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March 28, 2005

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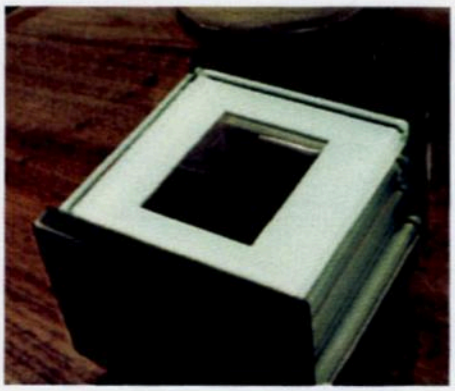
Re: PHOTO COASTER SQUARE, PHOTO COASTER SET SQUARE, QUADRA Graphic Design in Glass Block
Copyright Office Control No. 61-201-552(T)/61-218-5960(T)

Dear Mr. Tendler:

I write on behalf of the Copyright Office Board of Review [Review Board] in response to your letter dated March 23, 2004, requesting a second reconsideration of a refusal to register the works entitled "Photo Coaster Square" and "Photo Coaster Set Square," which were later merged and re-titled as "Quadra, Graphic Design in Glass Block." The Board has carefully examined the application, the deposit, and all correspondence in this case concerning the application process, and hereby reaffirms the denial of registration.

I. DESCRIPTION OF WORK

The applicant's work is essentially a set of four (4) square stacked glass blocks with a U-shaped holder. The glass blocks are described as having a square-within-a-square design [1]with a square apertured frosted appliqué and opposed square chamfered edges. The U-shaped block holder is made out of wood, and its thickness is proportional to the thickness of the glass blocks.



[1]On January 27, 2005, the body which considers an applicant's second request for reconsideration of a refusal to register a work became known as the Review Board. See 69 Fed. Reg. 77636 (December 28, 2004).

II. ADMINISTRATIVE RECORD

A. Initial Applications and Office's Refusal to Register

On June 6, 2003, the Copyright Office ("Office") received two Form VA applications submitted by you on behalf of your client, Swing Ltd., to register four works. The two works that are the subject of this appeal were submitted in separate packages and reviewed by different examiners. The work entitled Photo Coaster Set Square was examined by Joy Fisher Burns and rejected in a letter dated August 15, 2003. Ms. Burns rejected the work because she found it to be a useful article with no separable authorship sufficient to sustain a copyright. Letter from Burns to Tendler of 8/15/03. The work entitled Photo Coaster Square was examined with two other works by Visual Arts Examiner, Ivan Proctor. He refused registration of all three works, including Photo Coaster Square, because he determined that each was a useful article that did not contain any separable authorship as necessary to sustain a claim to copyright. Letter from Proctor to Henderson of 8/28/03, at 1.

Mr. Proctor explained that although copyright law protects works of artistic craftsmanship insofar as their form, this protection does not extend to such works' mechanical or utilitarian aspects. He further explained that protection of a useful article's design will arise only if such design incorporates pictorial, graphic, or sculptural authorship that is either physically or conceptually separable from the utilitarian aspects of the article. After describing several examples in which physical or conceptual separability did exist, Mr. Proctor concluded that "[b]ecause all of the elements of the works you deposited are either related to the utilitarian aspects or function, or are subsumed within the overall shape, contour, or configuration of the article, there is no physically or conceptually separable authorship as such." *Id.* at 2. Mr. Proctor lastly noted that designs for useful articles may be entitled to protection under federal patent laws. *Id.*

Requests for reconsideration were filed on both Photo Coaster Square and Photo Coaster Set Square, and the Office decided to merge both applications in order to save the applicant money because of the relatedness of the works to each other, the fact that one work was embodied in the other, and the reasons for refusal to register both works was the same. Letter from Giroux to Tendler of 2/6/04.

B. First Request for Reconsideration

In a letter dated December 3, 2003, you requested reconsideration of the Office's refusal to register the works. Your request focused on the argument that conceptual separability existed with respect to the sculptural components of the photo coasters. Letter from Tendler to Proctor of 12/3/03, at 1. In support of this argument, you pointed to stylistic features which were used to create a unique separable sculptural appearance, such as the glass material used to make the coasters, the chamfered hard edges that provided the edge glow, the white paint background that made the coaster look frosted on the bottom, and the style of the central opening. *Id.* You also mentioned that the utilitarian purpose of a coaster is to thermally insulate an article from an underlying surface such as the top of a table, and that the stylistic features did not further advance that purpose. *Id.* at 2.

C. Examining Division's Response to First Request for Reconsideration

In response to your request and in light of the points raised in your letter of December 3, 2003, Attorney Advisor Virginia Giroux of the Examining Division reexamined the applications and determined that the works could not be copyrighted because they failed to contain any authorship that was both separable and copyrightable. Letter from Giroux to Tendler of 1/29/04, at 1.

In her letter dated January 29, 2004, Ms. Giroux explained that the design of a useful article is considered a pictorial, graphic, or sculptural work only if, and only to the extent that such design incorporates pictorial, graphic, or sculptural features that can be identified separately from and are capable of existing independently of the utilitarian aspects of the article without losing its basic shape. 17 U.S.C. § 101. In applying this standard, the Copyright Office examines the work for physically or conceptually separable elements that are capable of copyright registration.

Having noted that your request for reconsideration did not dispute the fact that this coaster set is a useful article, Ms. Giroux focused on your argument that the coaster set contains non-functional designs which are conceptually separable elements, and ultimately held otherwise. Letter from Giroux to Tendler of 12/3/03, at 2. In making this determination, Ms. Giroux stressed that "[e]xaminers do not make aesthetic judgments; nor are they influenced in any way by the attractiveness of the design, its uniqueness, its visual effect or appearance, the time and effort it took to create, commercial success in the marketplace." *Id.* at 1.

Ms. Giroux first asserted that the material used to make the work does not aid in determining copyrightability, and thus the fact that the coasters were made of glass and finished with white underpainting does not contribute to the copyrightability of the work. *Id.* She then explained that none of the sculptural elements or features you referred to can be perceived as physically or conceptually separable from the article itself. *Id.* at 2. Ms. Giroux viewed the rectilinear central aperture and the chamfered edges as part of the overall shape, contour, and configuration of the coasters themselves, and not physically or conceptually separable from their utilitarian function without destroying their basic shape. *Id.* She compared this case to *Esquire, Inc. v. Ringer*, where an outdoor lighting fixture was denied copyright registration on the grounds that copyright protection was not possible based on the "overall shape or configuration of a utilitarian article, no matter how aesthetically pleasing that shape or configuration may be." 591 F.2d 796, 800 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 908 (1979). She also compared this case to *Norris Indus., Inc. v. Int'l Tel. & Tel. Corp.*, where a wire-spoked wheel cover was not copyrightable because it was a useful article that did not contain any sculptural design that could be identified apart from the useful article itself. 696 F.2d 918, 919 (11th Cir. 1983), *cert. denied*, 464 U.S. 818 (1983).

In addition, Ms. Giroux noted that just because a work may consist of a unique or distinctive shape for purposes of aesthetic appeal does not mean the work as a whole constitutes a copyrightable work. *Id.* at 3. The aesthetic value of a design or the fact that a design could have been designed differently is not a relevant consideration in determining copyrightability. *Compendium II: Compendium of Copyright Office Practices* § 503.01 (1984) ("*Compendium*

II"). All works involve choices, and the fact that other shapes, sizes, styles, coloring, contours, and configurations could have been selected or chosen for this coaster set does not mean that the work is copyrightable. Letter from Giroux to Tendler of 12/3/03, at 3. Based on the reasoning discussed above, Ms. Giroux refused copyright registration for both works.

D. Second Request for Reconsideration

On May 23, 2004, you submitted a letter requesting that the Office reconsider for a second time its refusal to register the copyright claims in the coaster sets. Letter from Tendler to Chief, Receiving and Processing Division (hereinafter Chief) of 5/23/04, at 1. In the appeal, you first disclaimed the coaster aspect of the sculpture, and asserted that the original use of the block glass as a photo coaster should no longer be an issue. *Id.* In doing so, you asked that the unstacked articles be viewed as blocks of glass with appliqués having a square-apertured frosting that extend from the center to the edge of the sculpture. *Id.* at 3. You also argued that the stacked glass blocks constituted "a sculpture characterized by luminous stacked spaced-apart prisms with chamfered edges and white-apertured appliqués," and was thus registrable as a sculpture regardless of utility. *Id.* at 4. Moreover, you insisted that the square-within-a-square design used was in and of itself "art," just as a number of artists and sculptors have used geometric elements in their copyrighted works, such as Anuszkiewicz's patterns of squares which is located in the Museum of Modern Art. *Id.* at 3.

Your main argument again reiterated the belief that the work contained copyrightable elements that are conceptually separable from the utilitarian aspects of the article. You pointed to features such as the square-within-a-square design with the square apertured frosted appliqué and opposed square chamfered edges, the square apertures in the frosting placed within the square provided by the illuminated chamfered edges, and the proportional relationship of the thickness of the glass to the plain view of the block. *Id.* at 2. You also asserted that the patterned frosting itself is a separable appliqué from which separability can be derived. *Id.* at 3. In addition, you claimed conceptual separability in the dark-light-dark pattern created "when the square edges are supplied by the glass block and the glass is decorated with a white backing patterned to have a square hole in the center with the square hole juxtaposed and spaced from the chamfered and spaced edges." *Id.*

In support of your argument, you cited to the *Kieselstein-Cord* holding that if the sculptural feature can be identified separately from and is capable of existing independently of the utilitarian aspects of the articles, the article is copyrightable even when the separability is conceptual and even where the aesthetic element is inextricably interwoven with the utilitarian aspect of the article. *Id.* at 1 (citing *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 993 (2d Cir. 1980)). You claimed that *Kieselstein-Cord* can be distinguished from *Esquire* because while the belt buckle design was not physically separable from the belt buckle, it was nonetheless held to be registrable because it was conceptually separable. *Id.* at 2. You also referred to Nimmer's use of Christo's "Running Fence" as an example of "conceptual art," even though the work did not contain sculptural features that were physically separable from the utilitarian aspects of the fence. *Id.* at 2. Additionally, you compared the case to *Trans-World Mfg Corp. v. Al Nyman & Sons, Inc.*, where the chevron design on an eyeglass display case was

said to convey copyrightability of the "curving 'free form sculpture' which creates a scalloped effect." *Id.* (citing 95 F.R.D. 95, 96 (D. Del. 1982)). Lastly, you pointed to *Spectrum Creations, Inc. v. Catalina Lighting, Inc.*, which held that when there are multiple constituent elements, the elements in combination can be registered as a graphic design. *Id.* (citing 2001 U.S. Dist. Lexis 11861 (W.D. Tex. 2001)). In the present case, you claimed there are multiple elements: (1) square-apertured appliqué (2) a square arrangement of chamfered edges, and (3) a thick glass structure containing the appliqué and edges. *Id.*

Finally, you urged that the fact this work has been copied extensively indicates some level of creativity. You noted that in 2003 alone over 40,000 articles sold in upscale establishments. *Id.* at 3. You also pointed to the commercial success of the work as support of its need for copyright protection, claiming that commercial success is a factor in determining copyrightability. *Id.* You also asserted that many customers, in fact, buy the stacked glass blocks as a sculpture without ever using them as photo coasters. *Id.* at 4.

III. DECISION

A. Useful Articles and Separability

i. Legal Framework for Useful Articles and Separability. In general, copyright protection presumptively does not extend to a useful article, defined as "an 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. However, works of artistic craftsmanship, which may be useful articles themselves or incorporated into a useful article, can receive protection as pictorial graphic, or sculptural works pursuant to 17 U.S.C. § 102(a)(5). This protection is limited, though, in that it extends only "insofar as their form but not their mechanical or utilitarian aspects are concerned." *Id.* § 101. The design of the useful article will be protected "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." *Id.* This separability can be physical or conceptual. Congress has explained that:

> [A]lthough the shape of an industrial product may be aesthetically satisfying and valuable, the Committee's intention is not to offer it copyright protection under the bill. Unless the shape of 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.

H.R. Rep. No. 94-1476, at 55.

Physical separability means that the subject pictorial, graphic, or sculptural features must be able to be separated from the useful article by ordinary means. *Compendium II, supra,* § 505.03. For example, a statuette that also serves as a lamp base can ordinarily be separated from the functional portion of the lamp by unscrewing the bulb and shade and thus, the statuette can qualify as physically separable. *See e.g. Mazer v. Stein*, 347 U.S. 201 (1954).

Conceptual separability means that the subject features are clearly recognizable as pictorial, graphic, or sculptural works which can be visualized independent of the shape of 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. *Compendium II, supra* § 505.03. For example, while a carving on the back of a chair cannot readily be separated physically from the chair, it can easily be separated conceptually because one could imagine the carving existing as a drawing. The chair, meanwhile, would still remain a useful article having retained its basic shape, even absent the carving. The carving would therefore qualify as conceptually separable.

However, just because a feature is not necessary to or dictated by the utilitarian concerns of an article does not mean that the feature is automatically conceptually separable. If removing such features would destroy the useful article's basic shape, namely because the features are an integral part of the overall shape or contour of the useful article, then the features would not qualify as conceptually separable.

As explained in *Esquire,* 591 F.2d at 800, copyright protection is not available for the "overall shape or configuration of a utilitarian article, no matter how aesthetically pleasing that shape may be." In that case, the Office refused to register an outdoor lighting fixture, which arguably contained non-functional, purely aesthetic features. The court upheld the Office's refusal, noting that "Congress repeatedly rejected proposed legislation that would make copyright protection available for consumer or industrial products." *Id.* Similarly in *Norris Indus.*, 696 F.2d at 924, the court held that a wire-spoked wheel cover was not entitled to copyright protection because it was a useful article used to protect lug nuts, brakes, wheels, and axles from damage and corrosion, and it did not contain any sculptural design features that could be identified apart from the wheel cover itself.

ii. The Work is a Useful Article. You originally titled your work "Photo Coaster Square" and "Photo Coaster Set Square." A photo coaster set is clearly a useful article. You yourself mention that a coaster is used to thermally insulate an article from an underlying surface such as the top of a table. Letter from Tendler to Proctor of 12/3/03, at 2. As mentioned above, copyright protection presumptively does not extend to a useful article. In order to circumvent this obstacle, you disclaimed the coaster aspect of the sculpture and renamed the work "Quadra, Graphic Design In Glass Block."

However, 37 C.F.R. § 202.10(a) states that in order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form. The registrability of such a work is not affected by the intention of the author as to the use of the work or the number of copies reproduced. Although you disclaim the coaster aspect of the sculpture and argue that utility should no longer be an issue, the Board cannot ignore the photographs of the identifying materials as well as the original title given to the work, both of which unequivocally point to the fact that the work at issue here is a useful article, no matter how uniquely or fancifully it may be structured, configured, or entitled. In addition, according to the statutory definition, a useful article has at least one - "an" - intrinsic utilitarian function. 17 U.S.C. § 101. Thus, an object having both a useful function as well as an aesthetic purpose may be classified as a useful article and fall under the statutory necessity of evidencing design features which must be separable as the statute describes that necessity in order to enjoy copyright protection. The Copyright Office may take notice of matters of general knowledge and use such knowledge as the basis for examining questionable applications. *Compendium II, supra*,§ 108.05(b). Taking administrative notice of the facts provided by your client in the application form and notice of the deposit materials submitted, we determine that despite its appearance, this set is still a coaster set and, thus, amenable to the useful article separability requirement.

iii. Any Separable Elements are not Copyrightable. Your argument rests on the belief that features such as the square-within-a-square design with the square apertured frosted appliqué and opposed square chamfered edges, the square apertures in the frosting placed within the square provided by the illuminated chamfered edges, and the proportional relationship of the thickness of the glass to the plain view of the block are all conceptually separable features. Letter from Tendler to Giroux of 5/23/04, at 2. However, conceptual separability and copyrightability do not automatically exist simply because an element within a useful article is not dictated by utilitarian concerns. Even if certain features are non-functional or could be designed differently, copyright registration is not possible where such features are an integral part of the overall shape or contour of the useful article. Confirming the assessment made by Ms. Giroux, the Board views the rectilinear central aperture, as well as the chamfered edges, as part of the overall shape, contour, and configuration of the coasters themselves, not physically or conceptually separable from their utilitarian function without destroying their basic shape, and therefore, not copyrightable. Letter from Giroux to Tendler of 1/29/04, at 2.

You cited several cases relating to conceptual separability. Unfortunately, none advances your cause. You first cited to *Kieselstein-Cord*, describing it as "a case 'on all fours' with the subject case." Letter from Tendler to Giroux of 5/23/04, at 1. *Kieselstein-Cord* held that because the ornamental features of the belt buckles could be identified separately from and were capable of existing independently of the utilitarian aspects of the articles, the article was copyrightable. *Kieselstein-Cord*, 632 F.2d at 993. Unfortunately, the sculptural features in the present work cannot be identified separately without destroying the basic shape of the sculpture. Your reliance on *Trans-World Mfg Corp.* F.R.D. 95 (D. Delaware 1980) is also misplaced. While the court did state that "a useful article possessing sculptural elements that are conceptually, though not physically, separable from its utilitarian elements is copyrightable," the court did not hold that the chevron design on the eyeglass display case was said to convey copyrightability of the curving 'free form sculpture' which creates a scalloped effect. Instead, the

court only concluded that summary judgment was not the appropriate means for deciding whether there are conceptually separable sculptural elements, capable of existing independently of their utilitarian aspects, and that such a conclusion should be made by the trier of fact on the basis of expert testimony. *Trans-World Mfg Corp.*, at 99. Finally, you cite to the *Spectrum Creations* holding that when there are multiple constituent elements, the elements in combination can be registered as a graphic design. Letter from Tendler to Giroux of 5/23/04, at 2 (citing *Spectrum Creations, Inc. v. Catalina Lighting, Inc.*, 2001 U.S. Dist. Lexis 11861 (W.D. Tex. 2001)). It is correct that a combination of normally unprotectible elements can qualify for copyright protection. *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1446 (9th Cir.1994); *United States v. Hamilton*, 583 F.2d 448, 451 (9th Cir.1978) (Kennedy, J.) ("[O]riginality may be found in taking the commonplace and making it into a new combination or arrangement."). However, it is not true that any combination of unprotectible elements will automatically qualify for copyright protection. *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003). *See also Feist, Publn's, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 358 (1991). ("[T]he principal focus should be on whether the selection, coordination, and arrangement are sufficiently original to merit protection."). In the present case, the selection and arrangement of the unprotectible elements, including the square-apertured appliqué , the square arrangement of chamfered edges, and the thick glass structure containing the appliqué and edges which you refer to are not sufficient enough to constitute an original work of authorship.

B. Original Works of Authorship

i Legal Framework for Originality. Even if the work were to be classified as a non-useful sculpture, registration is still not possible for the work in question because of the *de minimis* nature of the features to which you refer. In situations where an artistic feature may be separable from a utilitarian object, this separable feature will not automatically merit copyright protection. All copyrightable works, be they sculptures, drawings, or otherwise, must also qualify as "original works of authorship." 17 U.S.C. § 102(a).

The term original consists of two components: independent creation and sufficient creativity. *Feist,* 499 U.S. at 345 (1991). First, the work must have been independently created by the author, i.e., not copied from another work. The Office accepts at face value that the work in question was independently created. Therefore, this prong of the originality analysis is not at issue herein. Second, the work must possess sufficient creativity. In determining whether a work embodies a sufficient amount of creativity to sustain a copyright claim, the Board adheres to the standard set forth in *Feist*, where the Supreme Court held that only a modicum of creativity is necessary. *Id.*

While the requisite level of creativity is extremely low so that even a slight amount will suffice, the court also ruled that some works fail to meet the standard. *Id.* The Court observed that "[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more than a de minimis quantum of creativity." *Id.* at 363. There can be no copyright in a work in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359; *see also*, 37 C.F.R. § 202.10(a) (2003) ("In order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its

delineation or form."); 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.01[B] (2002) ("[T]here remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright.").

Even prior to the Feist decision, the Office recognized the modest, but existent, requisite level of creativity necessary to sustain a copyright claim. *Compendium II* states, "Works that lack even a certain minimum amount of original authorship are not copyrightable." *Compendium II, supra*, §202.02(a). With respect to pictorial, graphic, or sculptural works, *Compendium II* states that a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." *Id.* § 503.02(a).

In implementing this threshold, the Office and courts have consistently found that standard designs, figures, and geometric shapes are not sufficiently creative to support a copyright claim. *Id.* "[R]egistration cannot be based upon the simplicity of standard ornamentation . . . . Similarly, it is not possible to copyright common geometric figures or shapes . . . ."). Moreover, simply making minor alterations to these otherwise standard shapes will not inject the requisite level of creativity. *Id.* "[Registration cannot be based upon] a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations.").

Of course, some combinations of common or standard forms contain sufficient creativity with respect to how they are combined or arranged to support a copyright. *See Feist*, 499 U.S. at 358 (1991) (the Copyright Act "implies that some 'ways' [of compiling or arranging uncopyrightable material] will trigger copyright, but that others will not;" determination of copyright rests on creativity of coordination or arrangement). However, merely combining non-protectible elements does not automatically establish creativity where the combination or arrangement itself is simplistic. For example, the Eighth Circuit upheld the Registrar's refusal to register a simple logo consisting of four angled lines which form an arrow and the word "Arrows" in cursive script below the arrow. *John Muller & Co. v. New_York Arrows Soccer Team, Inc.*, 802 F.2d 989 (8th Cir. 1986).

ii Work is not Sufficiently Original. Even if the work were to be classified as a non-useful sculpture as you advocate, the Office would still need to consider whether the work had sufficient copyrightable authorship. We find that the design elements in the work fail to meet the low threshold of creativity required by the courts and Copyright Office, and therefore cannot support a registration claim. None of the aesthetic features you identified in the work rise to the level of sufficient creative authorship required for copyright protection. The square-within-a-square design, the grooved edges, and the frosted appliqué are all minor variations on common shapes in the public domain, which are consistently not sufficiently creative, in and of themselves or in combination, to sustain a copyright under the threshold articulated in *Feist*. *See Compendium II, supra*, § 503.02(b) ("[T]he 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.").

Finally, we reject your claim that the work can be viewed as a copyrightable sculptural work of art. Although the Board does not consider aesthetics in determining copyrightability,

merely analogizing a useful article to a sculpture of modern art cannot create copyrightability where it otherwise does not exist. *See id.* § 505.03. If this were the case, all useful articles and industrial products could be subject to copyright protection as modern sculptures, which Congress clearly did not intend. H.R.Rep. No. 94-1476, at 55 ("In adopting this amendatory language, the Committee is seeking to draw as clear a line as possible between copyrightable works of applied art and uncopyrighted works of industrial design."). While many artists and sculptors use geometric elements in their creations, the work in question simply does not contain sufficient copyrightable creative expression required to sustain a copyright registration claim.

iii. Commercial Success is NOT a factor. Your argument that commercial success is a factor in determining copyrightability is also without merit. Contrary to your assertion, the *Kieselstein-Cord*, quote you used does not support the use of commercial success in determining copyrightability. In fact, several cases have explicitly rejected commercial success as a proper consideration. *See Ets-Hokin v. Skyy Spirits, Inc.,* 225 F.3d 1068, 1075 (9th Cir.2000); *Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q.2d 1074, 1076 (D.D.C.1991); *see also* 1-2 Melvin B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.09; *Compendium II, supra,* § 505.02(b) (1984). In *Paul Morelli Design, Inc. v. Tiffany & Co.*, 200 F.Supp.2d 482, 488 (E.D. Pa. 2002), the court further noted that "[w]orks may experience commercial success even without originality and works with originality may enjoy none whatsoever. Nothing has been presented to us showing any correlation between the two."

IV. CONCLUSION

For the reasons stated herein, the Copyright Office Board of Appeals affirms the refusal to register the "Photo Coaster Square" and "Photo Coaster Set Square," (re-titled as "Quadra, Graphic Design in Glass Block"). This decision constitutes final agency action on this matter.

Sincerely,

/s/

Marilyn J. Kretsinger
Associate General Counsel
For the Review Board
United States Copyright Office