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August 9, 2005

Karen Feisthamel, Esq.
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1500 Fleet Center
Providence, RI 02903

Re: #43045- Double Designer Lounge
#43048 -Float
#43051- Float
Control Number: 61-223-173.(H)

Dear Ms. Feisthamel:

The Copyright Office Board of Appeals (now Review Board) has reviewed your second request, on behalf of Bestway USA, Inc., to reconsider the Examining Division's denial of claims to register the inflatable floating devices referenced above. After reviewing the materials submitted in support of the claims, the Board has determined that the works cannot be registered because they are useful articles that contain no separable and copyrightable authorship.

ADMINISTRATIVE RECORD

A. Submission of claims

On August 4, 2003, the Copyright Office received your client's applications for the registration of three-dimensional sculptures entitled #43045 - DOUBLE DESIGNER LOUNGE; #43048 - FLOAT; and #43051- FLOAT. By letter dated October 22, 2003, Visual Arts Examiner Wilbur King advised you that the Floats could not be registered because they are useful articles which contain no separable, copyrightable authorship. Examiner King noted that under the copyright law, the design of a useful article can be considered a pictorial, graphic, or sculptural work only to the extent that it contains features that can be identified separately from

and are capable of existing independently of the utilitarian aspects of the article. He found no physically or conceptually separable authorship in the works at issue here. Rather, his examination revealed that all of the sculptural elements in these works were either related to the utilitarian aspects or function or subsumed within the overall shape of the article. Thus the works were not entitled to copyright registration. He referred you to the U.S. Patent Office for investigation of possible federal design patent registration.

B. First request for reconsideration

On February 20, 2004, you requested reconsideration of that decision. You argued that the works contain nonfunctional design elements based on the designer's artistic judgment, and thus because they were not based on utilitarian or functional concerns, they should be considered as containing separable authorship that is copyrightable. Letters from Feisthamel to the Examining Division of 2/20/2004 at 2. (The three very similar letters will be referred to as one; we will note below the descriptions of the three different works which were submitted.) In support of your position on the copyrightability of these works, you observed that an extremely low level of creativity is needed to register a work for copyright. Citing *Feist Publications Inc. v. Rural Telephone Service Co.,* 499 U.S. 340 (1991), and other precedent, you further asserted that "Bestway's design [for Float # 43045] is not simply an ornamentation, such as chevron stripes, or a conventional fleur-de-lys design, but that it is a sleek asymmetrical shape with wing-like flanges, and arcing blue walls dissecting the interior in such a way as to evoke the image of [a] cloud." Letter from Feisthamel of 2/20/2004 at 2-3. You also describe the contents of Float # 43048– "a translucent body with a gently curving outer wall encompassing a spatially intriguing

interior with [sic] of interlocking pillows" and the contents of Float #43051– a repetition of the description of Float # 43045. You further cited precedent for the assertion that, as to all three designs, they in fact have much more than the "'slight amount' of creativity and 'distinctiveness in expression' required." *Id.* at 3. You concluded that the designs are no less creative than those found in other works that courts have found to be copyrightable.

Upon reconsideration, Attorney-Advisor Virginia Giroux, by letter dated March 22, 2004, advised you that the Examining Division could not register the copyright claims in the subject inflatable Floats. Preliminarily, she pointed out that the materials of which a work is made do not affect whether a work can be copyrighted. Letter from Giroux to Feisthamel of 3/22/2004 at 1. More fundamentally, she pointed out that although you did not dispute that these works are useful articles, you maintained that the works are copyrightable because they "contain non-functional design elements based on the designer's aesthetic judgment rather than utilitarian or functional concerns." *Id.* at 2. Disagreeing with that line of thought in her analysis of separability, Ms. Giroux noted that the Copyright Office employs the test set out in the *Compendium of Copyright Office Practices, Compendium II* (1984), and that this test follows the general separability principles of *Esquire v. Ringer*, 591 F.2d 796 (D.C.Cir. 1978). She confirmed that conceptual separability occurs when design features, although physically inseparable by ordinary means from the utilitarian item, are nevertheless clearly recognizable as a work of authorship, independent of the shape of the article, without destroying its basic shape. Letter from Giroux of 3/22/2004 at 2. Utilizing this test, Ms. Giroux found that none of the Floats at issue here contained any separable elements. *Id.* at 3. In concluding that the referenced

design elements or features could not be perceived as physically or conceptually separable from the Floats without destroying their basic shape, she observed that the outer and interior bodies and walls were all part of the overall shape, contour and configuration of the useful articles themselves. Finally, on the question of separability, Ms. Giroux reminded you of Congress's intent in according protection to pictorial, graphic, and sculptural material incorporated within useful articles. Quoting from the House Report to clarify the line between copyrightable works of art and uncopyrightable works of industrial design, she cited Congress' teachings that "[t]he 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 as separable from the useful article as such are copyrightable." H.R. Rep. No. 94-1476, at 55 (1976). Ms. Giroux further noted that Congress extended copyright in useful articles only to the elements that were separable, original, and creative, adding that such protection "would not cover the overall configuration of the utilitarian article as such." *Id.*

Having concluded that the works in question lack separable features, Ms. Giroux nevertheless and for the sake of argument analyzed the Floats for separable design features, including the interior and exterior components, and determined that they consist of "common and familiar shapes or designs, or minor variations thereof, in the public domain," which are not copyrightable. *Id.* And, analyzing the components as a whole, she explained that, "Even the combination and arrangement of the few sculptural element[s], *if separable*, would *not* support a separate registration as a copyrightable 'work of art.'" *Id.* (emphasis in original). She elaborated

that "[t]he fact that a work consists of a unique, atypical, or distinctive shape for purposes of aesthetic appeal does not mean that the work, as a whole, constitutes a separable "work of art." *Id.* Citing precedent, Ms. Giroux concluded that these Floats did not meet the standard for original or creative authorship because all elements or design features of the works were either "related to the utilitarian aspects or function of the works" or were "subsumed within the overall shape, contour and configuration of the works." *Id.* at 4. Consequently, registration for the three works in question was again refused.

C. Second request for reconsideration

On July 20, 2004, you appealed to this Board. Your request urges reconsideration of the Examining Division's determination on grounds both of nonseparability of design elements and of insufficient original authorship.

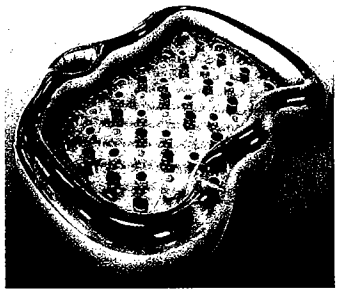
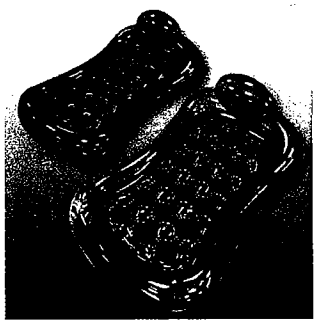
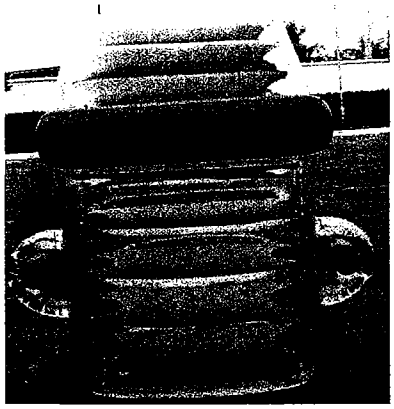
As examples of the presence of protected features, you point to elements such as curving outer walls, spatially intriguing interior, and interlocking pillows, suggesting that they add up to designs that are separable and copyrightable. You acknowledge that the designs of useful articles may be copyrightable only to the extent that they incorporate artistic works that are independent and physically or conceptually separable from the design of the useful article, citing *Norris Industries Inc. v. Int'l Tel. & Tel. Corp.*, 696 F.2d 918 (11th Cir. 1983) as precedent. Letter from Feisthamel of 7/20/2004 at 2-3. You also acknowledge that *Esquire* represents a different standard from the one you espouse, and suggest that *Esquire's* principles should be applied narrowly to overall design of a useful article rather than to separate features of a design. *Id.* at 3-4.

You then address the creative content of the works at issue, maintaining that the elements are in fact separable and involve sufficient creativity to constitute works of art for purposes of registration because, rather than novelty, only a 'slight amount' of creativity is required. *Id.* at 4-5. Moreover, you maintain that even if the elements themselves are "common and familiar shapes," the combination of elements may embody original authorship, as explained in *Atari Games Corp. v. Oman,* 979 F. 2d 242 (D.C.Cir. 1992). In particular, you assert that "the independently linked lattice weave of [Float # 43048] combined with the translucent coloring, is conceptually independent from the structural design of the float." You point out that the design of Float # 43045 contains "brightly contrasting colors interspersed within a vibrant green border" which "are evocative of a floral field within a grass patch." Finally, with respect to Float # 43051, you call attention to "the inclusion of wing-like flanges and a deeply contrasting blue dissecting walls, create[ing] the artistic image of a cloud that stands separate from the useful design of a float." Letter from Feisthamel of 7/20/04 at 3.

As a ground for your reliance on certain case authority related to non-useful articles, you point out that these decisions are instructive to assess the artistic content of those elements in the Floats which you assert are separable. Letter from Feisthamel of 7/20/2004 at 5. You seem to believe that the Office refused registration because of the presence of uncopyrightable elements in the Floats and cite *Compendium II* as authority to the contrary– that such elements in themselves are not a bar copyrightability. Letter from Feisthamel of 7/20/2004 at 4, 5.

Finally, you urge that a comparison of the works in the cases you cite with the instant Floats would lead to the conclusion that these Floats are also registrable. *Id.* at 7. Your arguments are set forth and addressed in further detail in the discussion section below.

DESCRIPTION OF WORKS

The three subject Floats are essentially inflated, round-edged rectangles, longer at the sides than at the top and bottom. Float # 43045 is inner-tube bordered, has a few S-shaped curves on its sides and appears larger and more square than the other two, as if to accommodate more than one person. The interior consists of a diagonal pattern of alternating colored cylinders. The inner-tube-like border is of light green plastic or polyvinyl tubing. Particularly, the Float's interior contains a number of horizontal rows of alternating hollow-core cylinders, sequentially in pink, orange, and yellow. The cylinders make tufted air-mattress-like indentations in the Lounge's interior. The view of the Lounge on the identifying photograph shows the right bordered side with a circular opening, perhaps for a beverage glass; the left side has a larger oval aperture, apparently for other items, for example, snack food.

Float Design #43048 is also an inner-tube bordered, rounded on the corners, rectangle. It has slightly indented sides and a pillow as a headrest. The interior contains six uniform horizontal rows of three circular cutouts each. Connecting each row of cutouts is a row of inflated bubbles (as one finds on bubble wrap). You refer to this pattern as "lattice weave." The identifying material for this design shows two identical Floats, one in pink, the other in blue.

Float Design # 43051 is a transparent unbordered rectangular recliner (~) shape with a blue float bar across the bottom and a circular beverage holder on each side. The interior of this float contains nine equidistantly suspended flat blue plates, basically oval in shape whose shorter sides are concave.

DISCUSSION

The only possible basis for the registration of a useful article is the registration of that aspect of the article that can be viewed as separable and that is also copyrightable in itself. (The design of a useful article...[can] be considered a pictorial, graphic or sculptural work only if ...such design consists of pictorial, graphic, or sculptural features identified separately from and are capable of existing independently of, the utilitarian aspects of the article.") 17 U.S.C. § 101. *See, e.g., Norris Industries Inc. v. International Telephone and Telegraph Corp.,* 696 F.2d 918 (11th Cir. 1983). Your appeal argues that the elements you identified, such as the curving outer walls and the interlocking pillows are separable and copyrightable "works of art." This discussion addresses both issues.

A. Separability

The purpose of the Office's separability analysis is to ensure that utilitarian aspects of useful articles are not registered since they are not the subject of copyright. Written guidelines for the separability analysis are found in section 505 of *Compendium of Copyright Office Practices*, *Compendium II* (1984). Section 505.02 states that:

> 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, 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, section 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.)

These guidelines are based on the legislative history of the Copyright Act of 1976, noted below, in which Congress clarified that utilitarian aspects of useful articles are not copyrightable. Only elements that are physically or conceptually separable features of a useful article may be copyrighted.

> [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).

Section 505 of *Compendium II* is a direct successor to the Copyright Office regulation that was affirmed in *Esquire, Inc. v. Ringer*, 591 F.2d. 796 (D.C. Cir. 1978). *Esquire* enunciated the rule that is the basis for the Office's analysis of whether a pictorial, graphic or sculptural work may be considered separable from the utilitarian object in which it is incorporated. Relying on explicit statements in legislative history, the *Esquire* Court found that the Office's regulation was an authoritative construction of the copyright 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).

Thus, determination of separability may be made on a physical or conceptual basis. *Compendium II,* § 505.02 (1984). In response to the Examining Division's determination that the design elements are not separable on either basis, you focus primarily on the elements' conceptual separability, and do not assert that any components are detachable, i.e., physically separable. As you noted, conceptual separability– in the Copyright Office's analysis– means that "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." Letter from Feisthamel of 7/20/2004 at 2, citing *Compendium II,* § 505.03.

However, in applying this definition to the inflatable Floats, we conclude that the features in all three of the Floats cannot be perceived as separable because such features are useful or because such positing of separability, within the terms of the Office's test, would destroy their basic shape. Moreover, features that might be considered to be separable are functional. For instance, the inflatable floating device # 43048 has inflated pillows which curve to support the recliner's head. Neither the existence nor the shape of the pillows are conceptually or physically separable from the inflatable float; and, even if the pillows were able to be detached from the rest of the Float, they would still serve a useful function. Pillows are the head rest portion of the Float. As such, an inflated pillow is part of the useful article which by statutory definition is itself a utilitarian article. 17 U.S.C. § 101. Therefore, the curve of a typical pillow– a useful article, no matter how beautiful– is not eligible to be considered as sculptural authorship under the statutory definition of pictorial, graphic, and sculptural works. 17 U.S.C. 101. Thus, to the extent you argue for copyrightability of the pillows' shape, they are works of utility, not works of art. The same is true for the beverage holders/arm supports of design of Nos. 43045 and 43051. Additionally, the rounded, basically rectangular shapes of these inner tube-like Floats represent the overall configuration of the useful articles themselves, which, aside from constituting basic geometric shapes, makes them ineligible for consideration as sculptural works in the absence of being separately perceptible under the Office's separability tests. The overall configuration of a raft, then, like the overall configuration of a telephone, cannot be considered as sculpture, absent separability.

You cited *Norris*, 696 F.2d at 921, for the proposition that the design of a useful article qualifies as copyrightable work only to the extent that the design incorporates features that can be identified separately from utilitarian aspects of the article; you then assert that certain design elements in these Floats are separable. The clear holding of *Norris* argues against your position. *Norris* held that a wire-spoked wheel cover was not copyrightable because it was a useful article that did not contain any superfluous sculptured design that could be identified apart from the wheel cover itself. *Id.* at 924. The court stated:

> Even if the arrangement of spokes could be identified separately, however, they are incapable of existing independently. As the Register and the district court observed, the pattern resulting from the placement of spokes is an inseparable component of the wheel cover. The spokes are attached to the rim and to the hub, and once the spokes are removed from their position the pattern ceases to exist.

Id. at 923. The Floats have the same fatal flaw. The Floats' curves, interior bubbles and hollow cylinders, and their arm, object and headrests are not capable of existing independently. As *Norris* notes, "[p]hysical separability would presumably mean that after removal of those features which are necessary for the utilitarian function of the article, the artistic features would nevertheless remain intact." *Id.*, (quoting Nimmer on Copyright § 2.08[B][3], at 2-96). After removing the features that are necessary for the inflatable Floats to function as they do, there is virtually nothing left to constitute the putative works of authorship for which registration is sought. For instance, even if the tricolored cylinders in the interior of Float # 43045 could be physically removed, the pattern, used presumably for comfort of the person using the Float, would cease to exist, like the pattern of the spokes on Norris's wheel cover.

Norris holds that functional components of useful articles, no matter how artistically designed, are generally denied copyright protection unless they are physically separable from the useful article. *Id.* at 924. The pillow-shaped head rests, circular beverage holders, the tufted interior, and the outer walls are functional, thus failing the test for separability. Nor can the design features of the Floats at issue here be considered conceptually separable. You have attempted to distinguish *Esquire, Inc. v. Ringer*, 591 F.2d 796 (D.C.Cir. 1978), asserting that it narrowly dealt with the application of section 202.10(c) to an *overall* design, as opposed to purportedly *separable* parts of the Floats. Letter from Feisthamel of 7/20/2004 at 3 - 4 (emphasis added). As you know, separable parts of a useful article are subject to the same constraints as the overall design of a useful article. "An article that is normally a part of a useful article is considered a 'useful article'." 17 U.S.C. 101. Therefore, functional individual elements, such as the food and beverage holders of Float # 43045, the head rests of Float # 43048, and the beverage holders and float bar of Float # 43051 are just as ineligible for copyright protection as the overall functionality of, say, the shape of Float # 43045 or its tufted interior.

We have discussed Esquire, *above at 11*. Here, as in *Esquire*, the float designs are not conceptually identifiable as works of authorship either in their individual features or as a whole. In considering the elements as works of authorship, the following stated rationale from *Esquire* is relevant:

> The Register reasons that aesthetic considerations enter into the design of most useful objects. Thus, if overall shape or configuration can qualify as a "work of art," the whole realm of consumer products. . . and industrial products designed to have aesthetic appeal . . . must also qualify as works of art . . . .

Id. at 801. Congress has repeatedly rejected proposed legislation that would make copyright protection generally available for consumer or industrial products. The Board stands by the determination that the overall shapes of the Floats at issue here as well as the individual design features are not conceptually or physically separable from the utilitarian aspects of the Floats in their entireties.[1] Although we can identify no conceptually or physically separable elements in the Float works at issue here, we nevertheless, for the sake of argument, will comment on your position that the identified features represent, in themselves, copyrightable authorship.

B. The Float works at issue here, if separability were present, would nevertheless lack sufficient creativity in their design features to sustain a claim to copyright

The fundamental basis of copyright protection is a work's originality. Originality has two components: independent creation and a certain minimum amount of creativity. *Feist,* 499 U.S. at 346. The Office does not contest the originality of these Float works in the sense of their being independently created; we make the assumption that this is the case. Regarding the second prong of protection, originality in the sense of possessing the required amount of creative content means the contribution of something more than a trivial variation of elements found in the public domain. *Alfred Bell & Co. v. Catalda Fine Arts,* 191 F.2d 99, 103 (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."); *see also In re Trade-Mark Cases,* 100 U.S. 82 (1879) ("The writings which are to be protected [under the copyright law] are the *fruits of intellectual labor*"(emphasis in original)).

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[1] Color itself is not a copyrightable element and cannot alone serve as a basis of copyright protection, as discussed below. *Compendium II,* Section 503.02(a).

1. The *Feist* standard

Your appeal principally addresses the second requirement: whether the works at issue here display a minimum amount of creativity. *See* 17 U.S. C. § 102(a); *Feist Publications, Inc. v. Rural Telephone Service Company,* 499 U.S. 340, 347 (1991). For a pictorial, graphic or sculptural work to meet this standard, it must "embody some creative authorship in its delineation or form." 37 C.F.R. § 202.10(a)(2004). *See, e.g., John Muller & Co. v. N.Y. Arrows Soccer Team, Inc.*, 802 F.2d 989 (8th Cir. 1986). Section 503.02(a) of *Compendium II* states:

> [R]egistration 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 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.

In response to Ms. Giroux's analysis that the Floats "consist of common and familiar shapes or designs, or minor variations thereof, in the public domain, and, therefore, [are] not copyrightable" (Letter from Giroux of 3/22/2004 at 3), you have stated that the designs are intriguing and unusual, and that they "involve sufficient creativity to be works of art for purposes of copyright registration." Letter from Feisthamel of 7/20/2004 at 4. You also contest the Examining Division's conclusion that the designs consist solely of "common and familiar shapes or designs." *Id.* at 2.

We agree that a work need not be complex, ornate, or otherwise complicated in its authorship or composition in order for it to enjoy copyright. As you noted, the requisite amount

of creativity necessary for copyright is very low. Letter from Feisthamel of 7/20/2004 at 4 (citing *Feist*, 499 U.S. at 345). However, the Supreme Court has stated that there can be no copyright in works in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Feist,* 499 U.S. at 359.

Feist laid to rest the notion that more than a modicum of creativity was needed. The authorship present in these three Floats does not, however, meet the admittedly low *Feist* requirement. Even before *Feist*, a continuum of *pre-Feist* copyright cases enunciated basic creativity standards. *See, e.g., Kitchens of Sara Lee v. Nifty Foods Corp.,* 266 F.2d 541 (2d Cir. 1959). *Compendium II* embodies this case law in speaking of the need for more than a simple combination of a few standard symbols. And, concerning sculptural authorship, the *Compendium,* section 503.02(b), states in similar vein that:

> Copyrightability is based upon the creative expression of the author, that is, the manner or way in which the material is formed or fashioned. Thus registration cannot be based upon standard designs which lack originality, such as common architecture moldings, or the volute used to decorate the capitals of Ionic and Corinthian columns. Similarly, it is not possible to copyright common geometric figures or shapes in three-dimensional form such as the cone, cube, or sphere. The mere fact that a work of sculpture embodies uncopyrightable elements, such as the standard forms or ornamentation or embellishment, will not prevent registration. *However, the creative expression capable of supporting copyright must consist of something more than the mere bringing together of two or three standard forms or shapes with minor linear or spatial variations.* (Emphasis added.).

Thus, although the required amount of creativity is low, nevertheless there remains a category of works in which the creative spark is not sufficient to support a copyright. *Feist*, 499 U.S. at 359.

As a result, although a work may reflect the creator's industry, the creator's efforts do not **necessarily** lead to copyright protection.

Regarding your appeal to consider the artistic content of the individual elements or design features of the Floats rather than the overall designs (Letter from Feisthamel of 7/20/2004 at 4), the elements on which we comment for the sake of argument which may be said to be not functional– and, again, we stress that we believe these features to be functional– are particularly sparse. Float # 43048, a rectangular inner tube with rounded corners and inwardly curved sides consists in its interior of 18 evenly spaced circular cutouts in 6 rows separated by evenly spaced puffed circles (which you refer to as interlocking pillows). This cutout-and-puffed-circle design, if separable if it is posited to be non-functional, merely brings together alternating rows of circular shapes. Float #43051 has the overall S-shaped contour of a simple recliner, kept in balance by a float bar across the bottom, with identical, half-circle beverage holders on each side. These individual shapes together constitute the overall form of an utilitarian article and have previously been discussed. However, assuming arguendo that the lengthwise oval inserts with semicircular cutout ends are separable, they represent the uniform repetition of a common geometric shape with a minor spatial variation. *Compendium II,* § 503.02(b). And, Float # 43045, with its, for the sake of argument, separable interior design of hollow cylinders, again does not evidence sufficient copyrightable authorship: a simple diagonal design of small, vertical, cylinder-like elements in straight rows, each row having an alternating three-color scheme of elements, is insufficient in its overall configuration to sustain copyright. Further, the simple S-

shaped curves on the sides of the Float represent only a trivial variation on the overall rectangular shape of the float.

2. Aesthetic considerations do not determine copyrightability

You emphasize that the Floats have "spatially intriguing interior[s]" and point out the creator's intent to elicit thoughts of a "floral field within a grass patch" and to evoke the artistic image of a cloud. Letter from Feisthamel 7/20/2004 at 2, 3. Yet, copyright is not a matter of aesthetics. "The requisite minimal amount of original sculptural authorship necessary for registration in Class VA does not depend upon the aesthetic merit, commercial appeal, or symbolic value of a work." *Compendium II,* § 503.02(b); *see also DBC of N.Y., Inc. v. Merit Diamond Corp.,* 768 F.Supp. 414 (S.D.N.Y. 1991)(some designs simply do not contain sufficient creative expression to support a copyright.) In this way *Compendium II* restates longstanding law that it is not aesthetic merit, but the presence of creative expression that determines copyrightability. Section 503.01 states:

> The registrability of a work does not depend upon artistic merit or aesthetic value. For example, a child's drawing may exhibit a very low level of artistic merit and yet be entitled to registration as a pictorial work.

In the Float designs at issue here, the selection, combination and arrangement of the few sculptural elements, even if they were separable, represents an overall authorship too minimal to sustain registration. The few elements involved in the Floats and their arrangement all argue for refusing registration. We recognize the principle stated in *Atari Games Corp. v. Oman,* 979 F. 2d 242 (D.C.Cir. 1992), that a given work may involve "a choice and ordering of elements that,

in themselves, may not qualify for copyright protection; the author's *selection* and *arrangement,* however, may 'entail [the] minimal degree of creativity' needed to bring the work within the protection of the copyright laws." *Id.* at 245 (quoting *Feist*, 499 U.S. at 348). With respect to the designs entitled Float, we do not, however, consider the particular way– a way that is essentially commonplace and lacking in any distinguishing sculptural or design variation from the common and routine– in which the few noted elements are arranged sufficiently original to sustain registration. It is also notable that *Atari*, which remanded the case to the district court with instructions to return the application for registration 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 (quoting *Reader's Digest Ass'n v Conservative Digest, Inc.*, 821 F.2d 800, 806 (D.C. Cir. 1987), quoting, in turn, *Amplex Mfg. Co. v. A.B.C. Plastic Fabricators, Inc.*, 184 F. Supp. 285, 288 (E.D. Pa. 1960)). Although you cite *Atari* for the proposition that a "combination of elements as a whole may embody original authorship, even if the component parts do not" [Letter from Feisthamel of 7/20/2004 at 4], *Atari* did not set forth a per se rule that **any** selection and arrangement of shapes or symbols would be sufficiently creative. In the Floats at issue here, the selection and arrangement of simple geometric figures, in the form of curved sides of a rectangular shape combined with a simple pattern of straight rows of a few round cutouts alternating with rows of a few bubbles in Float # 43048; or, the equidistant oval inserts with cutout ends and the ½ - circle side holders of Float # 43051; or, the S-shaped sides with a commonplace pattern of rows of three alternating-color cylinders in the interior of Float # 43045 do not, in the Board's opinion, represent overall

authorship which is a distinguishable variation of the individual, uncopyrightable elements with respect to the manner of arrangement or coordination or overall configuration of those elements– which design elements are, in themselves, *de minimis*. *See, e.g., Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) (concerning a glass-in-glass jellyfish sculpture, a combination of several commonplace elements, where the court opined that "it is not true that any combination of unprotectable elements automatically qualifies for copyright protection. ... 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."); *Florabelle Flowers, Inc. v. Joseph Markovits, Inc.,* 296 F.Supp. 304, 307 (S.D.N.Y. 1968) (an artificial flower, with a suggestion of a human face, in a flower pot was not copyrightable because work was an "aggregation of well-known components [that] comprise an unoriginal whole" which "[fell] short of the easy standard of originality required for a copyright").

You asserted that the Office disqualified your client's works because of the presence of uncopyrightable elements in the Floats and cited *Compendium II* for authority that the Office's refusal to register was contrary to *Compendium II's* principle at section 503.02: "[T]he mere fact that a work embodies uncopyrightable elements will not prevent registration." Letter from Feisthamel of 7/20/2004 at 5. The Office agrees with you that a work is not disqualified for copyright on that ground unless such uncopyrightable elements are the only content of the work. We acknowledge that the Office's examining practices incorporate the principle that the use of public domain elements, of commonly known and/or geometric shapes, and of familiar symbols

may result in a copyrightable work as long as the overall resulting design, taken in its entirety, consists of more than a trivial variation of the constituent elements or of other commonplace, scant or public domain designs. *Compendium II,* Section 503.02(b). It remains the case that to be registrable, a work must constitute an original work of authorship and evidence a certain minimum level of creativity. Unfortunately, that level is not present in these Floats, either in their individual components / design features or in their selection, arrangement and overall configuration of such components.

C. Cited cases are distinguishable

We also take this opportunity to address several cases you cited in your second request for reconsideration. In *Lotus Development Corp. v. Borland International, Inc.,* 140 F.3d 70 (1st Cir. 1998), the court focused primarily on attorney's fees and the case is not applicable here. Although the previous phase of the litigation, *Lotus Dev. Corp. v. Borland Int'l, Inc.,* 49 F.3d 807 (1st Cir. 1995), in discussing utility and novelty, cited *Feist,* the issue there was the protectibility *vel non* of a menu command hierarchy of a computer program and the court focused its analysis on the seminal case of *Baker v. Selden*, 101 U.S. 99 (1879) in discussing the non-copyrightability of systems and methods of operation. We do not consider the facts of *Lotus* to be helpful in your arguments that the Floats at issue here contain some separable and protectible design features.

Foxworthy v. Custom Tees, Inc., 879 F.Supp. 1200 (D.C. Ga. 1995), dealt with a comedian's common-law copyright in a phrase. *Foxworthy* bears no resemblance to the present facts and follows *Feist,* as does the Copyright Office in its administration of the registration

function, regarding the quantum of creative expression required for copyrightability. A number of the other cases you have cited involve fabric designs and graphic artwork, representative of works of authorship– several unhindered by the issue of separability of artistic content from an overall design of a useful article. *See, e.g, Tennessee Fabricating Co. v. Moultrie Manufacturing Co.*, 421 F.2d 279 (5th Cir. 1970)(complex filigree pattern of intersecting straight lines and arc lines); *Prince Group, Inc. v. MTS Prods.*, 967 F.Supp. 121 (S.D.N.Y. 1997)(pattern of irregularly sized, shaped, and spaced polka dots); *National Theme Prods., Inc. v. Jerry B. Beck, Inc.*, 696 F.Supp. 1348, 1353 (S.D.Cal. 1988)(this case did involve fanciful renditions of animals in masquerade costumes); *Amplex Manufacturing Co. v. A.B.C. Plastic Fabricators, Inc.*, 184 F.Supp. 285 (E.D. Pa. 1960)(pen and ink line drawings of Egyptian characters); *Folio Impressions, Inc. v. Byer of California,* 937 F.2d 759 (2d Cir. 1991)(roses in straight line turned to face different directions). As Ms. Giroux concluded, the artistic content of the works in the cited cases is not comparable to that present in these floats. In any event, we see no contradiction between those cases and the Office's decision in the instant case concerning our classification of the Floats as useful articles and thus requiring the presence of separable authorship which also meets the standard for the minimum quantum of creativity. *Feist,* 499 U.S. at 359, 363. Design elements or features of useful articles that might otherwise possess the requisite minimum quantum of creativity required under *Feist* cannot be considered as such where those design features are either subsumed within the configuration of the overall design of the article or where those features are functional in their nature. Admittedly, you urge consideration of only the artistic elements that are separately identifiable from the overall utilitarian aspects of Bestway's

Floats. As we have explained above, the Board sees no design features in these Floats which can be categorized as separable under the Office's *Compendium II* tests for separability; however, even where we have, but only for the sake of argument, assumed certain design features to be separable, we conclude that these features possess an insufficient quantum of creativity under *Feist's* teaching to be registered.

CONCLUSION

For the reasons stated above, the Copyright Office Review Board concludes that none of these three Floats can be registered for copyright. 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