United States Copyright Office
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December 12, 2005

Brett M. Hutton, Esq.
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Dear Mr. Hutton:

I am writing on behalf of the Copyright Office Review Board[1] in response to your second request for reconsideration, dated October 12, 2004. After reviewing the application from Boyd Lighting Fixture Company and the arguments you and your colleague, Susan F. Farley, presented on the company's behalf, the Board affirms the Examining Division's refusal to register Applicant's three sculptures/lamp bases entitled Primitive (tapered), Primitive (circular) and Primitive (elliptical).

I. ADMINISTRATIVE RECORD

A. Initial submissions

On November 4, 2003, applicant, Boyd Lighting Fixture Company, submitted separate applications to register each of three sculptures. Along with the shared title of "Primitive," each work has one of the corresponding subtitles of "tapered," "circular" or "elliptical," as appropriate for its overall shape or appearance (hereinafter, sometimes referred to as "Tapered," "Circular" or "Elliptical," when discussed individually).

Each application was reviewed by a different examiner in the Copyright Office. All three were refused registration. In a letter dated January 16, 2004, Examiner Colleen Kearney refused registration for Tapered. She determined that, as a lamp base, Tapered is a useful article that has no separable elements from its utilitarian aspects. For useful articles, only elements that are both separable from utilitarian aspects of the useful article and that have sufficient creativity may be copyrightable. By letter dated January 22, 2004, Examiner Ivan Proctor refused to register Elliptical for the same reason. The third refusal, for Circular, was issued in a letter dated January 25, 2004, by Examiner Joanna Corwin. Ms. Corwin determined that even though Circular's elements may be separable, the work does not have the minimum amount of creativity required to be copyrightable.

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[1] You submitted your second request for reconsideration to the Board of Appeals. However, on January 27, 2005, that body became known as the Review Board. 69 FR 77636 (December 28, 2004).

B. First request for reconsideration

Subsequently, in separate letters, each dated April 12, 2004, you and your colleague, Susan E. Farley, submitted a first request for reconsideration to the Examining Division, for each of the three works. The arguments in the three letters are the same. In essence, you argued that, because the information in the application forms pertains to registering three sculptures and does not include any information regarding the three sculptures as lamp bases, they should not be considered useful objects. Further, you argued that, even if they are considered useful objects, the works exhibit conceptually separable features. Using either approach, you argue that the works in question have sufficient creativity to be copyrightable.

More specifically, you have argued that the sculptures at issue here are not useful articles, alleging that there is no evidence to support the examiners' interpretations. You stated in support of registration that, "The various design elements ... and the arrangement of those ... in an original fashion serve aesthetic sculptural purposes and do not serve the utilitarian function of holding the light bulb of a lamp in place," citing Carl Falkenstein, Inc. v. Lustrelon, Inc., 1989 WL 69692 *1 (E.D.Pa. 1989). Letters from Farley and Hutton to Examining Division of 4/12/04, at 3 - 4. You described the authorship contribution as:

> ...numerous creative decisions and experimentation necessary to arrive at the sculptured design. Variable elements such as shape, height, width, and arrangement demonstrate originality and creativity, and serve no part of a lighting fixture other than aesthetic purposes. Applicant respectfully submits that a designer's choice of these features is sufficiently original for copyright protection, even though simple geometric shapes are not protectable on their own.

Id. at 4.

You argued that the sculptures are separable as required by copyright law and legal precedent, citing Mazer v. Stein, 347 U.S. 201 (1954); Carl Falkenstein, Sunset Lamp Corp. v. Alsy Corp., 698 F.Supp. 1146 (S.D.N.Y. 1988) and Spectrum Creations, Inc. v. Catalina Lighting, Inc., 2001 WL 1910566 *6 (W.D.Tex. 2001). You analogized the sculptures here to the belt buckle at issue in Kieselstein-Cord v. Accessories By Pearl, Inc., 632 F.2d 989 (2d Cir. 1980), arguing that the Copyright Office should view the sculptures as conceptually separable from lamps in the same manner that the Kieselstein- Cord court viewed the buckle as conceptually separable from the belt. You stated that:

> ...the whole point of the work [in Kieselstein-Cord] was that the artistic aspects of the work were conceptually separable. The copyright application in Kieselstein-Cord specifically described the nature of the work as "sculpture." ... While belt buckles and lamp bases have a function, the work for the present application, assuming for this appeal it represents a lamp base, is directed to a sculpture containing conceptually separable features that are copyrightable, even if used as a lamp base...similar to the [sculpture of a] Balinese dancer [in Mazer] having a rod passing through to hold a light bulb. (emphasis in original)

Letter from Hutton of 4/12/04, at 5.

In response, Attorney Advisor, Virginia Giroux, affirmed the refusals to register based on similar reasoning given by the examiners. She refused registration to Tapered, Elliptical and Circular in letters dated June 16, 2004, June 17, 2004 and July 27, 2004, respectively.

In essence, she characterized your arguments as conceding that the sculptures are useful articles, focusing rather on advocating registration on the basis that they exhibit separable and copyrightable authorship. However, Ms. Giroux responded that, even conceding that some elements on the sculptures' surface, such as the circular or semi-circular discs on Circular or the tapered concentric circles on Tapered, are conceptually separable, they lack sufficient creativity to be copyrightable. Ms. Giroux distinguished the belt buckle at issue in Kieselstein-Cord, as well as the works in the other cases you cited, from Applicant's sculptures on the basis that those works all had distinguishable authorship that is not present in Applicant's sculptures.

C. Second request for reconsideration

You sought reconsideration a second time for all three sculptures in a letter dated October 12, 2004. You refuted the argument that the works lack sufficient creativity to be copyrightable on the basis that a compilation of simple geometric shapes may be copyrightable. You argued that Ms. Giroux failed to consider the works as a whole, but, rather, based her analysis on elements of the sculptures that, individually, lack sufficient creativity to be copyrightable. You characterized each work as a "unique selection and arrangement of otherwise non-protectable elements" that exhibits sufficient creativity to be copyrightable. Letter from Hutton to Review Board of 10/12/04, at 2.

Again, you objected to characterization of the works as lamp bases, hence, useful articles, arguing there is no evidence to support that conclusion. You stated:

> It is important to note that none of the materials submitted to the Copyright Office by the Applicant suggests that these sculptures are lamp bases, hence useful articles. Moreover, it is inconceivable to think that the appearance of Applicant's sculpture serves any purpose or function to a light. Therefore, the Examiner's sole reliance on the non-controlling name of the Applicant to support the refusal was improper.

Id.

Citing Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991), you argued that only a small amount of creativity is necessary to satisfy the originality requirement. You stated that the works are the result of Applicant's independent effort and that the Examiner had not proven otherwise. Therefore, you reasoned that, because there is no question that the sculptures are sufficiently creative, they are entitled to registration. You characterized the sculptures as having a unique appearance that is the result of significant creative expression in selecting their arrangements. Letter from Hutton of 10/12/04, at 3.

Again citing Feist, you argued that the sculptures have sufficient creativity to be copyrightable because it is the arrangement of common and familiar geometric shapes that is sufficiently creative in each work. In support of that proposition, you cited Runstadler Studios, Inc. v. MCM Ltd. Partnership, 768 F.Supp. 1292, 1295 (N.D.Ill. 1991), in particular, and several other cases. You spoke in favor of registration by making an argument best summarized by this quote, "The various design elements incorporated into Applicant's works and the arrangement of those design elements in an original fashion serve aesthetic sculptural purposes and do not serve the utilitarian function of holding the light bulb of a lamp in place," citing Carl Falkenstein, 1989 WL 69692 *4 (E.D.Pa. 1989). You again described the creative effort as consisting of:

> [V]ariable elements such as shape, height, width, and arrangement [that] demonstrate orginality and creativity, and serve no part of a lighting fixture other than aesthetic purposes. Applicant respectfully submits that a designer's choice of these features is sufficiently original for copyright protection, even though simple geometric shapes are not protectable on their own.

Letter from Hutton of 10/12/04, at 5.

You again cited the cases you had cited in the first request for reconsideration for the proposition that separable features of a useful work may be copyrightable, restating your arguments

analogizing the sculptures to the Balinese dancer in Mazer v. Stein and the belt buckle in Kieselstein-Cord.

II. DECISION

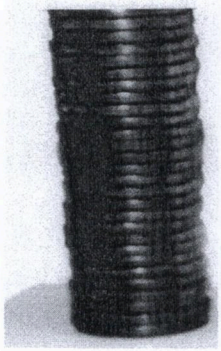
Having reviewed the arguments you presented on behalf of your client, Boyd Lighting Company, and the applications, the Copyright Office Review Board affirms the Examining Division's refusal to register Tapered, Circular and Elliptical.

A. Description of the works

We first present the description of the works at issue here and reproductions of the three works.



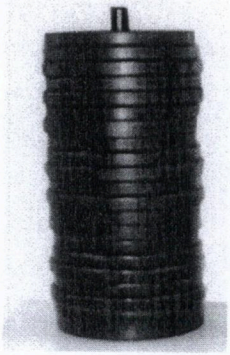
Primitive (circular)



Primitive (circular)



Primitive (tapered)



Primitive (elliptical)

Description. In general, based upon the photographs submitted, each of the Primitive sculptures has an appearance that resembles a stack of disks, reminiscent of free weights. Tapered's appearance resembles a stack of approximately 31 flat, round disks, stacked in order of size with the largest diameter at the bottom, gradually tapering to the smallest diameter at the top. The two bottom disks are the same thickness. The rest of the disks are not as thick as those two, but they appear to be the same, varying only in the size of their diameters.

The appearance of Elliptical is similar to that of a straight column of flat disks. It has approximately 21 flat, round disks, of consistent thickness, but with slight variation in diameter throughout the stack. Circular's appearance is similar to Elliptical's because it also looks like a straight column of disks, though they seem to be smaller in diameter than those in Circular. Elliptical has approximately 25 disks which have uniform thickness and vary little in diameter.

B. The Primitive works are useful articles

The Review Board has determined that Applicant's sculptures are useful articles because they are lamp bases. It is true that Applicant has submitted Form VA applications which may be used for registration of sculptures and, but for Applicant's business name, there appears to be no indication on the application forms themselves that the sculptures may be used as lamp bases.

However, copies of a document dated January 26, 1998, assigning the author's rights to Applicant, which were included with the applications, clearly indicate that the sculptures are lamp bases. In the first paragraph of the 1/26/98 assignment, it is stated that the author agrees not to further assign the designs for use in lighting products. It is thereafter mentioned throughout the document, explicitly or implicitly, that the author is agreeing to Applicant's use of the sculptures for lighting or electrical uses. Further, Exhibit A to the assignment that identifies the designs that are subject to the agreement, includes the title "Primitive" for use in both floor and table lamps.

We point out that, on the application form, Applicant has stated that the attached assignment transferred all the author's rights in the sculptures to Applicant. Therefore, the works titled "Primitive" listed in Exhibit A, which are labeled lamps, can fairly be said to be the same sculptures that are at issue here.[2] Other evidence was also available to the Board. In the

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[2] *Dicta* in Esquire v. Ringer suggests that, absent the assignment, your objection may have been more persuasive. 591 F.2d 796, 806 (D.C.Cir. 1978). In Esquire, the court considered argumentation similar to yours that only those aspects of the work for which registration was sought should be subject to the analysis for copyrightability, thereby eliminating the useful article issue. The court disagreed, under the facts of that case,

photographs of Tapered and Elliptical, a small protrusion that is visible coming out of the top of those sculptures appears to be a pole to be used to route wiring and hold light bulb fixtures. And, Applicant's name, "Boyd Lighting Fixture Company," is consistent with the interpretation that the works are used in the manufacture of lighting fixtures.

Such evidence and documentation are within the scope of the Office's examination policies. Examination of applications includes all materials submitted with a claim. Compendium of Copyright Office Practices II, Ch. 100, §108 (1984). Although the Office does not engage in fact finding, it reserves the right to make inquiries and to take administrative notice of matters of general knowledge. Compendium II, Ch. 100, §108.05. On the basis of this authority, the Office is satisfied that the submissions for the three works in question support an interpretation that the works are lamp bases.

The Board's classification of Applicant's works as useful articles is consistent with the statutory definition of a useful 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. Also, any article that is "normally a part of a useful article is considered a 'useful article.' " *Id.* The statute then provides that registration is possible only if, and to the extent that, a work contains pictorial, graphic or sculptural features that are separable from the useful article. 17 U.S.C. §101 (definition of "pictorial, graphic and sculptural works"). When the Copyright Office determines that a claimant's work is a useful article, it must then determine whether the work has any elements that are separable from its utilitarian function, since copyright protection is prohibited for utilitarian elements. If there is a separable element, a determination must subsequently be made whether, independent of the useful article, such design element satisfies the originality requirements that are necessary for copyrightability. The Board's analysis of those two factors, separability and originality, as applied to the Primitive works, is set forth below.

C. Separability

Congress established the principle that copyright protection is prohibited for utilitarian aspects of useful articles when it enacted the Copyright Act of 1976. However, elements of a useful article that are physically or conceptually separable features of the article may be copyrighted. The legislative history of the Copyright Act of 1976 states:

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because the information in Esquire's application, unlike Applicants' here, characterized the work as being part of a lighting fixture and included photographs showing it being used that way. By contrast, here, the information in the application form is restricted to sculptural authorship without any indication that such pieces of sculptural authorship are intended to become part of lighting fixtures. But, in this case, even without Applicant's revealingly descriptive name, the assignment makes it clear that these Primitive works serve as lamp bases.

> [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 (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. (emphasis added)

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

As a result, Copyright Office examination procedures follow a separability analysis to ensure that the utilitarian aspects of useful articles are not registered. Guidelines for the separability analysis are found in Ch. 500, § 505.02 of Compendium II, which states:

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

In the case of physical separability, Compendium II, Ch. 500, section § 505.04, states:

> The physical separability test derives from the principle that a copyrightable work of sculpture which is later incorporated into a useful article retains its copyright protection. ... However, since the overall shape of a useful article is not copyrightable, the test of physical separability is not met by the mere fact that the housing of a useful article is detachable from the working parts of the article.

In the case of conceptual separability, Compendium II, Ch. 500, § 505.03, states:

> Conceptual separability means that the pictorial, graphic and sculptural features, while physically inseparable by ordinary means from the utilitarian item, are nevertheless clearly recognizable as 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, 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. (emphasis added)

Chapter 500, § 505 of Compendium II, *Id. at* 7, is a direct successor to the Copyright Office regulation that was affirmed in Esquire, as a valid interpretation of copyright law. 591 F.2d 796. Relying on explicit statements in the legislative history, the Esquire court found that the Office's regulation was an authoritative construction of the law. *Id.* at 802-803. Esquire and later cases held that, despite an aesthetically pleasing, novel or unique shape, the overall design or configuration of a utilitarian object may not be copyrighted if it is not "capable of existing as a work of art independent of the utilitarian article into which [it is] incorporated." *Id.* at 803-804. In Esquire, the court held that the Copyright Office properly refused registration for a useful article, in that case a light fixture, notwithstanding how aesthetically pleasing the useful article's shape or configuration may have been. *Id.* at 800. As noted above, the legislative history states that:

> 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.

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

Based on the principles discussed, the Review Board has determined that the Primitive works which have been submitted do not evidence any separable elements. They do not show physically separable features or design elements because the actual removal of the sculptural aspect from each lamp would essentially destroy each lamp base– which is the work for which

registration is sought. The three works also do not satisfy the requirements for conceptual separability under the Compendium guidelines because, unlike the artwork on the back of a chair, the sculptures and the lamp bases they represent cannot be thought of as two separate entities that can exist independently of each other; nor can they both exist side by side and be perceived as two fully realized, separate works– one an artistic work and the other a useful article, as Compendium II requires. The sculpture and the lamp base are one and the same.

However, the Review Board has determined that, for the sake of argument, it will analyze the works at issue here as if it had found the three works to show separable design features. We also take this step because the initial three examiners did not refuse registration for the three works on uniform grounds: two examiners found no separable features in the lamp base sculptures because "all of the elements are either related to the utilitarian aspects or function, or are subsumed within the overall shape, contour, or configuration of the article." Letter from Examiner Proctor to Hutton of 1/22/04, at 21. A third examiner did, however, find separable features but concluded that such features were *de minimis* in nature. Again, although the Board finds no separable design features in any of the three Primitive works, we, nevertheless, proceed to analyze the works as if the design features for the works were separable.

D. Originality

After finding that an element of a useful article is separable, the Review Board then evaluates whether such an element is sufficiently original to be copyrightable. Copyright protection is only available for "original works of authorship." 17 U.S.C. §102(a). Based on constitutional principles, the U.S. Supreme Court has stated that originality consists of two elements, "independent creation plus a modicum of creativity." Feist, 499 U.S. 340, 346 (1991). *See also* Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99, 102 (2d Cir. 1951) ("'Original' in reference to a copyrighted work means that the particular work 'owes its origin' to the 'author.' No large measure of novelty is necessary."); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884) (The court defined "author" to mean the originator or original maker and described copyright as being limited to the creative or "intellectual conceptions of the author.") The Board accepts that the Primitive sculptures were independently created. However, the sculptures ultimately fail to satisfy the creativity requirement.

1. Minimum creativity required

Even prior to Feist, courts interpreted the creativity aspect of "original" as being very low. *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250 (1903): "... a very modest grade of art has in it something irreducible, which is one man's alone."

However, at the same time that the Supreme Court reaffirmed, in Feist, that only a modicum of originality is required for a work to be copyrightable, it also emphasized that there are works in which the "creative spark is utterly lacking or so trivial as to be virtually nonexistent." Feist at 359. Such works are incapable of sustaining copyright protection. *Id.*, *citing* 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright, § 2.01[B] (2002). The Court observed that "[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity," Feist at 363, and that there can be no copyright in works in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359. A work that reflects an obvious arrangement fails to meet the low standard of minimum creativity required for copyrightability. *Id.* at 362-363. An example would be alphabetical listings in white pages of telephone directories, the type of work at issue in Feist, which the Supreme Court characterized as "garden variety...devoid of even the slightest trace of creativity." *Id.* at 362.

Copyright Office registration practices have consistently recognized that some works of authorship have only a *de minimis* amount of authorship and, thus, are not copyrightable. Compendium II, Ch. 200, § 202.02(a). With respect to pictorial, graphic and sculptural works, which are Class VA [visual arts] works, Ch. 500, §503.02(a) of Compendium II states that a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." Further, there is no protection for familiar symbols, designs or shapes such as standard geometric shapes. 37 C.F.R. § 202.1. In addition to stating that prohibition, Compendium II, which provides detailed instructions for Copyright Office registration procedures, also reflects the principle that creative expression is the basis for determining whether a work is copyrightable, not an assessment of aesthetic merit. Chapter 500, § 503.02(a) of Compendium II states that:

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

Chapter 500, § 503.02(a) reflects one of the most fundamental principles of copyright law, which is that common, ordinary shapes and designs, and minor variations of those, may not be copyrighted because that could limit their availability to the general populace. Basic, common and ordinary shapes, designs, and symbols are in the public domain for use by all since they form the building blocks for creative works.

2. Primitive sculptures lack minimum creativity

The Review Board has determined that any arguably separable elements of the Primitive sculptures lack sufficient creativity, whether each scuplture's elements are considered individually or as a whole.

Each work, as a whole, consists of a very few elements with minor variations, that are arranged in stacks. Stacking is an obvious way to arrange the constitutive disks. Tapered is arranged from largest to smallest, an obvious arrangement. In the other two works, Circular and Elliptical, there is even less variation in the stacks because the overall appearance of the elements is basically that of a straight column or piling of one similar element upon another.

a. Individual elements. Considering its individual elements, Tapered does not have sufficient creativity to be copyrightable. It has one repeating element, a flat, disc shape, that has minor variations in thickness and diameter. Circular and Elliptical appear to have even less variation because they have consistent thickness throughout and some minor variation in diameter. The individual elements of Tapered are all flat disks. The same is true of Elliptical and Circular. There is little evidence of artistic choices and selections in the resulting visual expressions of the elements.

b. Overall appearance. It may be that a great deal of effort was needed to devise the works at issue here but the Copyright Office only evaluates each completed work that is presented for registration. For each sculpture, taken as a whole, the visible artistic expression is that of stacked disks with some varying diameters but with generally consistent thickness within each sculpture. As a whole, Tapered's appearance consists of a single element, a disk, repeated about 31 times, with minor variations in its thickness or diameter. The same is true for Circular and Elliptical, although they have even less variation than Tapered in the repeated element of a flat, spherical disk.

Such simplistic expressions consist of individual public domain elements which, considered as a whole, have very slight modifications in the overall arrangement and common stacking configuration of the elements in their entirety. The resulting expression has *de minimis* creativity.

As Compendium II states, it is not possible to copyright "a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spacial variations." Compendium II, Ch. 500, § 503.02(a). Here, the combinations presented in these sculptures consist of individual elements of a basic shape that is flat and circular or spherical and the total composition, or bringing together, of the simple, individual elements does not rise to the level of creative authorship.

The Office recognizes that works comprised of standard or common shapes or symbols that individually are not copyrightable may be copyrightable in combination. However, in some cases a particular combination is too simplistic or obvious to be original. You argue that the Primitive sculptures, like the spiral sculpture at issue in Runstadler. Spiral Motion, are copyrightable because like the spiral sculpture, the Primitive sculptures are made up of standard shapes that, individually, are uncopyrightable. 768 F.Supp. 1292, 1295 (N.D. Ill. 1991), but that, in their entirety, i.e., their arrangement, are capable of sustaining a claim to copyright. Letter from Hutton of 10/12/04, at 3. Unlike Applicant's works, the combination of standard or common shapes in Spiral Motion had sufficient creativity to be copyrightable. However, the combination of the simple-shaped elements brought together and arranged in the commonplace, vertical configurations found in the Primitive works is not sufficient for registration of the claims in these works.

There is substantial support in case law for the Board's conclusions that Applicant's works are not copyrightable. Many cases can be cited in which courts have upheld the Office's copyrightability analysis. 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); in Jon Woods Fashions, Inc. 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 John Muller & Co., Inc. v. N.Y. Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986) (upholding 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, Inc. v. Mailing Services of Pittsburgh, Inc., 634 F.Supp. 769 (W.D. Pa. 1986) (envelopes with black lines and words "gift check" or "priority message" did not contain minimal degree of creativity necessary for copyright protection); Bailie v. Fisher, 258 F.2d 425 (D.C. Cir. 1958) (cardboard star with two folding flaps allowing star to stand for retail display not copyrightable work of art); and 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-lis* held not copyrightable).

The fact that a work may consist of a unique or distinctive shape for purposes of aesthetic appeal does not mean that the work, as a whole, is copyrightable. The fact that a design could have been designed differently, as you emphasized in your discussions citing Carl Falkenstein, is not a relevant consideration in determining copyrightability. Compendium II, ch.500, § 505.05.

As Ms. Giroux stated in her letter, the works at issue in Kieselstein-Cord, Mazer, Spectrum Creations and Sunset Lamp are distinguishable from the Primitive sculptures because those works had sufficient creativity to be copyrightable. Applicant's sculptures do not possess similarly sufficient creativity. While the Board agrees that ordinary, commonplace, and trivial shapes and symbols may be combined to produce a work of authorship which shows sufficient creativity in its overall selection, arrangement, and composition, the Board concludes that the Primitive sculptures / lamp bases do not evidence such composition viewed in their entirety. Not all combinations and arrangements of commonplace, simple, or unprotected-in-themselves elements will rise to the level of copyrightable authorship. In Satava v. Lowry, the Ninth Circuit held unprotectible sculptural arrangements which combined elements not copyrightable in themselves. 323 F.3d 805 (9th Cir. 2003). The court explained that not "any combination of unprotectable elements automatically qualifies for copyright protection. Our case law suggests, and we hold today, that a combination of unprotectable elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship." 323 F.3d at 811.

Finally, we again point out that the Copyright Office does not judge the artistic merit of works. The Primitive sculptures at issue here may be considered highly sophisticated, aesthetically pleasing works. However, we again state that aesthetic or commercial merit is not relevant to an assessment of copyrightabilty. For the reasons stated in this letter, the Review Board affirms the Examining Division's refusal to register the Primitive (elliptical), Primitive (circular) and Primitive (tapered) works. This decision constitutes final agency action in this matter.

Sincerely,

/S/
Nanette Petruzzelli
Special Legal Advisor for Reengineering
For the Review Board
United States Copyright Office