United States Copyright Office
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March 29, 2004

Cooper and Dunham, LLP
Attn: Robert B.G. Horowitz
1185 Avenue of the Americas
New York, NY 10036

RE: FRAGILE BATH LINE BOTTLE
Control Number: 60-907-9910(C)

Dear Mr. Horowitz:

On behalf of the Copyright Office Board of Appeals, I am responding to your October 16, 2002, letter requesting a second review of the Office's refusal to register a bottle entitled Fragile Bath Line Bottle as a 3-dimensional sculpture on behalf of your client Beaute Prestige International. The Copyright Office Board of Appeals affirms the Examining Division's refusal to register.

ADMINISTRATIVE RECORD

Initial submission:

The Copyright Office received an application to register the Fragile Bath Line Bottle and a Fragile Perfume Bottle on August 6, 2001. In a letter dated October 29, 2001, the original Examiner refused to register the Bath Line Bottle on the ground that it was a useful article which did not contain any separable features that were copyrightable. After reviewing the application, including the deposit, the Examiner concluded that all of the elements of the work were either related to the utilitarian aspects or function, or were subsumed within the overall shape, contour, or configuration of the article, and there was no physically or conceptual separable authorship. The related claim entitled Fragile Perfume Bottle was registered on the ground that while it was a useful article, it contained separable features that were copyrightable.

First Request for Reconsideration:

In a letter dated March 8, 2002, you requested reconsideration of the Office's refusal to register the Fragile Bath Line. To support the arguments you made in an attached Memorandum of Law in Support of Appeal of Refusal to Register, you referred to and included a declaration of an industrial designer, John Lonczak. You urged that Mr. Lonczak analyzed the bottle and gave as his expert opinion that the bottle in question possesses separately identifiable artistic and sculptural authorship that was capable of existing independently of its utilitarian purpose. Memorandum of Law at 2. Moreover, you stated that Mr. Lonczak regarded the bottle as conceptual art. *Id.* at 3. You asserted three grounds for reconsideration: that the work is a work of artistic craftsmanship which merits registration; that it possesses physical pictorial, graphic or

sculptural features that are separable from the utilitarian aspects of the bottle, and that it possesses separable conceptual elements that can be regarded as a work of art. As to your first argument, you claimed that the definition of works of arts found in 17 U.S.C. § 101; the accompanying legislative history, H.R. Rep. No. 94-1476, at 55 (1976); Mazer v. Stein, 347 U.S. 201 (1954); and Mr. Lonczak's description of the bottle all support a finding that the bottle is a work of artistic craftsmanship that falls squarely within the 101 definition of pictorial, graphic, and sculptural works. You stated that certain elements were chosen for artistic not utilitarian reasons thus qualifying the work for protection as a sculptural work as the fish mannequins in Hart v. Dan Chase Taxidermy Supply Co., Inc., 86 F.3d 320 (2d Cir. 1996). You then asserted that even if one were to accept that the bottle is a useful article, it contains physically separable or independent elements that have nothing to do with the bottle's useful purpose and identified them as a (1) floating elliptical dome shape; capped with a (2) chamfered satin gold ring form; and topped with an amberish wheatish form comprised of two sub-forms (3) a vertically oriented cylindrical shape with vertical ribbing, and (4) a central horizontally oriented disk with opposing truncated parabolic forms. You further identified that these forms are suspended by two curved and taped rod shapes attached to the chamfered ring and following the shape of the bottle and urged that these elements were chosen purely for design purposes. *Id.* at 6-7. Finally, you urged that the work possesses conceptually separable elements that can be regarded as a work of art citing a number of cases which you claim support registration, *see e.g.*, Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989 (2d Cir. 1980). You stated that the Second Circuit clarified the conceptual separability test in Brandir Int'l, Inc. v. Cascade Pacific Lumber Co., 834 F.2d 1142 (2d Cir. 1987) by adopting a test advanced by Professor Denicola in a law review article.[1] You cited Poe v. Missing Persons, 745 F.2d 1238 (9th Cir. 1984) for the proposition that whether an article is utilitarian or a work of art is a factual issue.

After reviewing your first request for reconsideration, Examining Division Attorney Adviser Virginia Giroux responded in a letter dated June 21, 2002. She upheld the refusal to register the Bath Line Bottle on the grounds that the work was a useful article that did not contain any separable authorship that can be regarded as copyrightable. She noted that the Bath Line Bottle had an intrinsic functional use and that the fact that a useful article may serve as a work of art does not take it out of the useful article category. Consequently, she continued, such a work "must be examined in accordance with the standards applied to useful articles set forth in the copyright law." Letter from Giroux to Horowitz of 6/21/02, at 1. She stated that 17 U.S.C. § 101 not only defines a useful article as an article having an intrinsic function but also provides that the design of a useful article "shall be considered a pictorial, graphic, or sculptural work 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"without destroying its basic shape. *Id.* at 1 *citing* to 17 U.S.C § 10l. (emphasis added). Ms. Giroux noted that the House Report accompanying this section confirmed that separability may be physical or conceptual. *See* H.R. Rep. No. 94-1476, at 55 (1976). She then explained how the

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[1] Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles, 67 Minn. L.Rev. 707 (1983).

Office examined a useful article and observed that in applying the test of conceptual separability, the Copyright Office followed the practice stated in Compendium of Copyright Office Practices, Compendium II (1984) rather than the test offered by Professor Denicola. The practice set out in Compendium II was largely based on the case of Esquire v. Ringer, 591 F.2d 796 (D.C. Cir. 1978) *cert. denied,* 440 U.S. 908 (1979). Under the Office's test, conceptual separability occurs when

> ... the pictorial, graphic, or sculptural features, while physically inseparable by ordinary means from the utilitarian item, are nevertheless clearly recognizable as a pictorial, graphic, or sculptural work which can be visualized on paper, for example, or as free-standing sculpture, as another example, independent of the shape of the useful article, without destroying the basic shape of the useful article i.e., the artistic features can be imagined separately and independently from the useful article without destroying the basic shape of the useful article."

Compendium II, Sec. 505.03. She further noted that "where certain features are non-functional or 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. Letter from Giroux to Horowitz of 6/21/02, at 2 *citing* Esquire v Ringer and Norris Industries, Inc. v. International Tel. & Tel. Corp. 696 F.2d 918 (11th Cir. 1983) *cert. denied,* 464 U.S. 818 (1983). Following examination of the deposit for this work, Ms. Giroux concluded, further, that the elements you had identified as separable were "all part of the overall shape, contour, and configuration of the useful article itself, not physically or conceptually separable from its utilitarian function without destroying its basic shape, and as such, not copyrightable." *Id.* at 3.

Second Request for Reconsideration:

In a letter dated October 16, 2002, you filed a second request for reconsideration. In the accompanying legal memorandum you make the same arguments presented in your first request. First, you assert that the bottle should be judged according to the standards applicable to works of artistic craftsmanship. Second, you urge that even if the standards for useful articles are to be applied, the work possesses pictorial, graphic, or sculptural features that are separable from the utilitarian aspects of the bottle. Finally, you assert that the bottle possesses separable conceptual elements that make it a work of art.

DECISION

Description of the Work:

The deposit for the Bath Line Bottle depicts a dome-shaped container that appears to be a yellow color, described by you as amberish wheat, with a cover which is primarily clear permitting one to see the container within and which is attached to a flat base and a knob, apparently designed

in order to give the container a solid resting place and permit opening of the container. Trim on the cover and the knob are the same yellow as the container. The expert you hired states that the Bath Line Bottle suggests "a small scale or model of a law sculpture of friendly but unidentifiable nature. Like a monolithic sculpture, the bottle evokes a mystical and magical quality possibly from some distant, foreign or other worldly culture." Decl. ¶18. The Board sees this container as a simple rounded shape or dome inside another simple dome shape, set upon a flat base, with a rather common, basically circular, two-tiered top or cap. It is not unlike other containers for bath products.

Works of Artistic Craftsmanship:

Your first argument is that the Fragile Bath Line Bottle is a work of artistic craftsmanship which is a sculptural work under 17 U.S.C. § 101 and worthy of registration. The Board does not agree with this argument which completely ignores the fact that the Bath Line Product is a container.

Section 101 of the copyright law defines a "useful article" as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." Contrary to the assertions of Mr. Lonczak whom you refer to as an expert in industrial design, the Fragile Bath Line Bottle is clearly intended as a container to hold some kind of bath products; it, therefore, has an intrinsic utilitarian function.[2] Many bottles and similar containers are submitted for copyright registration to the Copyright Office and such works are consistently treated as useful articles because they fall squarely within the statutory definition. As Ms. Giroux noted in response to your first request for reconsideration, the fact that a useful article may be adapted to serve as a "work of art" does not take it out of the useful article category. Letter from Giroux to Horowitz of 6/21/02, at 1. As discussed further in response to your other two arguments, a useful article is subject to copyright protection only under the terms of the copyright law, including the legislative history explaining that law.

Your reliance on legislative history and on Mazer v. Stein[3] to support treatment of your client's bottle as a work of artistic craftsmanship is misplaced. The meaning of "works of artistic craftsmanship" in copyright terms is addressed in Compendium II, which provides: "For three-dimensional works of artistic craftsmanship falling outside the definition of useful articles, such as jewelry, toys, and wall plaques, the authorship may be either sculptural, or pictorial in nature, such as carving, cutting, molding, casting, shaping the work, arranging the elements into an original

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[2]The definition says that if a work has "an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information," it is a useful article.

[3]In 1954, the Supreme Court addressed the issue of whether copyright could be extended to a useful article Mazer v. Stein, 347 U.S. 201 (1954). The work was a lamp base consisting of Balinese dancing figures which were capable of standing alone as a sculpture. The Supreme Court mentioned favorably the regulations of the Copyright Office, and held that an article copyrightable as a work of art, such as the statuette in question, did not lose protection upon embodiment in a lamp. *Id.* at 218-19.

combination, or decorating the work with pictorial matter ..." Section 504 (emphasis added). As you correctly state Congress incorporated the standards that had been published in the Copyright Office regulations into the 1976 Copyright Act.[4] Neither this language nor Mazer supports your position.

In your extensive quotations from Mr. Lonczak, you appear to be asserting that a work which is normally a useful article can somehow be transformed into a work of artistic craftsmanship if extensive design considerations enter into the work's make-up. There is no precedent for such a conclusion. As reflected in your Memorandum, the House Report lists "an automobile, airplane, ladies' dress, food processor, television," as examples of industrial designs subject to the separability test. The Report goes on to say "or any other industrial product." H.R. Rep. No. 94-1476, at 55 (1976). A bottle or container that is used to hold a product is a useful article. Clearly, industrial products frequently have extensive design input in order to determine their make-up, yet that design effort does not transform these industrial products into works of artistic craftsmanship.[5] Moreover, even if a work is considered a work of artistic craftsmanship, this does not automatically subject it to copyright protection; it would still be examined for copyrightable authorship before a registration was issued just as the sculptural Balinese dancers in Mazer v. Stein were. *See* 17 U.S.C. § 410(a).

You urge that Hart v. Dan Chase Taxidermy Supply Co., Inc., 86 F.3d 320 (2d Cir. 1996) supports treatment of your client's bottle as a work of artistic craftsmanship. In Hart, the court found that the fish mannequins were copyrightable; based on the § 101 definition of a useful work, it concluded that "even if they were considered 'useful articles', they were useful insofar as they 'portray thei[r] appearance.'" *Id.* at 323. The court observed that mannequins straddle the line between utilitarian and sculpture work; the court's determination in Hart can serve as no controlling precedent for your client's work which clearly falls within the definition of useful article by virtue

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[4]In 1948, the Copyright Office amended its regulations to clarify the application of the copyright law in the area of applied design. The new regulation provided:

> This class includes works of artistic craftsmanship, in so far as their form but not their mechanical or utilitarian aspects are concerned, such as artistic jewelry, enamels, glassware, and tapestries, as well as all works belonging to the fine arts, such as paintings, drawings, and sculpture...

37 C.F.R. § 202.8 (1949) *as quoted* in Mazer v. Stein, 347 U.S. 201, 213-14 (1954). In 1959 the Copyright Office adopted a regulation based on the Mazer interpretation, which clarified the standards for assessing such claims by introducing a separability standard. The fact that these older regulations have been incorporated into present copyright law is specifically noted in Esquire, Inc. v. Ringer, 591 F.2d 796 (D.C.Cir. 1978) cert. denied, 440 U.S. 908 (1979) where the court noted "the new Act was designed in part to codify and clarify many of the regulations promulgated under the 1909 Act, including those governing "works of art.'" *Id.* at 803.

[5]Congress specifically declined to include design protection when it passed the 1976 Copyright Act.

of the bottle's intrinsic useful function as a container.

Useful Articles:

As set out in the law, legislative history, and Ms. Giroux's letter, if a work falls into the useful article category, it must be examined to determine whether there is any separable authorship, physically or conceptually. If there is, the examiner then determines whether this separable authorship is copyrightable.

In drawing a clear line between copyrightable works of applied art and uncopyrighted works of industrial design, Congress withheld 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 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 ... copyright protection would extend only to that element, and would not cover the over-all configuration of the utilitarian article as such.

H. Rep. No. 94-1476, 55 (1976)(emphasis added).

Physical Separability: The pictorial, graphic, or sculptural features of a work may be said to be physically separable from the shape of the work when a nonutilitarian work that is copyrightable as a pictorial, graphic, or sculptural work is later incorporated into a useful article. In such cases, the preexisting copyrightable authorship remains registrable. Compendium II, § 505.04. You do not argue that this is the case with respect to the Fragile Bath Line Bottle, and

there is no reason to believe that it is the case. Instead you next argue, based on Mr. Lonczak's declaration, that there are a number of elements in the Fragile Bath Line Bottle which you assert are physically separable and have nothing to do with the utilitarian aspects of this bottle. They include:

> a floating elliptical dome form with the weighed appearance of a creamy white marble or opaque glass, that is capped with a chamfered satin gold ring form, and topped with an amberish/wheatish form comprised of two sub-forms. The low sub-form is of vertically cylindrical shape with vertical ribbing on its circumference. The upper sub-form consists of a central horizontally oriented disk with opposing truncated parabolic forms emanating out of top and bottom of disk. The above mentioned assembly of forms are suspended by two curved, tapering rod forms as attached at the chamfered ring, that cascade down and conform to opposite sides along the wide axis of the elliptical dome form and which flare out at end of widest point of rod to attach at an elliptical chamfered edged form at the base of the assembly of forms above.

Memorandum at 6-7, *citing* Decl. ¶ 14-15.

The Board finds no evidence of physical separability in this work. The above description essentially details the basic shape of the bottle and its simple color pattern. The Board agrees with the previous two findings that the bottle lacks clearly identified artistic authorship. Additionally, even if some of the simple geometric shapes and embellishments identified in the above description could arguably be identified apart from the overall shape of the useful article, neither the elements alone nor in combination meet the creativity and originality standards of the copyright law.

Common shapes or designs, or simple arrangements of common elements such as letters or colors do not embody copyrightable authorship. Case law supports this conclusion. In John Muller & Co., Inc. v. N.Y. Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986), the court upheld a refusal to register a logo consisting of four angled lines forming an arrow, with the word "arrows" in cursive script below, noting that the design lacked the minimal creativity necessary to support a copyright and that a "work of art" or a "pictorial, graphic, or sculptural work ... must embody some creative authorship in its delineation of form." *See also*, Magic Marketing v. Mailing Services of Pittsburgh, 634 F.Supp. 769 (W.D. Pa. 1986) (envelopes with black lines and words "gift check" or "priority message" did not contain minimal degree of creativity necessary for copyright protection); Forstmann Woolen Co. v. J.W. Mays, Inc., 89 F.Supp. 964 (E.D.N.Y. 1950) (label with words "Forstmann 100% Virgin Wool" interwoven with three fleur-de-lys held not copyrightable); Homer Laughlin China Co. v. Oman, 22 U.S.P.Q. 2d 1074 (D.D.C. 1991) (upholding refusal to register chinaware design pattern composed of simple variations or combinations of geometric designs due to insufficient creative authorship to merit copyright protection); Jon Woods Fashions v. Curran, 8 U.S.P.Q. 2d 1870 (S.D.N.Y. 1988) (upholding

refusal to register fabric design consisting of striped cloth with small grid squares superimposed on the stripes where Register concluded design did not meet minimal level of creative authorship necessary for copyright).

In all of those cases, the number of elements and simple arrangement is roughly equivalent to what is found in the Bath Line Bottle involved in this appeal. [6]

Conceptual Separability. Finally you assert that the Fragile Bath Line Bottle should be protected because it possesses conceptually separable elements. Your argument here is based on a statement that the bottle conceptualizes "... the thoughts of universality, primality, passion, dynamism and mysticism as articulated into a resonating sculpture." Memo at 18, *citing* Decl., ¶ 20. You go on to urge that "These concepts, of course, are not essential to the use of the bottle." The concepts that you attribute to the bottle[7] are not those that are looked at by the Office in determining conceptual separability rather the Office is guided by the legislative history.[8]

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[6]As the Homer Laughlin court observed, "[w]hether a particular work reflects a sufficient quantum of creativity to satisfy the copyright laws is not susceptible to bright line rules or broad principles," but "in determining creativity, such a decision necessarily requires the exercise of informed discretion, and the Register, in part due to having to make such determinations on a daily basis, is generally recognized to possess considerable expertise over such matters." 22 U.S.P.Q. 2d 1074, 1075 (D.D.C. 1991)

[7]Aside from the fact that nothing other than the container and a cover are shown in the identifying material, copyright registration does not depend on symbolic value--how the work is perceived by the viewer; rather, protection depends on the manner or way in which an author's idea is expressed. 17 U.S.C. § 102(b) Copyright does not extend to ideas or concepts. Thus, the fact that your expert might see the Bath Line Bottle in a different way than the Board is not persuasive.

[8]This view is apparently premised on the test proposed by Professor Denicola rather than the test recognized by the Copyright Office. In fact, the Office has steadfastly refused to accept applicants' arguments that it should adopt various tests for separability in place of the current Compendium II tests [Compendium of Copyright Office Practices, Compendium II (1984)], especially where those tests suggest judgment based upon the creator's intention with respect to certain aspects of useful articles. We particularly cite Brandir which you used in support of your argument that the features of FRAGILE BATH LINE BOTTLE should be taken into account in assessing conceptual separability. Brandir International, Inc. v. Cascade Pacific Lumber Co., 834 F. 2d 1142 (2d Cir. 1987). The Brandir Court 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). Because of the possible problems which the Denicola test might engender, premised as it is, at least partly, on subjective perception and on the personal intention of the creator of the work in question, and because such a test 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

(continued...)

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 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. Examples given include the "carving on the back of a chair, or pictorial matter engraved on a glass vase. . . . ." *Id.* Thus, a pictorial engraving on this bottle could be considered for registration, a feeling supposedly evoked when one is viewing this bottle can not.

The Board finds no conceptually separable authorship when examining the deposit for this work. Rather it agrees with Ms. Giroux that the elements you identify as separable are part of the overall shape. They cannot be removed from the utilitarian aspects of the bottle without destroying that shape; moreover, the shape itself cannot be registered. *See* Esquire v Ringer where the court held that a Copyright Office regulation that preceded the current §505.03 properly prohibited copyright registration for the overall shape or configuration of an utilitarian article, no matter how aesthetically pleasing that shape or configuration may be. *Id.* at 800. Section 505.03 of Compendium II is a direct successor to the Copyright Office regulation that was affirmed in Esquire as an authoritative construction of the statute as explicitly stated in legislative history. *Id.* at 802-03. *See also* Custom Chrome, Inc. v. Ringer, 35 U.S.P.Q.2d 1714, 1718 (D.C. 1995), where the court stated that the conceptual separability test as it is currently enunciated in Compendium II "is consistent with the holding in *Esquire*, later cases decided under the present law, and the legislative history."

The cases that you cite as supporting registration on the basis of conceptual separability all involved works which were distinguishable from your client's bottle. Morever, a number of the cases cited by you as supporting registration actually found the works at issue to be uncopyrightable. For instance, in Norris Industries, Inc. v. International Tel. & Tel. Corp., 696 F.2d 918 (11th Cir. 1983) *cert denied* 464 U.S. 818 (1983) the wire-spoked wheel cover failed to meet the test of separability. In describing conceptually separable elements, the court in Norris observed, "These items are ornamental, superfluous designs contained within useful articles." *Id.* at 923-24. In Oddzon Prods. Inc. v. Oman, 924 F.2d 346 (D.C. Cir. 1991), a refusal to register a work referred to as a soft sculpture and entitled "Koosh Ball" was found not to be an abuse of discretion. In Ellison Educ. Equipment v. Accu-Cut Systems, 769 F.Supp. 1090 (D.Neb. 1991), 47 shapes used for manufacturer's dyes were found to be not copyrightable. Even in Brandir Intern.,Inc. v. Cascade Pacific Lumber Co., 834 F.2d 1142 (2d Cir. 1987), which contained dicta on conceptual separability not followed by the Copyright Office, the bicycle rack at issue was found to be not copyrightable. Rather than support registration of the Fragile Bath Line Bottle fragrance bottle, the results in these cases support the Copyright Office's decision to refuse registration.

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[8](...continued)
aesthetically pleasing, the Copyright Office has not adopted this particular alternative separability test.

A number of other precedents cited in your appeal letter involve decisions on preliminary matters, and provide little guidance as to the ultimate outcome. Both Poe v. Missing Persons, 745 F.2d 1238, (9th Cir. 1984) and Pivot Point Int'l Inc. v. Charlene Prods. Inc., 816 F.Supp.1286 (N.D. III. 1993) involved remands for further proceedings on factual issues. In subsequent 2001 proceedings in Pivot Point looking at the competing mannequins, the court reviewed the copyright law; emphasized that sculpture is only copyrightable as to form and then only to the extent that its sculptural features can be identified separately from, and are capable of existing independently of its utilitarian aspects; and granted summary judgment to the defendant having concluded that the mannequin head at issue was a non-copyrightable useful article and that the registration was therefore invalid. *See* Pivot Point Int'l Inc. v. Charlene Products, Inc., 170 F. Supp.2d 828,830-31, 839 (N.D. Ill. 2001). The Fragile Line Bottle has no separable and copyrightable features. 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 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.

The few cases cited by you which clearly and unambiguously uphold copyrightability of the subject matter of the case involve works dissimilar to your client's bottle. In Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989 (2d Cir. 1980), the works were ornamental belt buckles consisting of artistically original shapes and lines. You appear to be arguing that based on its aesthetic value, not its functional purpose as a container for a bath line product, the Fragile Bath Line Bottle should be protected like the belt buckles in Kieselstein-Cord. In Kieselstein-Cord, the court found evidence that the belt buckle designs at issue there were regarded as jewelry in a way that is not traditional for belt buckles, even to the extent of being worn "around the neck or elsewhere on the body other than the waist." *Id.* at 991.

CONCLUSION

For the reasons stated above, the Copyright Office Board of Appeals concludes that Fragile Bath Line Bottle cannot be registered for copyright protection. Consequently, it affirms the result reached in the Examining Division. This decision constitutes final agency action.

Sincerely,

/s/

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