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July 19, 2005

Ober, Kaler, Grimes & Shriver
Attn: E. Scott Johnson
120 East Baltimore Street
Baltimore, MD 21202-1643

Re: MARIELLE FAUCET BASE
MARIELLE FAUCET CONTROL VALVE BASE
Control No. 61-210-2908 (O)
Control No. 61-200-7678 (O)

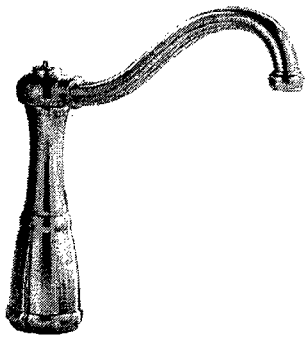
Dear Mr. Johnson:

The Copyright Office Review Board has reviewed your request for reconsideration of the Office's refusal to register the two faucet designs listed above for your client, Emhart LLC. The Copyright Office Review Board now affirms the Examining Division's refusal to register.

I. DESCRIPTION OF THE WORK

The two works at issue in this reconsideration have been described as a faucet base and a control valve base which resemble a pepper mill. They are depicted below:

The Marielle Faucet Base.



The Marielle Faucet Control Valve Base.



II. ADMINISTRATIVE RECORD

A. Initial Submission

On June 17, 2002, the Copyright Office received an application, deposit and fee for copyright registration of a faucet design entitled MARIELLE FAUCET BASE. One day later, on June 18, 2002, the Copyright Office received an application, deposit and fee for copyright registration of another faucet design entitled MARIELLE FAUCET CONTROL VALVE BASE. The works arrived in separate packages, and were reviewed by different examiners. Each examiner refused registration having determined that the work involved was a useful article and did not contain any separable authorship to sustain a claim to copyright. *See* Letter from Mansfield to Johnson of 10/11/02; Letter from Shapleigh to Johnson of 10/16/02.

B. First Request for Reconsideration

In a letter dated March 7, 2003, you requested reconsideration of the Office's refusal to register the two faucet designs. You asserted that the claimant's works were a faucet base and control valve both of which resembled a pepper mill. Letter from Johnson to the Examining Division of 3/7/03, at 1. While the base was arguably a useful article, you contended that what you referred to as the "pepper mill design" was a stand alone work of art because it was "conceptually separable" from the useful article. *Id.* at 1. You cited *Esquire, Inc. v. Ringer*, 591 F.2d 796, 805 (D.C. Cir. 1978), *cert. denied,* 440 U.S. 908 (1979), for establishing that "the Copyright Act does not enshrine a particular conception of what constitutes a work of art," and cautioned that the Copyright Office is not to serve as the "arbiters of national taste" because neither the Constitution nor the Copyright Act authorizes such power. Letter from Johnson re Control No. 61-200-7678 (O) of 3/7/03, at 2. You asserted that there are two prongs in determining whether a utilitarian object is eligible for copyright registration based on conceptual separability. You stated that the first element to be considered is whether the design stands alone, and urged that the pepper mill design meets this requirement. *Id.*

As examples of conceptually separable authorship which you considered similar to your client's works, you cited the cases of *Celebration International, Inc. v. Chosun International, Inc.*, 234 F. Supp. 2d 905 (S.D. Ind. 2002) and *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980). In *Celebration,* the court considered whether the head to a tiger costume was a conceptually separable artistic element eligible for copyright. In *Kieselstein-Cord* the court found two belt buckles to be copyrightable, despite the fact that they were useful articles. The court noted that they could be worn as jewelry. Your contention is that the pepper mill design is no less creative than a tiger's head or the belt buckle design in *Kieselstein-Cord* and, as such, there was an insufficient rationale for the office to deny conceptual separability. Letter from Johnson of 3/7/03, at 3.

You asserted that the other prong in the analysis of useful articles is whether the alleged useful article is equally useful if the design is removed. You argued that if the pepper mill design

were removed from the faucet base, the faucet base would still serve its functional purpose. You attached some exhibits of other faucet bases to show that the same function could be performed without the pepper mill design. *Id.* at 6. Finally, you cited two other registrations of faucets, one portraying an elephant, and one portraying a tiger and a frog, and you argued they differed only in that your client's work depicted a pepper mill.

After reviewing your first request for reconsideration, Examining Division Attorney Advisor Virginia Giroux responded in a letter dated June 20, 2003. She upheld the refusal to register either faucet design because she found each to be a useful article or part of a useful article that did not contain any separable authorship that was copyrightable. Ms. Giroux stated that there was no dispute that the works were useful articles. She contended that your argument was that the works contained non-functional design elements based on the designer's aesthetic judgment rather than utilitarian concerns, and that this aspect of the works, rather than their function, should be considered when determining copyrightability. This consideration, she argued, would not take the works out of the useful article category because such articles need only have "an intrinsic function" under the definition of useful article in section 101 of the copyright law. Letter from Giroux to Johnson of 6/20/03, at 2. In classifying the works at issue here as useful articles, Ms. Giroux explained that copyright protection could be extended if and to the extent that a design incorporates pictorial, graphic, or sculptural features that can be identified separately from and are capable of existing independently of the utilitarian aspects of the article without destroying its basic shape. *Id.* at 1.

Ms. Giroux clarified that in examining a work within the useful article category, the Copyright Office must first determine whether the work has any pictorial, graphic, or sculptural authorship that is either physically or conceptually separable from the utilitarian aspects of the article. *Id.* at 1-2. She noted that the Office is guided by statutory law, case law and practices in interpreting that standard. She also noted that in making this determination examiners do not make aesthetic judgments nor are they influenced by the attractiveness of a design, its visual effect or appearance, its uniqueness, its symbolism, the amount of time and effort it took to create, or its commercial success in the marketplace. *Id.* at 1.

She stated that the Copyright Office's test for conceptual separability is enunciated in *Compendium of Copyright Office Practices*, *Compendium II*, 505.03 (1984), which generally follows the separability principle set forth in *Esquire v. Ringer*, 591 F.2d 796 (D.C. Cir. 1978). *Compendium II* provides that conceptual separability occurs when the pictorial, graphic, or sculptural features, while physically inseparable by ordinary means from the utilitarian item, are nevertheless clearly recognizable as a pictorial, graphic, or sculptural work which can be visualized on paper, for example, or as a free-standing sculpture, as another example, independent of the shape of the article, without destroying the basic shape of the article. Examples include the carving on the back of a chair, or pictorial matter engraved on a glass vase. Letter from Giroux of 6/20/03, at 2.

Ms. Giroux stated that conceptual separability could not be met by analogizing the general shape of a useful article to modern sculpture, or by arguing that certain features are non-functional, or could have been designed differently. *Id.* at 2. She further contended that *Esquire* upheld the Copyright Office's position of not registering useful articles on the basis of the overall shape or configuration of a utilitarian article, no matter how aesthetically pleasing that shape might be. Similarly, she cited *Norris Industries, Inc. v. International Tel. & Tel. Corp.*, 696 F.2d 918 (11th Cir. 1983), *cert. denied*, 464 U.S. 818 (1983), which held that a wire-spoked wheel cover was not copyrightable because it did not contain any sculptural design that could be identified apart from the wheel cover, a useful article.

She determined that the faucet base and control valve base were useful articles in which the design elements could not be perceived as physically or conceptually separable from the works themselves without destroying their basic shape. Letter from Giroux of 6/20/03, at 3. Since the pepper mill design was part of the overall shape, it was neither physically nor conceptually separable from their utilitarian function.

C. Second Request for Reconsideration

On October 17, 2003 you filed a second request for reconsideration of the denial of registration of the faucet base and control valve. In your letter for reconsideration, you argue that the pepper mill design of the control valve and faucet base are sufficiently distinct from the form dictated by necessity so as to constitute a stand-alone sculptural work of art. Letter from Johnson to Board of Appeals of 10/17/03, at 1-2. Again you use a two prong argument. You assert that the faucet base and control valve are conceptually separable because these works "would be equally useful if their outer-surface (consisting of the pepper mill design) was conceptually 'peeled off' leaving the pepper mill design as a stand-alone sculptural work of art and the inner workings of the Faucet Base and Control Value intact." *Id.* at 2. Alternatively, you argue, "if it is believed that the outer-surface of the Control Valve and Faucet Base do not resemble a pepper mill, they are sculptural works that merely contain functional parts which do not dictate the shape or form of the outer-surface." *Id.*

You cite the cases of *Esquire v. Ringer*, 591 F.2d 796 (D.C. Cir. 1978), *cert. denied,* 440 U.S. 908 (1979) and *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980) for the legal tests that distinguish between what is conceptually separable and what is not. *Id.* at 2-3. You note that in *Esquire*, the applicant was seeking registration for the entire light fixture, not some lesser, distinguishable and removable feature and, therefore, the work was not separable and could not be registered. You then cite the court's decision in *Kieselstein*, where the court focused on the artistic design elements and found that the artistic designs were copyrightable because the designs could be conceptually "cut away" from the buckle without hampering the functionality of the buckle. You then argue that the pepper mill design, like the designs on the belt buckles, can be peeled away, leaving a plain rounded faucet base and control valve intact, and state that protection is being sought only for "the artistic design on the outer shell as applied to the utilitarian base." Letter from Johnson of 10/17/03, at 4-5.

As support for your argument, you include an exhibit of a conventional faucet and control valve, and argue that the pepper mill design has been applied to the outer housing of the faucet and not functionally integrated into the useful object. *Id.* at 6. You also argue that the pepper mill design is as artistic as the frog, tiger, and elephant faucets which the Office registered previously, and thus should be afforded a registration. To do otherwise you contend seems inconsistent and biased against certain types of representational art. *Id* at 7. You then argue in the alternative, that if the pepper mill design is not representational art, it is a clearly recognizable work of modern sculptural art, and that it meets the very low standard of creativity and originality required by the court in *Feist Publications v. Rural Tele. Serv. Co.*, 499 U.S. 340 (1991). Letter from Johnson to the Board of Appeals of 10/17/03, at 8.

III. DECISION

A. Copyrightability of Useful Articles

You acknowledge in your requests for reconsideration that the faucet base and control valve base are useful articles. The Board's discussion will begin with a summary of the extent to which copyright protection is provided by law to useful articles.

1. The statute

The copyright law sets forth the guiding principle regarding the extent of copyright protection for a useful article. It defines this protection with respect to a pictorial, graphic or sculptural work in the following terms: "the design of a useful article . . . shall be considered a pictorial, graphic or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." 17. U.S.C. 101. The legislative history accompanying the 1976 Copyright Act clarified Congress's intent with respect to copyright protection for useful articles: ". . . to draw as clear a line as possible between copyrightable works of applied art and uncopyrighted works of industrial design." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 55 (1976). The House Report further explains Congress's intention that "although the shape of an industrial product may be aesthetically satisfying and valuable, [Congress's] intention is not to offer it copyright protection. . ." *Id.* Specifically addressing the issue of the "shape" of an industrial product, the House Report goes on to state that:

> 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.

Id.

2. Conceptual separability

You have urged that the pepper mill design can be removed or conceptually "peeled away" from the faucet base and control valve [Letter from Johnson to Board of Appeals of 10/17/03, at 2, 4], thus making the design of the pepper mill shape conceptually separable from its useful function. We point to the Copyright Office's manual of practices, including those with respect to examination of claims to copyright registration, which addresses registration of the works of the visual arts. *Compendium of Copyright Practices, Compendium II,* (1984), section 505. *Compendium II,* chapter 500, treats separability and provides guidelines which explain how the Copyright Office approaches the examination of useful articles in order to determine whether such articles incorporate the statutorily-required "pictorial, graphic or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the articles." In the case of conceptual separability, *Compendium II,* 505.03 states:

> Conceptual separability means that the pictorial, graphic or sculptural features, while physically inseparable by ordinary means from the utilitarian item, are nevertheless clearly recognizable as pictorial, graphic or sculptural works which can be visualized on paper, for example, or as free-standing sculpture, 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.

In the case of physical separability:

> 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.
>
> *Compendium II*, section 505.04.

The Office's position and its *Compendium* articulation are consistent with the statutory grounds for protectibility of pictorial, graphic and sculptural works which are incorporated within useful articles. The statute's definitional guideline for determining whether protectible features exist apart from the utilitarian aspects of a useful article does not explicitly delineate the meaning, i.e., the scope and range, of utilitarian aspects which must be taken into account in performing such separability judgment. Courts, under both the 1909 and the 1976 Acts, have considered the appropriate extent of protection for works of art incorporated into useful articles and have consistently recognized the expertise of the Copyright Office in its administration of the registration activity, including confirming Office registration decisions concerning works of art incorporated into useful articles. *See, e.g., Norris Industries, Inc. v. International Tele. and Telegraph Corp.*, 696 F.2d 918 (11th Cir. 1983), *cert. denied*, 464 U.S. 818 (1983); *Esquire, Inc. v. Ringer*, 591 F.2d 796 (D.C. Cir. 1978), *cert. denied*, 340 U.S. 908 (1979); *Vacheron and Constantin - Le Coultre Watches, Inc. v. Benrus Watch Company, Inc.* 260 F.2d 637 (2d Cir. 1958); *SCOA Industries, Inc. v. Famolare, Inc.*, 192 U.S.P.Q. 216 (S.D.N.Y. 1976).

Concerning the Office's *Compendium* tests for separability, the relevant *Compendium* sections essentially confirm the case law which supports the long history of the Office's interpretation. In *Esquire v. Ringer*, referring to the useful article passage from the 1976 House Report, *supra,* the United States Court of Appeals for the District of Columbia Circuit stated that the passage "indicate[s] unequivocally that the overall design or configuration of a utilitarian object, even if it is determined by aesthetic as well as functional considerations, is not eligible for copyright." *Esquire, Inc. v. Ringer*, 591 F.2d 796, 804 (D.C. Cir. 1978). Although *Esquire* was decided under the 1909 Act, the Court made clear that its references to the provisions of the 1976 Act were appropriate because "the new Act was designed in part to codify and clarify many of the [Copyright Office] regulations promulgated under the 1909 Act, including those governing 'works of art.'" *Id.* at 803. The Office's position with respect to the interpretation of the separability issue was also confirmed by the Eleventh Circuit in *Norris Industries* in which the Court noted Congress's intention concerning the statutory language on separability and additionally noted that other federal circuit courts have relied upon the Office for "expertise in the interpretation of the law and its application to the facts presented by the copyright application," based upon the Office's having "been concerned with the distinction between copyrightable and noncopyrightable works of art since the Copyright Act of 1870. . ." *Norris*, 696 F.2d at 922. And, although it was a case brought under the Administrative Procedure Act [5 U.S.C. 701 - 706], *Custom Chrome, Inc. v. Ringer,* 35 U.S.P.Q.2d 1714 (D.D.C. 1995), nevertheless confirmed that the Office's refusal – premised on *Compendium II* tests – to register motorcycle parts was not arbitrary, capricious, an abuse of discretion nor otherwise not in accordance with law.

B. Application of the separability test

You contend that the works in question, MARIELLE FAUCET BASE and MARIELLE FAUCET CONTROL VALVE BASE, possess sculptural authorship which is conceptually separable from the utilitarian function of these works. Letter from Johnson of 10/17/03, at 2, 4.

You have stated that what you view as a conceptually separable design in these works – described as the design of a pepper mill – can be said to be separable from the utility of the works. Distinguishing the work at issue in *Esquire* from the works at issue in this appeal, you explain that:

> [I]t requires one to imagine whether he or she can somehow peel off or otherwise remove the outer layer of the utilitarian objects, leaving the inner, functional aspects intact while lifting the artistic design to exist as a stand-alone work of art, all-the-while being carefulthat peeling away the outer layer does not destroy the utility of the object. Letter from Johnson of 10/17/03, at 3.

You have also pointed out to the Board the existence of two other faucets which were registered and which incorporated sculptural images of tigers and frogs. *Id.*, at 5, 6. You contend that the pepper-mill design of the works at issue here should be regarded as supporting registration to the same degree as the more representational designs of the tigers and frogs and that the "style of the art" which may be incorporated into a useful article "cannot stand to bar a work from copyright protection." *Id.*, at 7. The Copyright Office Review Board believes that your arguments obscure the basic principles that any separable features embodied in a useful article must: [1] be considered separable under the Office's long-standing test for conceptual separability, and [2] be consistent with the basic philosophy set forth in the legislative history concerning Congress's intent to deny copyright protection to industrial designs.

1. Case law

As we have explained above, any separable authorship said to exist within a useful article must meet the *Compendium II* tests put forward by the Office. You posit the conceptual possibility of "peeling away" the pepper-mill design in these works in order to render that design separable. You cite *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980) and compare the belt buckles at issue there, found by the court to exhibit separable authorship, with the two works at issue here. You state that the "pepper mill design at issue, like the *Kieselstein* belt buckle, can be peeled away, leaving a plain rounded faucet base and control valve intact." Letter from Johnson of 10/17/03, at 4. We disagree with your comparison with *Kieselstein* and with your conclusion concerning the supposedly separable outer covering of the faucet base and the control valve base. *Kieselstein* involved two belt buckles, registered by the Copyright Office, and which incorporated ornamental features consisting of geometric shapes with "several surface levels"and wavy lines. 632 F.2d at 990. These identifiable ornamental features were found to be conceptually separable from the utilitarian function of the belt buckles. We further note that the Winchester and Vaquero belt buckles reflected sculpted, contoured lines which could not fairly be said to be co-extensive with the entire shape of the buckles; and, the court could visualize the sculpted lines as separate from the usefulness of the belt buckle, without violating congressional intent that useful articles remain without copyright protection. We do not see a parallel to the *Kieselstein* works in the works at issue here.

You also cite as support for registration of the two faucet works *Celebration International, Inc. v. Chosun International, Inc.*, 234 F. Supp. 2d 905 (S.D. Ind. 2002). *Celebration* involved a sculpted mask head of a tiger connected to a fanciful tiger body costume. The court held the tiger head portion of the costume to be both physically and conceptually separable from the utilitarian function of the costume and, then, to be limitedly protectible as a "modest" level of creative artwork. 234 F. Supp. 2d at 915, 917. We point out that a registration had been made for the work in *Celebration.* Further, the portion of the costume found separable, the head of the tiger, falls within a category of works which the Office has formally stated are not useful articles: "since masks generally portray their own appearance, this subject matter appears to fall outside of the definition of 'useful article' in section 101 of title 17." United States Copyright Office, Policy Decision, 56 Federal Register 56530 (November 5, 1991). The Board thus does not consider the tiger mask head in *Celebration* to be analogous to the clearly useful faucets at issue here; the mask head and the faucets require different analysis in order to determine, first, the possibility of copyright protection with respect to separability – none needed for the tiger mask head–, and, second, if separability is found, the degree of that protection. Like *Kieselstein*, *Celebration* does not provide the groundwork for establishing the separable nature of the pepper mill designs of the faucets.

2. The Office's test

The "pepper mill" design which you urge the Board to accept as a separable design element is essentially the overall shape or configuration of the useful articles here. Congress explicitly refused copyright protection to the shape of useful articles, *above at 5*. The works here, MARIELLE FAUCET BASE and MARIELLE FAUCET CONTROL VALVE BASE, may possess overall shapes that you choose to describe as pepper-mill like; that does not, however, change the fact that they are useful articles which are designed with a specific shape and that the shape – the pepper mill – *is* the configuration of the articles themselves and, without further features that may be seen as separate and apart from the overall configuration, the required separability is not present. We again cite *Compendium II* and its test for conceptual separability: the artistic features must be amenable to being "imagined separately and independently from the useful article without destroying the basic shape of the useful article." *Compendium II*, section 505.03. You argue that the pepper mill shape can be conceptually "peeled away" from these useful articles and that the "interior component parts continue to perform, unaffected by removing the outer, non-functional, artistic shell." Letter from Johnson of 10/17/03, at 6. We disagree that such conceptual "peeling away" meets the test of conceptual separability. *Compendium II's* standard, cited above, is not met here: such peeling away conceptually removes the outer covering and, thus, the basic shape of the useful articles is, in the further words of *Compendium II*, "destroyed." "The artistic features and the useful article cannot "both exist side by side and be perceived as fully realized, separate works – one an artistic work and the other a useful article." Section 505.03. The conceptual removal of the outer, pepper mill "artistic shell" [Letter from Johnson of 10/17/03, at 6] results in the bare, interior components or working parts – questionably usable in that state by consumers. The interior working parts of the faucets are not identical to the intact useful articles that have been submitted for registration.

We again point out that the pepper mill design constitutes the entire shape of the faucet designs. We add that this includes at least one of its utilitarian features. In the control valve, the handle serves to turn water on and off. We assume that if the pepper mill design were conceptually "peeled away," the control valve would lose the working handle and would no longer be able to perform the useful function for which it was created. As we have explained above, registration of the outer, pepper mill design for these two useful objects would necessarily extend protection to the overall shape and configuration of an industrial design. Extending such protection by way of registration would contravene the intention of Congress that "although the shape of an industrial product may be aesthetically satisfying and valuable, [Congress's] intention is not to offer it copyright protection. . ." H.R. Rep. No. 1476, at 55 (1976).[1]

C. Aesthetic Considerations

Because we see no conceptually separable authorship in these two works, we will comment very briefly on your arguments that the Copyright Office applied too rigid a concept of art to the examination of these faucet designs by limiting the separability test to "representation art", and that the control valve and faucet base are sculptural works of modern art. Letter from Johnson of 10/17/03, at 7.

The "registrability of a work . . . is not affected by the style of the work or the form utilized by the artist." *Compendium II*, section 503.01. The question before the Board is not the artistic style adopted by your client in designing the faucet base and control valve at issue here, but whether the works contain separately identifiable artistic expression. In *Mazer v. Stein*, 347 U.S. 201 (1954), the Supreme Court held that the "use in industry of an article eligible for copyright" does not prevent the copyright registration of that article. *Id.* at 218. The *Mazer* principle does not, however, negate the need under Title 17 to identify separable artistic elements within the design of useful articles in order to consider such artistic elements for registration.

As we have explained, *above at 5 - 6*, when a work of utility exhibits separable elements, those elements may be copyrightable if they have a sufficient level of creativity. Again,

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[1] We note that the extent to which your client's designs resemble a pepper mill may be a matter of personal interpretation. However, even assuming that both designs closely resemble a pepper mill, a pepper mill is a useful article, itself governed by the copyright law's necessity for the presence of separable features in order to enjoy any copyright protection. The registered faucet designs incorporating representational figures such as tigers and frogs, although they may be seen as kitschy [Letter from Johnson of 10/17/03, at 7] by some, also contain clearly recognizable works of sculpture which cannot fairly be characterized as constituting the overall shape of the article. As we have discussed, *above at 8*, even *Kieselstein-Cord,* which may represent some point on the outer reaches of the copyright law regarding useful articles, found copyrightable belt buckles which incorporated fanciful shapes separably identifiable from the overall design or configuration of the belt buckles. As we have previously stated regarding the legislative history to the 1976 Copyright Act, Congress intended the separability concept to establish the boundaries of copyright protection for useful articles. If the separability test could be met merely by analogizing the design of one useful article to the designs of other useful articles, the boundary created by the separability test would become blurred, perhaps to the point of disappearing.

conceptual separability alone is not sufficient for elements of a useful article to be copyrightable. After finding that an element of a useful article is separable, the Board then evaluates whether that element exhibits sufficient originality in its composition to be copyrightable: copyright protection is only available for "original works of authorship." 17 U.S.C. 102(a).

The Supreme Court has defined original in terms of two elements, "independent creation plus a modicum of creativity." *Feist Publications, Inc. v. Rural Tele. Serv. Co., Inc.*, 499 U.S. 340, 346. *See also Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 102 (2d Cir. 1951) ("'Original' in reference to a copyrighted work means that the particular work 'owes its origin' to the 'author.' No large measure of novelty is necessary."); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (The court defined "author" to mean the originator or original maker and described copyright as being limited to the creative or "intellectual conceptions of the author.")

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

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

The policy reflected in these provisions represents a fundamental principle of copyright law: common ordinary shapes and designs, and minor variations of those, may not be copyrighted because that could limit their availability to the general populace. Basic, common and ordinary shapes, designs and symbols are in the public domain for use by all since they form the building blocks for creative works.

The Office applies the same quantum standard of authorship to all types of works without judging the aesthetic merit of the works. Although you contend that the faucet base and control valve are works of modern sculpture, the Office's analysis of any work is premised upon statutory and regulatory requirements and not on a subjective interpretation of the artistic value of the work. *See, e.g., Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903) (courts should not undertake to judge the artistic worth of a work of authorship.) *Accord*, H.R. Rep. No. 1476, at 51 (1976) (the standard for copyright protection "does not include requirements of novelty, ingenuity, or esthetic merit.") The Copyright Office does not look for, nor does it reject, any particular "style" of art in its examination; rather, it looks for the presence of separable, copyrightable authorship in useful articles which have been submitted for registration. As we have explained in this letter, MARIELLE FAUCET BASE and MARIELLE FAUCET CONTROL VALVE do not exhibit separable authorship and, thus, we do not get to the subsequent examining step of analysis of the necessary quantum of original authorship. We point out, however, that had the Board found separability and gotten to that step of analyzing the authorship in the overall pepper mill shapes, it would have found insufficient copyrightable authorship in the common, rectangular upright forms, or minor, tapered variations of such shapes, with their accompanying S-curved or simple two-part handles.

IV. CONCLUSION

The Review Board has applied statutory guidelines, relevant case law, and Copyright Office registration practices in an analysis of the authorship in the faucet base and control valve base, and has determined that registration for these two useful articles is not warranted because each lacks separately identifiable authorship. This decision constitutes final agency action.

Sincerely,

/s/

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