 55 ("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.")

Your reliance on *Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co.,* 851 F. Supp. 222 (E.D. Va 1994), *aff'd*, 74 F.3d 488 (4th Cir. 1996) is also misplaced. In that case, the court upheld the copyrightability of animal mannequins used by taxidermists to mount animal skins. The court found that these specific mannequins, with their positioning of body parts and anatomical detail, were copyrightable sculpture rather than useful articles. The court based this determination on the fact that each mannequin actually remained part of a "permanent display," and that such mannequin's "creative form and expression" was still "conspicuous in the final display," even though it was ultimately covered by a skin. 74 F.3d at 494-95. The mannequin's use therefore was to display its own contours, not just to hold up a skin. With respect to the subject cake molds, though, the molds are not part of any final display, and therefore their function cannot be said to be merely to portray their own appearance. After the molds have served their functional purpose to contain the batter during baking, the molds are detached and discarded from the cake. Even though the resulting cake may reflect the molds' design, the molds themselves are not the items portraying their own appearance, and therefore do not qualify as copyrightable sculpture. Due to the difference in the facts of these cases, the holding in *Superior Form* is inapplicable to the circumstances presently at issue.

Based on the foregoing, the Board finds that these two cake molds fit squarely within the definition of useful articles, and as such, neither can sustain a copyright registration. As you correctly note though, separable elements embodied within a useful article can warrant copyright protection in and of themselves provided that they meet certain criteria. However, as discussed below, the Board finds that in these circumstances, neither cake mold contains separable, copyrightable subject matter.

3. The Molds Contain No Separable Elements

The subject works simply do not contain any pictorial, graphic or sculptural features that could be separated from the utilitarian aspects of these useful articles without destroying the cake molds' basic shapes. Since each mold consists of a single piece of material, there is no feature

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[3] (Letter from Giroux to Nikolai of 6/11/03, at 2; Letter from Nikolai to Giroux of 9/5/03, at 2.)

that can be physically separated by ordinary means such as by unscrewing, dismounting or otherwise detaching it. Neither does there exist any feature that is conceptually separable. The protrusions on each of the cake molds are not only part of the overall shape and contour of the molds, these protrusions are the very mold itself. As you yourself stated, "[w]ithout either the Star design or the Bavarian design[,] the molds would not serve [their] intended purpose." (Letter from Nikolai to Giroux of 9/5/03, at 2.) The Board concurs that the basic shape of the molds would be destroyed without the Star and Bavaria designs. It is for this exact reason that the designs are therefore not conceptually separable and not copyrightable.

Yet, you argue that the "patterns" of the molds, as if they were topical overlays on smooth bundt cake pans, "could be easily drawn on a piece of paper," and are therefore conceptually separable. (*Id.* at 2.) Because these "patterns" exist in three-dimensions, though, the Board disagrees with your assertion. While a semblance of the patterns may be able to be drawn on paper, the conversion from three dimensions to two would necessarily alter the designs, and therefore the exact design is not conceptually separable. Your alternative argument that "the photographs submitted with the application of the molds shows that the molds can be seen as free-standing sculptures," *id.*, has already been addressed and dismissed.

You cite several cases relating to conceptual separability. Unfortunately, none advances your cause. In *Collezione Europa U.S.A., Inc. v. Hillsdale House, Ltd.*, 243 F. Supp. 2d 444, 455 (M.D.N.C. 2003), the court did find that sculptural leaves which adorned a chair, baker's rack and other furniture were conceptually separable, namely because the furniture "would be equally useful even without the sculpted features" and these features "had little to do with the [furniture's] structural integrity." However, as discussed above, the utility of the cake molds and their structural integrity would be compromised, if not destroyed, without the presence of the Star and Bavaria designs. You also cite *Barry Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980) where the court found the conceptually separable features of a belt buckle to be copyrightable. In that case, though, the court noted that although a belt buckle is traditionally a useful article used to hold trousers at the wearer's waist, these particular "buckles" were considered jewelry and worn at other parts of the body as well. 632 F.2d at 993. With respect to the cake molds, though, their only use is a functional one, whether or not they perform that function with an aesthetic flair. Finally, you cite *Sunset Lamp Corp. v. Alsy Corp.*, 698 F. Supp. 1146, 1151 (S.D.N.Y. 1998), which held that a banana leaf design was separable from a table lamp and copyrightable. Notwithstanding the fact that the *Sunset Lamp* court addressed the issue of separability in only three sentences lacking any substantive analysis,[4] the court had a

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[4]The court's separability analysis reads in its entirety: "That the design appears on a useful object such as a lamp is no bar to a valid copyright so long as the design is physically or conceptually separable from the objecton which it appears. [Citation omitted.] Here it takes no great feat of ratiocination to separate the concept of the banana leaves from the concept of the lamps. Accordingly, I find that the design is copyrightable in this respect." 698 F. Supp. at 1151.

relatively easy determination to make with respect to this issue given the clear direction by the Supreme Court in *Mazer* that works of artistic craftsmanship do not lose their copyrightability simply because they are incorporated into useful articles such as table lamps. *Mazer*, 347 U.S. at 214.

Unfortunately, most determinations do not have such clear precedent. As the *Kieselstein-Cord* court noted, determining which utilitarian objects have conceptually separable features is "on a razor's edge of copyright law." 632 F.2d at 990. Given its access to the actual deposits and its specialized knowledge and experience in making these distinctions, the Office is in the best position to make such determinations of registerability. It is for this reason that courts defer to the Office's issuance or rejection of a copyright registration. *See, Esquire*, 591 F.2d at 801 ("Considerable weight is to be given to an agency's interpretation of its regulations. . . . This is particularly so if an administrative interpretation relates to a matter within the field of administrative expertise and has been consistently followed for a significant period of time. . . . [Defining the boundaries between copyrightable 'works of art' and noncopyrightable industrial designs] is an issue of long-standing concern to the Copyright Office, and is clearly a matter in which the Register has considerable expertise.") In all three of the above cases, the Office had found and registered the separable copyrightable subject matter existing in the works, and all three courts concurred with the Office's determination. With respect to the subject cake molds, however, the Office has determined that no physically or conceptually separable features exist in either work. The above cited cases, with their distinguishable circumstances, do not change the Board's position.

Even if, for the sake of argument, the Board were to view the Star and Bavaria designs as topical overlays that were conceptually separable from the cake pans, these designs still would not be copyrightable because they do not contain sufficient authorship, as discussed below.

B. Original Works of Authorship

1. Legal Framework for Originality

In situations where an artistic feature may be separable from a utilitarian object, this separable feature will not automatically merit copyright protection. All copyrightable works, be they sculptures, drawings or otherwise, must also qualify as "original works of authorship." 17 U.S.C. § 102(a).

As you properly noted in your letter of September 5, 2003, the term "original" consists of two components: independent creation and sufficient creativity. *Feist*, 499 U.S. at 345. First, the work must have been independently created by the author, *i.e.*, not copied from another work. The Office accepts at face value your assertion that the "molds were independently created."

(Letter from Nikolai to Giroux of 9/5/03, at 2.) Therefore, this prong of the originality analysis is not at issue herein. Second, the work must possess sufficient creativity. In determining whether a work embodies a sufficient amount of creativity to sustain a copyright claim, the Board adheres to the standard set forth in *Feist*, 499 U.S. at 345, where the Supreme Court held that only a modicum of creativity is necessary.

Although the "requisite level of creativity is extremely low; even a slight amount will suffice," *Feist*, 499 U.S. at 345, the Court also ruled that some works (such as the work at issue in that case) fail to meet the standard. 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," 499 U.S. at 363, and that there can be no copyright in a work in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359; *see also*, 37 C.F. R. § 202.10(a) (2003) ("In order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form."); 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.01(b) (2002) ("[T]here remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright.").

Even prior to the *Feist* Court's decision, the Office recognized the modest, but existent, requisite level of creativity necessary to sustain a copyright claim. *Compendium II* states, "Works that lack even a certain minimum amount of original authorship are not copyrightable." *Compendium II*, *supra*, § 202.02(a). With respect to pictorial, graphic and sculptural works, *Compendium II* states that a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." *Id.* § 503.02(a).

In implementing this threshold, the Office and courts have consistently found that standard designs, figures and geometric shapes are not sufficiently creative to support a copyright claim. *Id.* § 503.02(a) ("[R]egistration cannot be based upon the simplicity of standard ornamentation . . . . Similarly, it is not possible to copyright common geometric figures or shapes . . . .").[5] Moreover, simply making minor alterations to these otherwise standard shapes will not inject the requisite level of creativity. *Id.* § 503.02(a) ("[Registration cannot be based upon] a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations.").

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[5] *See also, id.* § 202.02(j) ("Familiar symbols or designs, and mere variations of typographic ornamentation, lettering, or coloring, are not copyrightable."); *Id.* § 503.03(b) ("No registration is possible where the work consists solely of elements which are incapable of supporting a copyright claim. Uncopyrightable elements include common geometric figures or symbols, such as a hexagon, an arrow, or a five-pointed star . . . ."); 37 C.F.R. § 202.1(a) ("[F]amiliar symbols or designs" are "not subject to copyright and applications for registration of such works cannot be entertained.").

Of course, some combinations of common or standard forms contain sufficient creativity with respect to how they are combined or arranged to support a copyright. *See, Feist*, 499 U.S. at 358 (the Copyright Act "implies that some 'ways' [of compiling or arranging uncopyrightable material] will trigger copyright, but that others will not"; determination of copyright rests on creativity of coordination or arrangement). However, merely combining non-protectible elements does not automatically establish creativity where the combination or arrangement itself is simplistic. For example, the Eighth Circuit upheld the Register's refusal to register a simple logo consisting of four angled lines which formed an arrow and the word "Arrows" in cursive script below the arrow. *John Muller & Co. v. New York Arrows Soccer Team*, 802 F.2d 989 (8th Cir. 1986).

2. Any Separable Elements Would Not Be Copyrightable

With respect to the Bavaria design, its parallel, equidistant, symmetrical lines are not sufficiently creative to support a copyright claim, nor is the "V" these lines create where their mirror images meet. Lines and "Vs" are common geometric shapes, or at most, minor variations thereof. As previously explained in detail, common geometric shapes are in the public domain and not afforded copyright protection. Similarly, the Star design also consists only of common geometric shapes such as triangles, arcs and quarter-circles.

Section 503 of *Compendium II* states, "If the work consists entirely of uncopyrightable elements, registration is not authorized." Because both cake pans consist entirely of common geometric shapes, the only means by which these non-protectible elements could possibly sustain a copyright would be if their particular combination or arrangement exhibited a sufficient level of creativity. Unfortunately, they do not. Even when the constituent elements are viewed in combination, *i.e.* the Star design and the Bavaria design are each viewed as a whole, the designs consist only of repetitive, symmetrical, mirror-image arrangements. Such simplistic arrangements of non-protectible shapes cannot rise to the requisite level of creativity. *See, Compendium II, supra,* § 503.02(b) ("[T]he 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.").

Yet, you argue in part that copyright should subsist in the Bavaria design because the "series of inverted V-shaped protrusions which are stacked on top of one another . . . serve no functional purpose." (Letter from Nikolai to Kearney of 12/16/02, at 1.) As previously stated, whether or not a feature of a useful article has a functional purpose has no bearing on whether the feature is sufficiently creative to sustain a copyright. A functional feature which is also separable

and sufficiently creative may be copyrighted, whereas a non-functional, standard design, such as the V-shaped protrusions presently at issue, would not be.[6]

You further point out that the Bavaria design has a "distinct ornamental pattern," (Letter from Nikolai to Kearney of 12/16/02, at 1), and that "the ornamental protrusions on the Bavarian mold give the impression of a flower, waves or some structure other than a cake mold." (Letter from Nikolai to Giroux of 9/5/03, at 3.) Similarly, you contend that the Star design's star-shape and its series of protrusions are "purely ornamental features," and "represent a mountain range or some structure other than a cake mold." *(Id.)*; (Letter from Nikolai to Giroux of 9/5/03, at 3.) However, not all ornamental designs are entitled to copyright protection. For example, standard, round, equidistant polka-dots can certainly be used as an ornamental design, but they are not sufficiently creative to be copyrightable. *See, Compendium II, supra,* § 504.01. Additionally, whether or not the ornamental designs selected are thematically related to the useful article itself is immaterial. Therefore, it would make no difference in the analysis if these cake molds featured protrusions resembling candles, or rather those, as you argue here, that arbitrarily resemble flowers, waves and mountain ranges.

The two cake mold designs, regardless of whether evaluated as a whole or by constituent elements, consist entirely of non-protectible shapes and designs. Therefore, even if any portion of either design were conceptually separable, which the Board does not believe any is, such portion would still not be subject to copyright protection due to the lack of sufficiently creative authorship.

IV. CONCLUSION

For the reasons stated herein, the Copyright Office Board of Appeals affirms the refusal to register the two cake mold designs, "Cake Mold - Star Design" and "Cake Mold - Bavaria Design." This decision constitutes final agency action on this matter.

Sincerely,

/S/

Marilyn J. Kretsinger
Associate General Counsel
for the Appeals Board
United States Copyright Office

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[6]The Board also notes that with respect to your characterization of the points where the diagonal lines meet in the Bavaria design as "V"s, copyright protection is not available for typeface. H.R. Rep. No. 94-1476, at 55.