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January 14, 2005

Michael A. Albert, Esq.
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600 Atlantic Avenue
Boston, MA 02210-2206

Re: PRESSED FLOWERS FRAME COLLECTION
Control Number: 61-207-2148(W)

Dear Mr. Albert:

The Copyright Office Board of Appeals [now, Review Board] has reviewed your second request for reconsideration of refusal to register the PRESSED FLOWERS FRAME COLLECTION by Malden International Designs, Inc. After reviewing all material submitted in support of the claim in the frames [specifically, in the separable flower arrangements subsumed within the frames], including the additional photographs requested to supplement the original deposit material,[1] the Board has decided to register a claim in the single work found registrable upon reexamination. The Board will register a claim in the separable two-dimensional artwork, for Frame #294-20 (labeled as Frame 1 in the original deposit material) upon your submission of a new application claiming in "artwork" at space 2 of the new application with a new title referring to the single work. The effective date of registration applied to the new application will be the original date of receipt of these registration materials in the Copyright Office, October 25, 2001.

The Board affirms the refusal to register the other frames included in the PRESSED FLOWERS collection because they fail to meet the minimum level of original artistic authorship required for copyright. The remainder of this letter primarily refers to those frames, 2-5, for which no registration is possible.

I. DESCRIPTION OF THE WORK

The deposit for the PRESSED FLOWERS FRAME COLLECTION consists of a single sheet containing photographic reproductions of six[2] picture frames numbered by hand from 1 through 5 and bearing the following printed numbers: 294-20 (Frame 1); 294-10 (Frame 2); 294-46 and 294-33 (Frame 3); 294-03 (Frame 4); and 294-C (Frame 5). These picture frames

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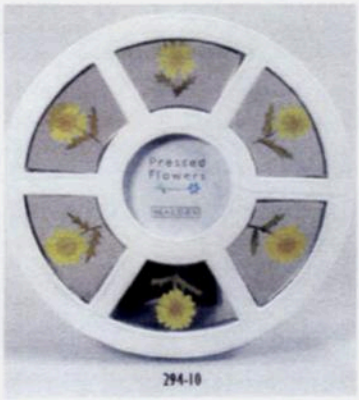
[1]In response to our September 20, 2004 request, Ms. Cheryl Clarkin promptly submitted enlarged color photographs of the PRESSED FLOWER FRAMES.

[2]Two nearly identical frames are designated as Frame 3; one rectangular (294-46) and one square (294-33). The shape of the picture openings follow the shape of the frames.

employ common geometric shapes– rectangles, circles, half-circles, triangles and pentagons. Each frame contains one or very few cut-out rectangular or circular openings for insertion of photographs within the overall frame.

Also within the frame boundaries are symmetrically arranged panels of geometric shapes containing artificial flowers pressed between panels of glass or clear plastic. Floral panels contain either a single flower pressed directly in the center of the available space, or a few flowers (generally, two or three) in a straight line. For example, in Frame 2, the circular frame contains equidistant panels resulting from the division of a circle in six equal parts like spaces in a spoked wheel. Frame 3 contains a semicircular floral panel at the top with a rectangular panel holding pressed flowers at the bottom. The panels, again, are filled with a single line of contrasting flowers in the available space. Frame 4 is circular, with a square panel in the center for picture display. Around each of the four sides is a floral panel shaped like a half-circle containing three flowers. Frame 5 is a pentagon shape with a top, triangular portion divided into four equal panels, each with a single flower pressed in its center. The floral panels in Frames 2, 4 and 5 are equal in size and shape. The shapes of the floral panels as well as the picture openings within the frames are all common and familiar– square, rectangular, triangular or semicircular.











II. ADMINISTRATIVE RECORD

On October 25, 2001, the Copyright Office received from Malden International Designs, Inc., an application for registration of a work entitled PRESSED FLOWERS FRAME COLLECTION as works of three-dimensional sculpture.[3]

A. Refusal Letter from Visual Arts Examiner Proctor

Finding no evidence of three-dimensional sculptural authorship, Examiner Ivan Proctor of the Visual Arts Section of the Examining Division informed Mr. Edward Perlman of your office, in a letter dated July 12, 2002, that the PRESSED FLOWERS FRAME COLLECTION could not be registered for copyright because it consists of useful articles which contain no separable authorship. Noting that picture frames are clearly useful objects, Mr. Proctor stated that the design of such useful articles can 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.'" 17 U.S.C. Sec. 101. Thus, according to legislative history, Examiner Procter pointed out, in order to be registered, these picture frames must possess independent authorship that is either physically or conceptually separable from the utilitarian aspects of the articles. Citing *Compendium of Copyright Office Practices, "Compendium II,"* Chapter 5 (1984), the examiner explained that physical separability means that "the pictorial, graphic, or sculptural features c[ould] be physically separated by ordinary means from the utilitarian item." Letter from Proctor to Perlman of 7/12/2002 at 1. The examiner found no such separability in the FRAME COLLECTION.

Continuing the analysis, Examiner Proctor again cited *Compendium II* in his explanation of conceptual separability: "[P]ictorial, 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 a free-standing sculpture, as another example, independent of the shape of the 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." *Id.* Finding that all of the sculptural elements of the frames were either related to their utility, or subsumed within the overall contour and shape of the useful articles, the frames could not be registered. Letter from Proctor of 7/12/2002 at 2. The examiner concluded his refusal of copyright registration by referring to the possibility of patent protection for some designs for useful articles.

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[3]The nature of the work is described on the application as "artwork." Usually, a "nature of work" statement describes the kind of work being registered rather than the authorship claimed in the work.

B. First Request for Reconsideration

In a letter dated November 8, 2002, you requested reconsideration of the Copyright Office's initial denial of registration. You stated that the PRESSED FLOWERS FRAME COLLECTION consists of individual frames which exhibit separable sculptural elements consisting of pressed flower arrangements. Letter from Albert to Examining Division of 11/8/2002 at 2. You first argued that the artistic elements of the frames were physically separable from their utilitarian aspects because the pressed flower arrangements could be physically removed from the frames without hampering the functionality of the frames. *Id.* at 3. You also cited *Parfums Givenchy, Inc. v. C. & C. Beauty Sales, Inc.*, 832 F.Supp. 1378 (C.D. Cal. 1993), in support of this contention.

You next argued that the artistic aspect of the frames were conceptually separable from the frames themselves. Citing *Brandir Int'l, Inc. v. Cascade Pacific Lumber Co.*, 834 F.2d 1142 (2d Cir. 1987), your basis for conceptual separability was the fact that the design elements of the frames "reflect[ed] the designer's artistic judgment exercised independently of functional influences." Letter from Albert of 11/8/2002 at 3. Claiming that there was no functional reason for incorporating pressed flowers into the frames, you asserted that there must be conceptual separability.

You add that the Copyright Office informational circular No. 40 provides two additional grounds for registration of the PRESSED FLOWER FRAME COLLECTION. U.S. Copyright Office, Circular No. 40, *Copyright Registration for Works of the Visual Arts* (2004). The first is that the Circular specifically mentions artificial flowers and plants as copyrightable subject matter, and therefore the pressed flower content in the FRAME COLLECTION may, in itself, be the subject of copyright. Second, you argued that the presence of the pressed flowers within the frames transforms the frames from useful objects into functional works to which three-dimensional floral designs are affixed. Circular no. 40 states that artwork applied to useful objects is copyrightable; therefore, the floral panels adorning the frames deserve copyright protection.

Finally, you have stated that the purpose of the frames is "to be looked at"-- that is, to portray its own appearance; therefore, such a purpose confirms that the work is not a "useful article" within the meaning of 17 U.S. C. Sec 101. Finally, you asserted that the FRAMES are registrable for policy reasons, citing the Copyright Office's brief in *Esquire, Inc. v. Ringer*, 591 F.2d 796 (D.C.Cir. 1978). Letter from Albert of 11/8/2002 at 7. You cite a threefold policy reason for prohibiting useful articles from obtaining copyright protection: where form dictates function, where consumer preference demands uniformity of shape and where protection for a limited number of basic shapes would accord copyright holders a monopoly on the use of these few shapes, [regardless of] how aesthetically well it was integrated into a utilitarian article. After noting that the first two policy reasons do not apply, you state that there is nothing "basic" or "limited" or "in the public domain" about these pressed flower designs. *Id.* at 7-8.

C. Examining Division Response to First Request for Reconsideration

By letter from Attorney Advisor Virginia Giroux dated February 10, 2003, the Examining Division refused registration of the frames. Essentially, Ms. Giroux agreed that the pressed flowers are conceptually separable from the utilitarian aspects or shape of the article, but found the arrangements too minimal to support a claim to copyright. Ms. Giroux noted the portion of the definition of "useful article" that states: "An article that is part of a useful article is considered a useful article." 17 U.S.C. Sec. 101. She further explained that useful articles such as the PRESSED FLOWERS FRAME COLLECTION could be registered only upon a showing of authorship that was both separable and copyrightable. Letter from Giroux to Albert of 2/10/2003 at 1.

Ms. Giroux disagreed with the contention that these FRAMES should be registered because they contain nonfunctional design elements based on artistic judgement rather than utilitarian concerns and, as such, contain separable authorship that is copyrightable. Letter from Giroux of 2/10/2003 at 2. She stated that the Copyright Office examines a useful article for separable elements that can be regarded as a work of art separate and apart from the shape of the article. Ms. Giroux also observed that physical separability derives from the principle that a copyrightable work of art that is later incorporated into a useful article retains its copyright protection. She stated that the components of this work did not meet the test of physical separability, citing *Mazer v. Stein*, 347 U.S. 201 (1954). Letter from Giroux of 2/10/2003 at 2.

In addressing conceptual separability, Ms. Giroux pointed out that the standard you used, derived from *Brandir International v. Cascade Pacific Lumber Co.,* 834 F.2D 1142 (2d Cir. 1987) is not the same as that used by the Copyright Office. She pointed out that the Office follows the standards set out in *Compendium II*– essentially the separability principle enunciated in *Esquire v. Ringer*, 591 F.2d 796 (D.C. Cir. 1978). Applying this principle, Ms. Giroux agreed that the pressed flowers embodied within the frames are conceptually separable from the utilitarian aspects and/or shape of the useful frames.

Ms. Giroux then evaluated the authorship present in the pressed flowers design element. She stated that the standard of originality for authorship was laid out in *Feist Publications v. Rural Telephone Service Co.,* 499 U.S. 340 (1991). She distinguished *Mazer v. Stein,* 347 U.S. 201 (1954); *Keiselstein-Cord v. Accessories By Pearl Inc.,* 632 F. 2d 989 (2d Cir. 1980); and *Animal Fair Inc., v. Amfesco Industries, Inc.*, 620 F.Supp. 125 (D. Minn. 1983), on the basis that the works at issue in those cases contained separable authorship that met the creativity threshold necessary for protection. Letter from Giroux of 2/10/2003 at 4. Ms. Giroux also distinguished *Act Young Imports Inc. v. B & E Sales Co.,* 673 F. Supp. 672 (S.D.N.Y. 1987); *Hart v. Dan Chase Taxidermy Supply Co.,* 86 F. 3d 321 (2d Cir. 1996); and *Masquerade Novelty Inc. v. Unique Industries, Inc.,* 912 F.2d 663 (3d Cir. 1990) on the basis that the works at issue in those cases were works that portrayed their own appearance, unlike the PRESSED FLOWER FRAMES whose primary function is primarily to hold pictures, decorative as they may be. Letter from Giroux of 2/10/2003 at 5.

In summary, Ms. Giroux refused to register the PRESSED FLOWER FRAMES collection because what little separable authorship was contained in the FRAMES did not rise to the level of creativity necessary for protection.

D. Second Request for Reconsideration

You appealed the Examining Division's refusal of registration in a letter to the Board of Appeals dated June 10, 2003. You hold that the Copyright Office's concession of conceptual separability entitles this work to registration. You further argue that Malden International Designs' PRESSED FLOWER FRAMES contain "unquestionably physically separable" flower design elements and contend that the Examining Division did not sufficiently explain its position on this point. Nevertheless, you note that the refusal to register appears not to be based on the lack of separability. Letter from Albert to Board of Appeals of 6/10/03 at 3 - 4.

Assuming from Ms. Giroux's letter of February 10, 2003 that the Examining Division has withdrawn it refusal to register based on no finding of conceptual separability, you then address Examining's conclusion that there was insufficient originality in the authorship of the conceptually separable pressed flower designs to support a copyright registration. You maintain that the selection, coordination and arrangement of the pressed flower designs appearing within the overall shape of the frames is sufficiently original to support copyright. Noting the modest standard of *Feist Publications, Inc. v. Rural Tel. Serv., Inc.*, 499 U.S. 340 (1991), you assert that many courts have awarded protection to original works similar to the pressed flowers. You rely on *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996 (2d Cir. 1995) and *Mason v. Montgomery Data, Inc.*, 967 F.2d 135 (5th Cir. 1992) for the principle that the selection and arrangement of unprotected drawings or other data may be "original" under the statute. Letter from Albert of 6/10/03 at 5.

As to the work under consideration, you note that the selection and arrangement was made "from a virtually infinite number of flowers and arrangements, to create a pleasing blend of color, shapes, and positions." Letter from Albert of 6/10/2003 at 5. You note that the arrangements were coordinated "with a white opaque background, while any number of different backgrounds could have been used." *Id.*

You again point out that "the Copyright Office itself identifies 'artificial flowers and plants' as being copyrightable, even when the floral design is imposed on functional objects such as flatware." *Id.* at 5 - 6. You remind the Board that "**the Attorney Advisor had no response regarding the Copyright Office's own guidelines for registration of flowers and floral designs on flatware**" and assert that Malden International Designs' submission presents a stronger case for registration, the conceptually separable flower designs at issue here constituting arrangements of multiple flowers in a particular pattern. *Id.* at 6 (Emphasis in original).

III. DECISION

Turning to the substance of your appeal, the Board concludes that copyright registration for the separable pressed flower arrangements in FRAMES 2 - 5 was properly denied. The discussion below will begin by addressing the precondition for qualifying for copyright that useful articles presents and then will address the issue of originality, as the latter represents the fundamental basis of this decision. In determining whether a useful article is entitled to registration, The Board follows a two-part analysis.

First, the Board determines whether there are any design elements that are separable from the overall shape and from the function of the useful article. The design of a useful article may be registered for copyright only if and to the extent that it contains elements that can exist and be identified independently from the useful article. 17 U.S.C. 101: definitions of "pictorial, graphic, and sculptural works" and "useful article;" *Compendium of Copyright Office Practices, Compendium II,* section 505 (1984). As you have noted, separability may be physical or conceptual. *Id.* at 505.02. Once separability has been established, separable elements must be independently copyrightable in order for that aspect of the useful object to obtain copyright protection.

A. Separability

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.)

The Copyright Office's 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. 1476, 94th Cong., 2d Sess. 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

> considerations, only elements, if any, which can be identified separately from the useful article as such are copyrightable.

H.R. Rep. at 55.

1. Physical separability. You assert that the pressed flower arrangements embodied within the FRAMES are registrable on grounds of physical separability by stressing the detachability of these arrangements : "the arrangements could, in fact, be physically removed from the frames and the frames would remain in existence and would continue to serve their function." Letter from Albert of 6/10/2003 at 3.

In one sense, the concept of physical separability is derived from the theory that a copyrightable work does not lose its protection when a useful article is integrated with it. Letter from Giroux of 2/10/2003 at 2. This is the principle articulated in *Compendium II*, section 505.04, *above at 6 - 7;* and that particular *Compendium* section references the landmark case of *Mazer v. Stein,* 347 U.S. 201 (1954), in which an easily recognizable, separable work of sculpture of a Balinese dancing figure was distinct from the utilitarian aspects of the lamp in question.

Another, and perhaps more apparent, sense of physical separability is that of actual detachability of a design feature from the body or overall shape of a useful article. With respect to the FRAMES at issue here, it is not clear that the individual panels within the frames would remain together if those panels were separated from the overall structure of the FRAMES. We note that your first request for reconsideration stated that the pressed flower arrangements, if separated from the frames, "could exist as a separate physical entirety" and that the flower arrangements could be "removed from the frames without the frames falling apart, or failing to function as holders of pictures." Letter from Albert of 11/08/2002 at 3. We nevertheless question whether the particular arrangements– in your words, the "selection of the design, shape, style, color and layout" and "their positions relative to each other" [Letter from Albert of 11/08/2002 at 2]– would remain as they appear within the frames, i.e., if physically removed would remain sufficiently, i.e., precisely fixed as the tangible medium of expression in which they appear within the frames. *See* 17 U.S.C. 101: definition of "fixation." It is, of course, necessary that a work be sufficiently fixed in order to enjoy copyright protection.

Nevertheless, regardless of which of the two senses noted above for the describing of physical separability, and regardless of whether or not the pressed flower arrangements maintain their particular arrangement or fixation after physical separation from the remainder of the frames, we need not address the question of physical separability because the Board has concluded that conceptual separability is present with respect to the pressed flower arrangements embodied within the PRESSED FLOWERS FRAMES COLLECTION.[4]

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[4] You earlier raised *Parfums Givenchy, Inc. v. C & C Beauty Sales, Inc.,* 832 F.Supp. 1378 (C.D.Cal. 1993) in support of physical separability and asserted in the second request for reconsideration that your point on physical separability had not been adequately addressed. Letter from Albert of

(continued...)

2. *Conceptual separability*. Again, conceptual separability means that the pictorial, graphic, or sculptural work, while physically inseparable by ordinary means from the utilitarian item, is nevertheless clearly recognizable as a pictorial, graphic, or sculptural work which can be visualized on paper, for example, or as a free-standing sculpture, as another example, *independent of the shape* of the 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*, section 505.03.

You note that the arrangements of pressed flowers are conceptually separable from the useful articles because the artistic choices which contribute to the creation of the pressed flower arrangements and, thus, the arrangements themselves "have nothing to do with the utilitarian function of the frame, which is simply to hold a picture and which therefore does not require the presence of any of these artistic features." Letter from Albert of 11/08/2002. In response to that position in your first request for reconsideration, Ms. Giroux pointed out the Office's *Compendium* test for conceptual separability, *above at 7*, and concluded that the pressed flower arrangements, as compilations of preexisting elements, were conceptually separable from the overall shape and contour and from the function of the frames and, thus, were the subject for further analysis on required creativity. Letter from Giroux of 2/10/2003 at 3 - 4. The Review Board agrees with Ms. Giroux's conclusion on conceptual separability of the flower arrangements appearing within the frames. We now turn to the copyrightability of those arrangements.

B. Creativity

1. Originality standard. Copyright protects "original works of authorship, fixed in any tangible medium of expression..." 17 U.S.C. § 102(a).

Originality has two components–independent creation and a certain minimum amount of creativity. *Feist Publications, Inc. v. Rural Telephone Service, Inc.*, 499 U.S. 340, 347 (1991). As noted in your appeal, the required amount of creativity is low. Nevertheless, there remains a narrow category of works in which the creative spark is insufficient to support a copyright. *Feist*, 499 U.S. at 359. The Court explicitly recognized this principle that some works fail to meet the low standard of copyrightability. The Court observed that "[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess

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[4](...continued)
6/10/2003 at 3 - 4. We point out that the *Givenchy* decision focused on a two-dimensional copyrighted design that appeared on perfume box packaging. The court summarily stated that the design was "physically separable from the utilitarian aspects of Amerige perfume." 832 F. Supp. at 1392. Thus, the court's analysis seemed to focus on the two-dimensional design as being distinguishable from the perfume bottle itself. We also note that under the Office's *Compendium* test for separability, the two-dimensional design was conceptually separable from the packaging box. Two useful articles were the case here– the bottle holding the perfume and the packaging box holding the bottle. We see no help from this particular opinion for your argument of physical separability for the flower arrangements embodied within the frames at issue here.

more than a *de minimis* quantum of creativity," 499 U.S. 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. The Copyright Office has long recognized in its registration practices [prior to *Feist*] which, in turn, are premised on the statute and settled case law, that works with merely a *de minimis* amount of authorship are not copyrightable. *See Compendium II,* section 202.02(a). Originality means something more than a trivial variation of elements found in the public domain. *Alfred Bell & Co., v. Catalda Fine Arts, Inc.,* 191 F.2d 99, 103 (2d Cir. 1951). (" 'Original' in reference to a copyrighted work means that the particular work 'owes it origin' to the 'author.' No large measure of novelty is necessary.") 191 F.2d at 102. This does not mean, however, that no standard at all existed. Although Catalda itself stated that "no large measure of novelty is necessary" in a work of authorship in order to enjoy copyright protection, the same Second Circuit opinion also held that the distinguishable variation in a work of authorship for which copyright protection is sought, must be "more than a 'merely trivial' variation." 191 F.2d at 102-103. Forty years later, Feist again confirmed that the "standard of originality is low, but it does exist." 499 U.S. at 362.

Your appeal principally addresses whether these works display a minimum amount of creativity. To do so, the separable pressed flower arrangement works must embody some creative authorship in delineation or form." 37 C.F.R. 202.10(a). *See, e.g., Jon Muller & Co. v. N.Y. Arrows Soccer Team, Inc.,* 802 F.2d 989 (8th Cir. 1986). Though a work may reflect the author's industry, the author's efforts do not automatically lead to copyright protection. Registration cannot be based on the simplicity of standard ornamentation; nor is it possible to register a design consisting of common geometric figures or shapes or standard symbols. *Compendium II,* section 503.02(a). The Office also recognizes that the use of public domain elements, of commonly known and/or geometric shapes, and of familiar symbols may yet result in a copyrightable graphic work as long as the overall resulting design, or overall pattern, taken in its entirety, constitutes more than a trivial variation of the constitutive elements. The complementary principles that a work of authorship should be considered as a unified entity in order to determine its copyrightability and that a work may be copyrightable even if it is composed of elements all of which are not copyrightable in themselves are principles established in case law and which the Copyright Office applies in its examining procedures. *See, e.g., Atari Games Corp. v. Oman*, 979 F.2d 242, 245 (D.C. Cir. 1992).

2. *Originality of the works at issue*. The second part of this analysis asks whether the separable parts of the remaining works rise to the level of authorship required by law. *See* 17 U.S.C. 102(a). We conclude that they do not.

In urging registration of these works, you assert that the Copyright Office did not follow its own guidelines as to registration of flowers and floral designs on flatware. Letter from Albert of 6/10/2003 at 6. Although Copyright Office Circular 40 uses "floral relief design on silver flatware" as an example of possibly copyrightable work, that example is distinguishable from the flowers used for the picture frames at issue here. Note that Circular 40 merely states that the floral relief design "*could be protected* by copyright." U.S. Copyright Office, *Copyright Registration for Works of the Visual Arts,* Circular 40 at 2 (emphasis added). The conditional nature of the Circular's language is evidence that its list of copyrightable material was meant to be illustrative, not determinative. The listing of artificial flowers and floral

designs on objects among the items that may be copyrighted does not guarantee copyright registration for any or all arrangements of artificial flowers or floral designs.

You urge the registration of this work on the basis of the selection, coordination, and arrangement of the pressed flowers. Letter from Albert of 6/10/2003 at 5. Again, *Feist* is instructive as the articulation that, although the requisite amount of selection, coordination and arrangement of component elements of a given work is low, there is a narrow group of works that fail to meet the threshold amount of creative authorship necessary for copyright. *Above at 10.* Component elements and the resulting work as a whole may be pleasing, but if the arrangement or organization of the individual elements into the work as a whole does not meet the minimum standard, the work cannot be registered for copyright. Indeed, the work in *Feist,* purported to be a composition of selection, coordination, and arrangement of telephone listing data, did not meet the required minimum. Here, as in *Feist*, a simple combination of only a few pre-existing flower elements is insufficient to merit copyright protection. *See, e.g., 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").

The arrangement of the flowers in each of the frames (other than frame 294-20) is substantially limited by the shape of the frame windows themselves. For example, Frame 2 (Item No. 294-10) consists of two concentric circles, with the space between the circles split into six evenly spaced arcs. That spacing is not per se copyrightable, of course, because standard shapes are not copyrightable. *Compendium II*, section 503.02(a). ("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 five pointed star. The same is true for a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations.") The placing of a flower in the center of each of those arcs is essentially formulaic. Similarly, Frame 5 (Item 294-C) consists of a pentagon, shaped like a triangle on top of a square. The triangle is divided into equal portions with a flower in the center of the available space. Fitting the flowers into each of the smaller triangles does not involve creative or artistic expression. In Frame 3, (Items 294-33 and 294-46) three contrasting (light/dark/light) flowers fill the semicircular top panel and five similarly contrasting flowers fill the rectangular bottom panel. The flower arrangement in Frame 4 consists of three contrasting flowers in a semicircular panel on each side of the square picture frame. The contrast of the individual flowers at the top and bottom panel, light/dark/light, and the contrast on the sides of dark/light/dark, constitute minor variations. *See, e.g., Gardenia Flowers, Inc., v. Joseph Markovits, Inc.,* 280 F. Supp. 776 (S.D.N.Y. 1968) (the fact that only minimal standards apply to copyright for corsage designs made from artificial flowers do not prevent conclusion that works lack that modicum of originality required for a valid copyright).

Recall that aesthetics are not considered in the examining process, because the Copyright Office does not judge art. Thus, the assertion that the flowers were selected from "a virtually infinite number of flowers and arrangements, to create a pleasing blend of color, shapes, and position....coordinated with a white opaque background" (Letter from Albert of 6/10/03 at 5) misses the point. *Compendium II* provides guidance here.

> 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 ... Likewise, *mere coloration cannot support a copyright even though it may enhance the aesthetic appeal* or commercial value of a work...

Compendium II § 503.02(a) (emphasis added).

Gardenia Flowers, Inc. v. Joseph Markovits, Inc. 280 F.Supp. 776 (S.D.N.Y. 1968) is also instructive here. In that case, the court denied copyright protection to artificial flower corsages, noting that the claims were limited to the arrangements of the flowers in the corsages. The court began by acknowledging the applicable regulatory standard for artistic works of authorship. "In order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form," quoting 37 C.F.R. 202.10(a). 280 F.Supp. at 781. The court found "no evidence of creativity" in the flower arrangements, holding that, for example, 'rose and bud with lilies of the valley and ferns' were traditional flower arrangements for corsages. It observed that "the boundaries [of an acceptable quantum of creativity] may be generous, [but] there are, nevertheless, limits beyond which courts cannot accord objects the status of work of art." *Id.* Moreover, the court noted "that degree of creativity necessary to define objects as works of art is not supplied through innovations which are solely utilitarian or mechanical." *Id.* Where the creative input of an artificial floral arrangement is too low to meet the necessary quantum of authorship, the arrangement cannot be copyrighted. The Board finds the very simple arrangements of the few flower pieces in each floral arrangement at issue here to be insufficient under *Feist* to allow registration.

3. Comment on case law. The two cases you cited to support your position are distinguishable. *Knitwaves, Inc. v. Lollytogs, Ltd.,* 71 F.3d 996 (2d Cir. 1995) addressed the issue of squirrel and leaf designs on clothing; the designs had been registered.

The issue there was whether a competitor's line of clothing infringed the protected elements of design. The case provides an example of what can be copyrighted. In this respect, the case involves a work not much different from the listed examples in Circular 40. In fact, the separable clothing designs in *Knitwaves* fall within two of the examples listed in Circular 40: artwork applied to clothing or to other useful articles and fabric, floor, and wall covering design. Circular 40 at 2. Again, the point of Circular 40 is what authorship is potentially copyrightable, not what is automatically copyrightable. The Office's registration practices incorporate the principle that the use of public domain elements, of commonly known and/or geometric shapes, and of familiar symbols, may yet result in a copyrightable work as long as the overall resulting design, taken in its entirety, constitutes more than a trivial variation of the constitutive elements. *Compendium II*, section 503.02(b). In *Knitwaves,* the court, although considering the appropriate infringement test for a design on clothing, articulated a copyrightability analysis in terms of the overall pattern that was infringed in that case, pointing out that "[W]hat is protectible then is 'the author's original contributions,' (citing Feist at 350)--

the original way in which the author has 'selected, coordinated and arranged' (citing Feist at 358) the elements of his or her work." 71 F.3d at 1004. Using *Feist's* standard, the Board does not see a sufficient original selection or arrangement of the flower components or, assuming the separability of the spaces holding the flowers, of those individual spaces within the frames' borders– or the arrangement of those spaces– which rises above the commonplace and simple.

In *Mason v. Montgomery Data, Inc.*, 967 F.2d 135 (5th Cir. 1992), the court considered, among other things, whether maps of Montgomery County, Texas, possessed sufficient creativity to be copyrighted as pictorial works of authorship, as you suggest similar pictorial authorship is present in the works at issue here. Letter from Albert of 6/10/2003 at 5. The maps in *Montgomery Data* are distinguishable from the conceptually separable features of the FRAMES at issue here. We point out that the maps themselves, although incorporating preexisting material, represented a substantial change over maps that had existed before. The court found that the maps' author had produced a compilation of literary and graphic expression portraying surveys, tracts and various topographical features within the county– in other words, the arrangement consisted of a number of elements or features, not merely a few as is the case with the flower elements in the FRAMES. 967 F.2d at 142. Noting that maps had historically been treated as compilations of facts, the court concluded that the plaintiff mapmaker used his own skill and judgment resulting in expression that conveyed his understanding of the lay of the land in Montgomery County, and ultimately concluded that the mapmaker, in addition to exercising sufficient creative choices as to the exact factual elements embodied in the map, had created compilations of both facts and data as well as compilations of features which resulted in pictorial or graphic expression. *Id.* The Board does not see such multiple components / data / features brought together in a manner which results in the expression of protectible compilation authorship present in the flower arrangements at issue here.

In summary, the Review Board affirms the Examining Division's refusal to register the selection, arrangement and coordination of the separable features of the frames in the PRESSED FLOWER FRAME COLLECTION, with the exception of Frame 1, #294-20; registration for that work may be completed upon submission of a new application with a title that refers only to that frame, stating a claim as "two-dimensional artwork." The remainder of the FRAME COLLECTION frames do not rise to the level of registrability. We accept the fact that the works contain separable floral arrangement features, but, again, those features, both separably and in their overall configuration, lack the quantum of copyrightable artwork or of copyrightable compilation authorship sufficient to justify registration. 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