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January 5, 2004

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Coats & Bennett
1100 Crescent Green
Suite 206
Cary, NC 27511

Re: POTTERY JAR
Control No. 60-703-4026(C)

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CONGRESS

Dear Mr. Davenport:

I am writing on behalf of the Copyright Office Board of Appeals in response to your letter dated April 21, 2000, requesting a second reconsideration [second appeal] of a refusal to register a work entitled "POTTERY JAR" on behalf of your client, Stephen Smith. I take this opportunity to apologize for the delay in getting this decision to you. The Board has carefully examined the application, the deposit, and all correspondence in this case concerning this application and affirms the denial of registration because the work is a useful article that does not contain sufficient separable authorship to support a claim to copyright.

Washington
D.C.
20559-6000

I. Administrative record

A. Initial submission and Office refusal to register

The initial application for registration, received on October 20, 1999, sought registration for the work entitled POTTERY JAR as a three-dimensional sculpture. In a letter dated October 21, 1999, Visual Arts Examiner James L. Shapleigh rejected the application because he found there was insufficient original sculptural authorship to warrant copyright protection. Mr. Shapleigh also noted that copyright does not protect familiar shapes, symbols and designs or simple variations or combinations of basic geometric designs. Letter from Shapleigh to Coats of 10/21/99.

B. First request for reconsideration

In a letter dated November 24, 1999, Larry L. Coats of your firm sent a letter to Mr.

Shapleigh disagreeing with his refusal to register the work and requesting reconsideration. Mr. Coats cited the low threshold for originality articulated in Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991) and confirmed in Atari Games Corp. v. Oman, 979 F.2d 242 (D.C. Cir. 1992) and stated that when viewed under this standard and considered as a whole, POTTERY JAR presents "substantial originality." Letter from Coats to Shapleigh of 11/24/99 at 1-2. Mr. Coats also cited the concern expressed by Justice [then, Judge] Ginsburg in Atari that the Register's attention may have been trained dominantly on components of the work and not the work as a whole. Letter from Coats of 11/24/99 at 1. Pointing out that the applicant was not seeking to register familiar shapes and symbols, Mr. Coats further argued that the very nature of creating a pottery design strongly suggests that originality is present in almost any sculpted pottery design that was independently created and not copied. Again, Mr. Coats urged the Office to examine the various aspects of the work– the shape and design of the jar along with the presentation of the raised panel about the front of the jar and the design and implementation of the cork top– considered as a whole. He observed that while the contributions constituting the work may be considered by the Office to humble or even obvious, such authorship contributions "are still original and when viewed as a whole certainly meet the minimum requirement for originality." Id. at 2.

On November 30, 1999, Mr Coats submitted a follow-up letter, again requesting reconsideration of the refusal to register POTTERY JAR. Letter from Coats to Visual Arts Section of 11/30/99. Mr. Coats reiterated the views expressed in his November 24, 1999 letter. Again emphasizing the standard for originality set forth in Feist and confirmed in Atari, he argued that the overall shape and design of the pottery jar is original. He described POTTERY JAR as having a main body curving upwardly and inwardly, with the top of the main body having a "prominent rim that forms a transition area between the main body and the implementation of a cork that actually projects upwardly from the main body of the work." On one side of the main body is a "most prominent raised panel that is raised or elevated with respect to the main body of the work." Mr. Coats added that there "are other original design features incorporated into the work" but did not describe or itemize these features. He concluded again that POTTERY JAR when viewed as a whole meets the minimum standard for originality. Id. at 2.

C. Examining Division response to first request for reconsideration

In response to this request for reconsideration of the refusal to register, Examining Division Attorney-Advisor Virginia Giroux reviewed the submission for registration and the arguments presented in Mr. Coat's requests for reconsideration; then, in a letter dated March 2, 2000, she again refused registration. Ms. Giroux upheld the refusal to register POTTERY JAR because that the jar is a useful article, intended to be used for holding and storing material, and found that it did not contain any separable artistic or sculptural features that are copyrightable. Letter from Giroux to Coats of 3/2/00 at 1.

In classifying the work at issue here as a useful article, Ms. Giroux explained that a useful article, under the statutory requirements of the copyright law, must evidence some pictorial, graphic, or sculptural authorship 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 and sculptural works*. She also mentioned that the legislative history of the 1976 Act provides that such "separability" may be physical or conceptual. Letter from Giroux of 3/2/00 at 1. Ms. Giroux then cited the Compendium of Copyright Office Practices, Compendium II, (1984), sections 505.03 and 505.04, in explaining the Office's definition of the terms "physical" and "conceptual" separability. She cited Esquire v. Ringer, 591 F.2d 796 (D.C. Cir. 1978) cert. denied, 440 U.S. 908 (1979), for the proposition that copyright could not be secured for a useful article based on the overall shape or configuration of the article, no matter how aesthetically pleasing that shape or configuration might be. Letter from Giroux of 3/2/00 at 2. Ms. Giroux explained that the "test for conceptual separability, however, is not met by merely analogizing the general shape of a useful article to works of modern sculpture since, in this case, the alleged 'artistic or decorative features' and the useful article cannot be perceived as having separate, independent existences." Further, she explained that although certain features could have been designed differently, if the features are an integral part of the overall shape or contour of the useful article, no registration is possible. Id. Ms Giroux found that the only element that could be considered as conceptually separable is the design appearing on the surface of the jar but, since this design appears to have been created largely as a result of a mechanical process and not the product of human authorship, it does not qualify for copyright protection. Id. She found that all of the sculptural elements of the jar, including the cork top, were part of the overall shape, contour, or configuration of the useful article itself and could not be perceived as conceptually separable without destroying the basic shape of the article itself. Id.

Ms. Giroux explained that although a functional work may have been created for aesthetic or artistic purposes, only those features that can be identified as separable from the useful article are copyrightable. Id. at 3. In addition to stating that the Copyright Office's test for separability is found in Compendium II and citing courts' support for this test, e.g., Esquire v. Ringer, 591 F.2d 796 (D.C. Cir. 1978) and Custom Chrome, Inc. v. Ringer, 35 U.S.P.Q.2d 1714 (D.D.C. 1995), Ms. Giroux quoted the relevant legislative history which emphasized the need for separable authorship to stand on its own. Id. at 3, citing H.R. Rep. No. 1476, 94th Cong., 2d Sess. 55 (1976). She concluded that because all of the sculptural elements of the POTTERY JAR were either related to the utilitarian or functional aspects of the article or were subsumed within the overall shape, contour, or configuration, no physical or conceptual authorship was identified and, thus, registration was again refused. Id. at 4.

D. Second request for reconsideration

On April 21, 2000, you filed a second request for reconsideration of the denial of

registration. You argued that the Copyright Office's characterization of the work as a useful article is incorrect since these jars are not truly useful to the public and were not intended to be useful, but rather are meant to serve as humorous conversation pieces. Letter from Davenport to the Board of Appeals of 4/21/00 at 1-2. While conceding that the POTTERY JAR in question could be used as a receptacle, such use is not its intended purpose; rather, the purpose is to evoke a humorous response. You have stated that the Copyright Office, in classifying a work as useful if that work has any useful function, has probably gone beyond its legitimate bounds, given the fact that courts themselves have abstained from such inquiries and you cited Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903), in support of your position.

You acknowledged the Office's separability tests as stated in Compendium II but pointed out that many other definitions of, and tests for, separability also exist, citing Judge Newman's dissent in Carol Barnhart, Inc. v. Economy Cover Corp., 773 F.2d 411 (2d Cir. 1985), which itself is cited by Professor Goldstein in his treatise Goldstein, Copyright § 2.5.3(b) at 107-108. You have also cited Professor Goldstein's own separability test as well as a case following the Goldstein test, Pivot Point Int'l., Inc. v. Charlene Productions, Inc., 816 F. Supp. 1286 (N.D. Ill. 1993). Letter from Davenport of 4/21/00 at 3. In your explanation of the work in question, you have stated that POTTERY JAR is only marginally useful, with its primary purpose being artistic. As a work originally crafted on a pottery wheel by hand, you maintain that the sculptor's original molding of this work into an aesthetically pleasing work required artistic decisions: the thickness, height and shape of the walls of the jar were all under the artist's creative control to achieve a "certain aesthetic *je ne sais quoi*." Id. You further explained that, as part of the molding process, there were choices of color of materials selected as well as glazing and firing in a kiln. You have pointed out that "the layer of clay that is applied after initial creation has nothing to do with the functionality, shape, or utility of the pottery jar." Id. at 4.

Stating that POTTERY JAR meets the requirements for conceptual separability under any test, POTTERY JAR's being purchased primarily for its aesthetic beauty, you take the position that POTTERY JAR's functionality is "incidental." Letter from Davenport of 4/21/00 at 4. You have argued that the Examining Division "has chosen a test that is most favorable to support its refusal to register," noting that the test followed by the Copyright Office was enunciated in Equire and that Esquire was decided under the 1909 Copyright Act, not the current 1976 Act. Letter from Davenport of 4/21/00 at 5. You argue that if the jar were a solid clay object, shaped identically to POTTERY JAR, but without vessel qualities, it would be registrable. Finally, you conclude that the "shape is not really a part of the function of the jar" and maintain that the Office has "forced an unnecessary appeal by not properly identifying the grounds for refusal to register," referring to the examiner's refusal based on insufficient creativity versus Ms. Giroux's refusal based on lack of conceptually separable authorship. Because you take the position that the Office has applied an improper separability test to POTTERY JAR, you urge registration.

The Board of Appeals has reviewed the application as well as all material submitted in support of the registration at both the first and second levels of reconsideration and has determined that POTTERY JAR is a useful article possessing no separable authorship and, thus, cannot be registered. Our reasoning follows.

II. Decision

A. Description of work

POTTERY JAR is a five-inch high by five-inch wide jar made of clay which has been glazed and kiln-fired. The jar is generally rounded in its overall shape and narrows at the top with a lip or collar of different coloration which lip or collar is topped by a "generally trapezoidally-shaped cork top." Letter from Davenport of 4/21/00 at 3-4. The front surface of the jar possesses a slightly raised rectangular-shaped panel with the ends of the rectangle curved.

B. POTTERY JAR is a useful article

The Board of Appeals has determined that POTTERY JAR is a "useful article" within the definition of that term in the Copyright Act. 17 U.S.C. §101. Section 101 states that "[a] 'useful article' is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." A jar by general definition is useful even if it has other, non-functional uses. We point out that the statutory definition indicates "*an* intrinsic utilitarian function"– one functional use is sufficient to render a work utilitarian under the statutory definition and the fact that a work may serve in other, non-useful ways does not negate its usefulness.[1] The fact that the work is distributed

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[1] The statutory definition's reference to *an* intrinsic utilitarian function was a legislative change in 1976 from the Copyright Office's previous regulatory provision regarding the extent of copyright protection for a useful article. The Office's previous regulations at 37 C.F.R. 10[c] (1959), (revoked 1978), determined a work to be a useful article, and thus requiring separately identifiable artistic features, if its "*sole* intrinsic function" was its utility. (emphasis added). The ultimate 1976 statutory revision was the result of the decision in Mazer v. Stein, 347 U.S. 201 (1954), that works of art incorporated into utilitarian objects did not lose their copyright protection. *See also* Fabrica, Inc. v. Ed Dorado Corp., 697 F.2d 890, 893 (9th Cir. 1983): "The significant change from the prior law is that courts need no longer determine whether an article's function is *solely* utilitarian. Now, if an article has *any* intrinsic utilitarian function, it can be denied copyright protection except to the extent that its artistic features can be identified separately and are capable of existing independently as a work of art." (emphasis in original); and, *see also* Carol Barnhart, Inc. v. Economy Cover Corp., 773 F.2d 411 (2nd Cir. 1985), for a

and purchased in the marketplace primarily for the inclusion of witty phrases on the front surface of the jar does not alter the nature of the work for copyright registration purposes. The work as depicted in the deposit copy materials submitted for this claim and as described in the arguments submitted on reconsideration is a ceramic jar with a cork lid and, thus, without question, a useful article.

C. Separability

Since the Board unanimously finds this work to be a useful article, the question becomes whether there are any separable copyrightable elements. The Copyright Act provides that "works of artistic craftsmanship" may be protected by copyright "insofar as their form but not their mechanical or utilitarian aspects are concerned," and that the design of a useful article is protectible "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. 17 U.S.C. 101 (definition of "pictorial, graphic, and sculptural works"). You argue that even if the POTTERY JAR is a useful article, the work is entitled to registration. It is true that the finding that the POTTERY JAR is a useful article does not disqualify it for copyright protection if authorship features can be identified in the work which are separable from the utilitarian aspects of the article.

Congress clarified its intent with respect to the shape of useful articles in the legislative history of the Copyright Act of 1976. Specifically, the House Report accompanying the Act states 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 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 of an article is determined by aesthetic (as opposed to functional) considerations, only elements, if any, which can be identified separately from the useful article as such are copyrightable. (emphasis added). H.R. Rep. No. 94-1476 at 55 (1976).

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review of the history of copyright protection for useful articles.

The Office's implementation of the 1976 Act, including the Act's legislative history, on this issue is reflected in Compendium of Copyright Office Practices, Compendium II, sections 505.02, 505.03 (1984). These sections of Compendium II state that claims in three-dimensional useful articles may be registered if the works in question exhibit separately identifiable– either physically or conceptually– pictorial, graphic, or sculptural features capable of independent existence apart from the shape of the useful article. The Board has examined the work for physical and conceptual separability and has been unable to discern copyrightable authorship that is separable from the utilitarian shape of the article. We cannot identify any feature of POTTERY JAR that is physically separable: Section 505.04 of Compendium II cites examples of physical separability as a sculptured Balinese dancer serving as a lamp base and a pencil sharpener shaped as an antique car. Compendium II states that because the overall shape of a useful article is not copyrightable, the mere fact that the housing of a useful article is detachable from the working parts does not render the shape separable. In the work at issue here, the only physically detachable part of POTTERY JAR is the lid but the lid cannot be considered physically separable under the statutory and Compendium guidelines because it is an integral part of the POTTERY JAR work which is the subject of the registration submission and the work *as such* would be altered if the lid were removed. We further cite the statutory definition of "useful article" which states that "an article that is normally a part of a useful article is considered a useful article." 17 U.S.C. 101. Thus, the lid, or cork topper, of POTTERY JAR is in itself a useful article and its overall shape does not sustain registration.

We then consider conceptual separability. Such 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. 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, section 505.03. Again, the Board has carefully considered the work at issue here and finds no separable authorship which is copyrightable. The shape of POTTERY JAR, although one may find it aesthetically pleasing, cannot be conceptually separated under the Compendium test as that test implements the House Report's explanation of separability with respect to according any copyright protection to useful articles. POTTERY JAR consists of its rounded shape topped by its flat, trapezoid-shaped lid, and includes the coloration on the surface of the fired clay of which the body of the work is made. The overall configuration of the work exhibits no separable authorship features and that configuration cannot be considered copyrightable since it *is* the shape of the useful article. You have cited the distinctive qualities of POTTERY JAR as being "primarily aesthetic" in their nature: the overall shape; the interior wall and the thickness of the jar's wall; the lip; the height; the general roundness of the article. Letter from Davenport of 4/21/00 at 3 - 4. All of these features are subsumed within the article itself and form the overall shape and lines of the article. Thus, although these features may

represent choice and discretion on the part of the author, they cannot be considered separable under the House Report guidance [above at 6] or under the Compendium II test, a test which has come under analysis by a number of courts.

1. Under the Office's separability tests, POTTERY JAR does not present separable features which are copyrightable

You have stated that the Examining Division "has chosen a test that is most favorable to support its refusal to register," referring to Esquire, Inc. v. Ringer, 591 F 2d 796 (D.C. Cir. 1978), cert. denied, 440 U.S. 908 (1979). Letter from Davenport of 4/21/00 at 4 - 5. We point out that the Copyright Office's Compendium tests for separability essentially confirm the case law which supports the long history of the Office's interpretation. In Esquire v. Ringer, referring to the useful article passage from the 1976 House Report [above at 6], the United States Court of Appeals for the District of Columbia Circuit stated that the passage "indicate[s] unequivocally that the overall design or configuration of a utilitarian object, even if it is determined by aesthetic as well as functional considerations, is not eligible for copyright." 591 F.2d at 804. Although, as you pointed out [Letter from Davenport of 4/21/00 at 5], Esquire was decided under the 1909 Act, the Court made clear that its references to the provisions of the 1976 Act were appropriate because "the new Act was designed in part to codify and clarify many of the [Copyright Office] regulations promulgated under the 1909 Act, including those governing 'works of art.' " 591 F.2d at 803. Esquire held that the Copyright Office regulation properly prohibited copyright registration for the overall shape or configuration of a utilitarian article, no matter how aesthetically pleasing that shape or configuration may be. Id. at 800. In fact, section 505.03 of Compendium II is a direct successor to the Copyright Office regulation which was affirmed in Esquire as an authoritative construction of the statute as explicitly stated in the legislative history. Id. at 802 - 03.

Further, the Norris case which you have cited provides no basis for the registration of POTTERY JAR as you have suggested [Letter from Davenport of 4/21/00 at 5]. The Office's position with respect to the interpretation of the separability issue as articulated in its Compendium tests was confirmed by the 11th Circuit in Norris Industries, Inc. v. International Telephone and Telegraph Corporation. 696 F.2d 918 (11th Cir. 1983). There, a case in which the Register joined as a defendant for the purpose of contesting the registrability of the automobile wire wheel cover in question, the court confirmed the district court's conclusion that the wheel covers were useful articles containing no physically or conceptually separable works of art. The Eleventh Circuit also cited the same House Report reference in explaining Congress' intention concerning the statutory language on separability and additionally noted that other federal circuit courts have relied upon the Office for "expertise in the interpretation of the law and its application to the facts presented by the copyright application," based upon the Office's having "been concerned with the distinction between copyrightable and noncopyrightable works of art since the Copyright Act of 1870..." 696 F.2d at 922. And, although it was a case brought under the

Administrative Procedure Act [5 U.S.C. 701 - 706], Custom Chrome, Inc. v. Ringer nevertheless once again confirmed that the Office's refusal– premised on the Compendium tests– to register motorcycle parts was not "arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law." 35 U.S.P.Q.2d 1714 (D.D.C. 1995).

Your argument that there are other tests that have been applied by the courts to determine the issue of conceptual separability is unavailing since these alternative tests have not been adopted by the Copyright Office. We point out that the Office does not follow any of the alternative separability tests: that proffered by Judge Newman in his dissent in Carol Barnhart[2]; or, that proffered by Professor Denicola[3]; or, that proffered by Professor Goldstein.[4] Because of the possible problems which these and other tests might engender, premised as they are, at least partly, on subjective perception and because such tests might result in registration of works in conflict with the expressed Congressional intent to deny copyright protection to the design of useful articles which happen to be aesthetically pleasing [above at 6], the Copyright Office has not adopted these particular alternative separability tests; nor has the Office adopted any other separability test advanced by any particular copyright scholar or commentator. The test applied by the Office must be one consistent with the expressed intention of Congress as it was set forth in the substantial legislative history that accompanied the 1976 major revision of the copyright law. Although one of the various separability theories advanced in this area may ultimately be

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[2] Judge Newman's test, sometimes referred to as a "temporal displacement" test, would take into consideration whether the observer of the article in question would be able to arrive at a "separate non-utilitarian concept that can displace, at least temporarily, the utilitarian concept." 773 F.2d at 423.

[3] The Second Circuit in Brandir International, Inc. v. Cascade Pacific Lumber Co., 834 F. 2d 1142 (2d Cir. 1987), adopted Professor Denicola's test for determining conceptual separability. That test considers whether or not a given feature or aspect of a useful article "reflects a merger of aesthetic and functional considerations;" if so, the artistic features of the useful article cannot be said to be conceptually separable; if not, conceptual separability may exist. 834 F.2d at 1145. Professor Denicola's test encompasses a consideration of the design process involved in the useful article in question as well as the artistic choices of the creator of the article and whether the artistic aspects of the article were significantly influenced by the functionality requirements. 67 Minn. L. Rev. 707 (1983).

[4] In his treatise on copyright [Goldstein at 2.5.3 (2000)], Professor Goldstein offers an alternative separability test which affords copyright protection to a "pictorial, graphic or sculptural feature incorporated in the design of a useful article if it can stand on it own as a work of art traditionally conceived and if the useful article in which it is embodied would be equally useful without it."

endorsed by a majority of courts which come to view the test as consistent with expressed Congressional intent ["courts have twisted themselves into knots trying to create a test to effectively ascertain whether the artistic aspects of a useful article can be identified separately from and exist independently of the article's utilitarian function," Masquerade Novelty, Inc. v. Unique Industries, Inc., 912 F.2d 663, 670 (3d Cir. 1990)], no such consistent or universally accepted test alternative to the current position of the Copyright Office has yet emerged.

We also note that the two other cases cited in your second request for reconsideration to prove that a work may be registrable even "where it is difficult to identify the conceptually separable elements,"do not affect the Board's view. Letter from Davenport of 4/21/00 at 5. In Trans-World Mfg. Corp. v. Al Nyman & Sons, Inc., 218 U.S.P.Q. 208 (D. Del. 1982), the posture of the case was a motion for summary judgment and the court found that there existed a genuine issue of material fact, precluding the granting of such a motion. The issue before the court was whether the eyeglass display cases at issue there exhibited conceptually separable authorship but the court noted that it could no draw no inference that the Copyright Office had considered the separability issue in rejecting Trans-World's copyright application since the Office had refused registration because of a lack of original sculptural authorship. Ted Arnold Ltd. v. Silvercraft Co., Inc., 259 F. Supp 733 (S.D.N.Y. 1966) involved a simulation of an antique telephone (with no functionality) which housed, or encased, a *physically* separable pencil sharpener. Ted Arnold provides no guidance for our consideration of the work at issue here because there is no physical separability present in the POTTERY JAR. Further, POTTERY JAR is not in itself a non-functioning, artistic representation of a jar; it is itself a useful article [above at 5] within the meaning of the Copyright Act.

As we have stated, the aesthetic appeal of a work does not guarantee copyright protection. Compendium II, section 503.01: registration of a work of the visual arts is not premised on the art style employed in the work or on the aesthetic merit of the work in question. And, Compendium II, section 202: quality, aesthetic merit, ingenuity, and uniqueness are not considered in determining the copyrightability of a work. These examining guidelines of the Office are derived from the Supreme Court's hallmark teaching in Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903), that the courts [and, thus, *a fortiori*, the Copyright Office] may not judge the artistic worth or aesthetic quality of works of the visual arts and may not premise copyright protection on the commercial value, *vel non,* of a work. 188 U.S. at 251-252. Further, as with aesthetic appeal, the intent of the author to evoke humor is not the standard for copyrightability. The intended purpose of the work of a "desire to evoke a chuckle from the viewer" claimed in your request for reconsideration [Letter from Davenport of 4/21/00 at 2] cannot be considered in the evaluation of the work's copyrightability: authorial intent is not a statutory guideline. And, in the work at issue here, the deposit copy submitted for registration does not evidence any literary or text authorship. We do note, however, that words and short phrases in themselves [which might have been added on the front surface of POTTERY

JAR] are not copyrightable. 35 C.F.R. 202.1[a]. Simply applying an uncopyrightable word or phrase to a useful article would be unlikely to alter the outcome even if the purpose were to make a useful article humorous. For works which are useful articles, the test for copyright protection must first address the statutorily required presence of features of the useful article which can be identified as existing separately from the utilitarian aspects of the article itself. It is not sufficient to posit the "elegant lines, the squat shape, and the cork top" as "stimulating in the mind of the beholder a concept that is separate from the jar that is the underlying utilitarian item." Letter from Davenport of 4/21/00 at 4. The "concept" you have thus described is co-extensive with the description of the configuration of the useful article and, under the Office's Compendium test, the useful article lacks the requisite separately identifiable and independently existing features.

a. Coloration

You have also argued that "materials are placed in this mold [made from the original POTTERY JAR] by the craftsman with the thought that certain materials will give the finished product certain colorations and striations." Letter from Davenport of 4/21/00 at 4. It is true that a two-dimensional pictorial or graphic design appearing on the surface of a useful container may be the subject of copyright. The graphic design appearing on the surface of POTTERY JAR, however, is accomplished by the use of certain materials, e.g., clay, which materials are chosen for the coloration which they will produce after the molding, glazing and firing processes are completed. We do not disagree with you that the artist, or craftsman, chose the materials with the finished product in mind. We do not agree, however, that the choice of pottery materials is a choice which can be classified as an authorial choice for copyright purposes. Ms. Giroux in her refusal to register on first reconsideration conceded that the design on the surface of POTTERY JAR is conceptually separable and the Board agrees with that assessment. Letter from Giroux of 3/2/00 at 2. Ms. Giroux referred to the surface coloration design as "created largely as a result of a 'mechanical process,' not a product of original human authorship." Id. You have taken exception to that description, calling the coloration a result "not of a machine process but, rather, an artist's individual expression." Letter from Davenport of 4/21/00 at 4.

We point out that mere coloration cannot support a copyright even though it may enhance the aesthetic appeal or commercial value of a work. Compendium II, section 503.02[a]. Color may, however, play a part in assessing the overall copyrightability of a pictorial, graphic or sculptural work. The Board has concluded that the coloration on the surface of POTTERY JAR is the result of the choice of particular pottery-making materials and the subsequent steps through which such materials are processed. Whether or not such processing is referred to as a "mechanical process," the fact remains that the coloration design is not the result of the artist painting the design on the surface or providing such graphic authorship which is then reproduced on the surface of all copies of POTTERY JAR. Thus, the surface coloration cannot provide a basis for registration of any two-dimensional pictorial or graphic design. As Ms. Giroux mentioned, particular authorship

which may be the subject of registration must be "owe it origin to a human being." Compendium II, section 202.02[b]. Materials found in nature such as the clay or other materials of which pottery is made, and their attributes, including coloration, whether in their original states or in an after-processed state, are not the subject of copyright. Materials found in nature and their characteristics, whether originally appearing or appearing after preparation processes such as glazing and firing, do not fall within the statutory guidelines of works of authorship found in section 102[a] of the statute. 17 U.S.C. 102[a].

D. Change in Office's basis of refusal to register : even if the Office were to classify POTTERY JAR as non-useful sculpture, POTTERY JAR consists of de minimis authorship

Finally, you have taken exception to the Office's changing the basis of its refusals to register: first, refused by the examiner on the grounds of lack of sufficient original sculptural authorship and, second, refused by the Examining Division attorney on the grounds of lack of separable authorship in a useful article. Even if we were to ignore the functional use of POTTERY JAR and were to consider the work simply a non-useful, sculptural work, POTTERY JAR does not meet the minimal level of creativity necessary for copyright registration. The Board recognizes the applicability of Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340 (1991), in examining and judging the authorship of a sculptural work such as POTTERY JAR would be classified if we were to categorize it as non-useful. Feist confirmed, as Mr. Coats pointed out in his first request for reconsideration, that the standard for determining the copyrightability of a work is low. [Letter from Coats 11/30/99 at 1 - 2, citing Feist, 499 U.S. at 345 - 346.] The Feist ruling also explicitly recognized, however, that some works, such as white-page alphabetical listings of phone books, fail to meet that low standard for copyrightability. Id. at 359. The Court observed that "[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity," id. at 363, 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.

Even prior to Feist, Copyright Office registration practices recognized that works with only a *de minimis* amount of authorship are not copyrightable. *See* Compendium II, sec. 202.02[a]. With respect to pictorial, graphic and sculptural works, the class within which POTTERY JAR would fall if we were to classify the work as non-useful, Compendium II states that a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." Compendium II, sec. 503.02[a]. Again, as we have stated throughout this letter, Compendium II recognizes that it is not aesthetic merit, but the presence of creative expression that is determinative of copyrightability. With respect to sculptural works, registration cannot be based upon "common geometric figures or shapes in three-dimensional form, such as the cone, cube or sphere. Creative expression capable of supporting a 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." Compendium II, section 503.02[b].

The sculptural work at issue here, were we to concede that it is not a useful article, would consist of a simple rounded body which narrows at the lip or collar. The opening of the jar at the lip or collar is filled with a flat-topped "generally trapezoidally-shaped cork top." Letter from Davenport of 4/21/00 at 3 - 4. The front surface of POTTERY JAR possesses a slightly raised rectangular-shaped panel with the end of the rectangular panel curved. The squat, rounded body of the jar topped by a cork stopper which follows the contour of the body of the jar and which jar contains only a slightly curved and raised rectangular portion on its surface to serve as a holder for the writing of humorous sayings is not sufficient, even under Feist, to sustain registration. The overall shape of the sculptural piece– again, if we were to consider it merely as sculpture– is a slight variation on a geometric shape with the lip or collar of the jar as well as the cork top following the circumference of the jar's opening. Even if we were to consider the work as a whole, which Mr. Coats urged in his November 30, 1999, letter, and as Atari instructed [Atari Games Corp. v. Oman, 979 F.2d 242 (D.C. Cir. 1992)][5], POTTERY JAR would not meet the admittedly low threshold of creativity needed under Feist. We point out that the bringing together of few common geometric shapes or, at most, minor variations on those shapes, is not sufficient under Feist to register a claim in POTTERY JAR.

For the reasons stated in this letter, the Copyright Office Board of Appeals affirms the Examining Division's refusal to register POTTERY JAR. This decision constitutes final agency action in this matter.

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[5] We comment specifically regarding Atari that, although the Office had initially refused to register the work in question in Atari, the Office did, upon reconsideration, register the videogame work at issue in recognition of the overall audiovisual authorship, composed of several individual elements– a series of related images with sound– which, taken together, were sufficient. The 1992 Atari decision, which remanded the case to the district court with instructions to return the registration application to the Copyright Office for reconsideration, referred to the need for finding a "'distinguishable variation in the arrangement and manner of presentation' of public domain elements." 979 F.2d at 246, citing Reader's Digest Ass'n v. Conservative Digest, Inc., 821 F.2d 800, 806 (D.C. Cir. 1987). Were the Board, again, to consider POTTERY JAR a non-useful item, the Board would find no such distinguishable variation in the arrangement and manner of presentation of the sculptural elements and shapes constituting POTTERY JAR.

Sincerely,

Nanette Petruzzelli
Chief, Examining Division
for the Board of Appeals
United States Copyright Office