United States Copyright Office
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February 7, 2006

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Re: ORTHO SEASON LONG
Copyright Office Control No. 61-309-4576(V)
Your Reference No. 026547-000002

Dear Mr. Wilson:

I write on behalf of the Copyright Office Review Board ("Board") in response to your letter dated December 14, 2004, in which you requested the U.S. Copyright Office ("Office") to reconsider for a second time its refusal to register the purported design elements embodied in a container which has been described as the sculptural work ORTHO SEASON LONG. The Board has carefully examined the application, the deposit and all correspondence concerning this application, and must affirm denial of registration because of lack of sufficient separable and copyrightable authorship.

I. DESCRIPTION OF WORK

The container at issue here which embodies the purported sculptural design is a commonplace handheld rectangular container with a safety screw cap typically used for pesticides or other hazardous materials. A slightly diagonal, linear indentation runs along the bottom of the container. A cylindrical open "holster" for the spray nozzle appears on the side of the container and seems to be attached to the back of the rectangular container. The holster features the same indentation running along its bottom edge as well as four other parallel, slightly diagonal, linear indentations that follow the contour of the diagonal opening of the cylindrical holster. The container is formed of metallic gray plastic. The labels featured on the container are not part of this work for the purpose of this application.





II. ADMINISTRATIVE RECORD

A. Initial application and Office's refusal to register

On December 30, 2003, the Copyright Office received a Form VA application signed by you for Cory M. Amron, Esq. of your firm on behalf of your client OMS Investments, Inc., to register three-dimensional sculptural design elements on a container. In a letter dated February 20, 2004, Visual Arts Section Examiner Joanna Corwin refused registration of this work because she determined that it is a useful article that does not contain any separable authorship needed to sustain a claim to copyright. Letter from Corwin to Amron of 02/20/04, at 1-2.

Ms. Corwin explained that while copyright protects works of artistic craftsmanship with respect to their form, it does not protect their mechanical or utilitarian aspects. The design of a useful article will be subject to protection only if it can be identified separately from, and is capable of existing independently of, the utilitarian aspects of the article. She explained that such separability can be physical or conceptual. *Id.* at 1 (citing 17 U.S.C. 101 (2004) and H.R. Rep. No. 94-1476 (1976)). Physical separability exists where design features can be physically separated from the utilitarian item by ordinary means. Conceptual separability exists where the design feature is 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. Letter from Corwin of 2/20/04, at 1 (citing Compendium of Copyright Office Practices *II,* Ch. *5 (1984)*). Ms. Corwin provided examples of each type of separability. She cautioned, though, that the test of conceptual separability is not met by merely analogizing the general shape of a useful article to a work of modern sculpture, since, in such a case, the alleged "artistic features" and the useful article cannot be perceived as having separate, independent existence. She also noted that regardless if certain design features are non-functional or could have been designed differently, no registration is possible if such features are an integral part of the overall shape or contour of the useful article. *Id.* at 2.

Ms. Corwin concluded that "all of the sculptural elements of the work you deposited are either related to the utilitarian aspects or function, or are subsumed within the overall shape, contour, or configuration of the article, that there is no physically or conceptually 'separable' authorship as such" and that the Office could not register this claim. *Id.*

On April 21, 2004, Mr. Richard Donald, who stated to the Office that he represented OMS Investments, Inc. contacted Ms. Corwin by phone to discuss the rejection of this application. As part of that conversation, Mr. Donald inquired about the label appearing on the container, and Ms. Corwin confirmed that the label was registered separately.

B. First request for reconsideration

In a letter dated June 17, 2004, you requested reconsideration of the Office's refusal to register this work, arguing that it is "an original work of authorship that is conceptually separable from, and exists independently of, the three-dimensional article in which the work is embodied." Letter from Wilson to Chief, Receiving and Processing Division, of 06/17/04 at 1. You described the work as including "i) parallel indentations running diagonally across the holster, ii) an angled indentation along the bottom of the container that becomes wider as it runs across the front of the container and continues around the bottom of the holster, iii) a ridge that runs diagonally across the top of the container, and iv) metallic-gray coloring." *Id.*

After reciting the basic tenets of the copyrightability of design elements embodied in useful articles and Examiner Corwin's initial findings, you argued "that the artistic features listed above – the parallel and angled indentations, diagonal ridges, and metallic gray coloring – are readily visualized independent of the shape of the container itself and without destroying the basic shape of the container. The original work or authorship embodied in Applicant's work is easily imagined on other containers of various shape and sizes while still separately identified apart from the utilitarian aspects of the container." *Id.* at 2.

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 June 17, 2004, Attorney Advisor Virginia Giroux of the Examining Division reexamined the application and determined that the container is a useful article which does not contain any authorship that is both separable and copyrightable. Letter from Giroux to Wilson of 08/16/04, at 1.

Ms. Giroux explained in her August 16, 2004, letter that because the container is a useful article, which by definition has an intrinsic utilitarian function that is not merely to portray the appearance of the article and can include an article that is a part of a useful article, the design is copyrightable:

> only if and 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 destroying its basic shape.

Id., (citing 17 U.S.C. 101). She noted that this separability could exist either physically or conceptually. Ms. Giroux explained that the Office follows the conceptual separability test set forth in *Esquire v. Ringer*, 591 F.2d 796 (D.C. Cir. 1978) and *Compendium II*, § 505.03. Conceptual separability occurs when the pictorial, graphic or sculptural features of the work can,

for example, be visualized on paper or as a free-standing sculpture, independent of the shape of the utilitarian article, without destroying the basic shape of the article. Examples include a carving on the back of a chair or pictorial matter engraved on a glass vase. Letter from Giroux to Wilson of 08/16/04, at 2.

She explained, however, that 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, Ms. Giroux noted that no copyright registration is possible where such features are an integral part of the overall shape or contour of the useful article. *Id.* She then recounted the holding in *Esquire* wherein the court upheld the Office's refusal to register the shape of a utilitarian outdoor lighting fixture, even though the shape of the lamp might be said to be aesthetically pleasing. In further support of the limits imposed on the copyrightability of useful articles, Ms. Giroux also cited *Norris Industries, Inc. v. International Telephone & Telegraph Corp.*, 696 F.2d 918 (11th Cir. 1983), *cert. denied*, 464 U.S.818 (1983) (holding a wire-spoke wheel cover was not copyrightable because it did not contain any separable sculptural design). She also quoted the House Report regarding the copyrightability of elements in an industrial design or product. Letter from Giroux of 8/16/04, at 3-4, (citing H.R. Rep. 94-1476 at 55). Ms. Giroux cautioned that the test for conceptual separability cannot be met merely by analogizing the general shape of a useful article to a work of modern sculpture, since the artistic or decorative features would not be perceived as having a separate existence. Letter from Giroux of 8/16/04, at 2.

Ms. Giroux also referenced several factors that do not bear upon the Office's determination of copyrightability, including the material of which a work is made and the coloring. *Id.* at 1. She also noted that examiners do not evaluate a work's aesthetics, attractiveness, uniqueness, distinctiveness, visual effect, commercial success in the marketplace, the fact that a design could have been designed differently, nor the time and effort expended to create the work in examining the work for copyrightability. *Id.* at 1, 3, (citing *Compendium II*, § 505.05). Evaluating the work at issue, Ms. Giroux stated that the container is a useful article that does not contain any design elements, apart from the coloring, that could be physically or conceptually separated from the container without destroying its basic shape. Specifically, she found that "the parallel and angled indentations as well as the diagonal ridging all [are] part of the overall shape, contour, and configuration of the useful article itself, not conceptually or physically separable from [the container's] utilitarian function without destroying its basic shape, and as such, not copyrightable." *Id.* at 2. She stated that even if some portion of these designs were conceptually separable, such elements consisted of common and familiar geometric shapes or designs, or minor variations thereof, in the public domain, which are consequently not sufficiently creative, in and of themselves or in combination, to sustain a copyright registration under the relatively low standard of creativity required in *Feist Publications. v. Rural Telphone Service Co., Inc.* 499 U.S. 340 (1991). Letter from Giroux of 8/16/04, at 3, (citing 37 C.F.R. § 202.1 (2004) and *Compendium II*, §§ 503.02(a) and (b)).

Ms. Giroux concluded that "[b]ecause all of the elements or features of this work are either related to the utilitarian aspects or function of the work or, if separable, do not contain any authorship that is copyrightable, or are subsumed within the overall shape, contour, or configuration of the work, there is no physically or conceptually separable authorship that is copyrightable." Letter from Giroux of 8/16/04, at 4. Therefore, Ms. Giroux again refused copyright registration for this work.

C. Second request for reconsideration

In a letter dated December 14, 2004, you request the Office to reconsider for a second time its refusal to register the copyright claim in the purported design elements on the sculptural container ORTHO SEASON LONG. Letter from Wilson to Board of Appeals of 12/14/04, at 1. You recount the procedural background, the prior findings made by the Copyright Office and the legal principles relevant to the copyrightability of elements incorporated into a useful article as well as the test for conceptual separability. *Id.* at 1-3. In your current description of the work at issue, you separately identify, as two design elements, portions of the indentation running along the bottom of the container and add to your description, as an additional design element, the "oversized handle that juts out from the container." *Id.* at 2. You argue that the "combination and arrangement of the design features as embodied in this work contain a sufficient amount of original authorship to support a copyright registration." *Id.* at 3. You cite *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2nd Cir. 1980) for the proposition that conceptual separability exists where design elements reflect the designer's artistic judgement exercised independently of functional influences. Letter from Wilson to Board of Appeals of 12/14/04, at 3-4.

You also cite two cases involving mannequins, one where the court deemed the "hungry look" facial expression of a mannequin to be separable from its functional aspects and one where the court held that the features of a mannequin's torso were not separable. *Id.* at 4 (citing *Pivot Point Int'l, Inc. v. Charlene Prods.*, 372 F.3d 913 (7th Cir. 2004), and *Carol Barnhart, Inc. v. Economy Cover Corp.*, 773 F.2d 411 (2nd Cir. 1985); also citing *Animal Fair, Inc. v. AMFESCO Indus.*, 620 F. Supp. 175 (D. Minn. 1985), *aff'd* 794 F.2d 678 (8th Cir. 1986)). Finally, you question the Copyright Office's determination that the design elements of the container are variations of common and familiar geometric shapes or designs in the public domain because the Office has not produced evidence that they are "common and familiar." *Id.* at 4. You argue that even if these elements are common and familiar, they can still be subject to copyright protection by virtue of an original arrangement. *Id.*

III. DECISION

A. Useful articles and separability

1. The legal framework

As a general proposition, copyright protection 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.* at 101. The design of a 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 . . . [an] 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, detached, or removed from the useful article by ordinary means. The test of physical separability is not met, however, by the mere fact that the housing of a useful article is detachable from the working parts of the article. *Compendium II*, § 505.04.

Conceptual separability means that the subject features are "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 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." *Compendium II*, § 505.03. For example, while a carving on the back of a chair cannot readily be physically separated from the chair, it can easily be conceptually separated 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 because such features are an integral part of the overall shape, contour, or configuration of the useful article, the features would not qualify as conceptually separable. As explained in *Esquire* [*see above* at 3-4], 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 had 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 has repeatedly rejected proposed legislation that would make copyright protection available for consumer or industrial products." *Id.*[1] Similarly in *Norris Industries*, [*see above* at 4], 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 lugnuts, brakes, wheels and axels from damage and corrosion, and it did not contain any sculptural design features that could be identified apart from the wheel cover itself.

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[1] Although *Esquire* was decided under the 1909 version of the Copyright Act, its reasoning is still applicable to cases arising under the 1976 Act. "[T]he 1976 Act and its legislative history can be taken as an expression of congressional understanding of the scope of protection for utilitarian articles under the old regulations." 591 F.2d at 803. Since pre-1976 case law, in part, formed the basis for the 1976 Act, the reasoning of earlier cases concerning useful articles remains relevant to cases arising under the later Act.

2. The container ORTHO SEASON LONG is a useful article

The Board agrees with Examiner Corwin's and Attorney-Advisor Giroux's determinations that the container on which the purported design elements appear qualifies as a useful article. Its intrinsic purpose is to provide a safe means by which to contain, transport and apply a potentially hazardous liquid, in this case grass and weed killer. An industrial product qualifies as a "useful article" as long as it has "an intrinsic utilitarian function." Appropriately, in neither of your requests for consideration do you contest the characterization of the container as a useful article. In fact, the application described the subject work as "design elements *on* container," rather than the container itself, and you concede that the applicant "is not seeking registration for the overall shape or configuration of a utilitarian article." Letter from Wilson of 12/14/04, at 3.

3. The container has no separable elements, except surface coloration

As you correctly note, separable elements embodied within a useful article may warrant copyright protection in and of themselves, provided that they meet certain criteria– in essence, independent existence, physical or conceptual, separate and apart from the useful article, without destroying the overall basic shape of that article. However, the Board finds that in this circumstance, the work at issue contains no separable subject matter apart from the surface coloring.

Physical separability is a moot point because the container has no design elements that could be separated by ordinary means. You argue instead that the five purported design elements– parallel, diagonal indentations on the holster, one or more angled indentations along the bottom of the container, a ridge across the top of the container, the handle of the container and the metallic-gray coloring– are conceptually separable since they can be "visualized separate and apart from the shape of the container." Letter from Wilson of 12/14/04, at 2, 3. Except for the coloring, the Board disagrees and finds none of the features conceptually separable.

With respect to the indentations, these are part of the general contours and configuration of the container and, thus, are not conceptually separable. The Board is also unable to identify a particular ridge that you claim runs across the top of the container, and assumes that you are referring to the point at which the container angles inward so that the width at the top of the container is narrower than at its bottom. This angle is part of the general contour of the container, and is also arguably functional in and of itself as it may be necessary to accommodate the positioning of the handle and safety screw cap. Even if it is not, the narrowing is part of the container's angles and cannot exist independent from a container to be angled; any separation of angles from the container would destroy the container's basic shape as it would no longer permit the container's side to come together to meet at the handle. The Board finds, therefore, that the angled ridge is not conceptually separable because it cannot exist independent of the

container, it is part of the container's general contours, and its absence would destroy the container's basic shape.

In your second request for reconsideration, you also argue that the rectangular handle itself is a design element conceptually separable from the container. Letter from Wilson of 12/14/04, at 2. However, this particular handle is an integral part of the container, molded from the continuous piece of plastic comprising the container. Even if the handle were made of a product other than the plastic comprising the rest of the container, it is functional in that it permits a person to hold and carry the container, in addition to the fact that it appears to be hollow thereby functioning to contain a portion of the liquid. The handle is, therefore, a structural component of the container, unable to be conceptually separated without destroying the basic shape of the container.

Your analogy to the ornamented belt buckles in *Kieselstein-Cord v. Accessories by Pearl, Inc.* does not aid your argument. Letter from Wilson of 12/14/04, at 3. In finding the ornamentation on the belt buckles to be separable from the functional aspects of the buckles, the *Kieselstein* court specifically noted that although a belt buckle is traditionally a useful article used to hold trousers at the wearer's waist, the particular buckles could be considered jewelry and worn at other parts of the body as well: wearers saw what the court saw–conceptually separable sculptural elements. 632 F.2d at 993. With respect to the container at issue here, however, its only use is a functional one, whether or not it is alleged to perform that function with more of an aesthetic flair due to the design elements for which you have applied for copyright protection. The *Kieselstein* buckles' curves, on "several surface levels," 632 F. 2d at 990, formed a sculptural configuration which existed apart from their utility and from their overall buckle shape; the ORTHO SEASON LONG container does not exhibit any comparable and distinguishable sculptural configurations as did the belt buckles in *Kieselstein*.

You also cite two contrasting cases involving the copyrightability of design features in mannequins. Letter from Wilson of 12/14/04, at 4. In *Pivot Point*, 372 F.3d 913, 931-932, the Seventh Circuit, relying on the separability test adopted in *Brandir International, Inc. v. Cascade Pacific Lumber Co.*, 834 F.2d 1142 (2d Cir. 1987), found that the particular facial expression of the mannequin's face at issue there was separable from the mannequin's functional aspect of displaying wigs and applying make-up. The test which the Seventh Circuit utilized was Professor Denicola's test which states that, where design elements can be identified as reflecting the designer's artistic judgment exercised independently of functional influences, conceptual separability may exist. Denicola, *67 Minn. L. Rev. 707 (1983)*. In favorably comparing the work at issue here with the human face mannequin in *Pivot Point*, you have taken the position that the "original work of authorship embodied in the ORTHO SEASON LONG work is easily imagined on other containers of various shapes and sizes while still separately identified apart from the utilitarian aspects of the container." Letter from Wilson of 12/14/04, at 4. *Pivot Point* employs a separability test which takes into account design influences and purposes; the Office does not

use such a test. An alternative separability test which essentially relies on the exercise of subjective judgment and the need for fact-finding concerning the creative process underlying a work would likely cause problems in administering consistent examining practices, premised as such a test may be, at least partly, on subjective perception, i.e., when, how, and to what degree do the aesthetic-artistic and the functional considerations underlying the design of a useful article merge. Because such an alternative test might result in registration of works in conflict with the expressed congressional intent to deny copyright protection to the design of useful articles which happen to be aesthetically pleasing, the Copyright Office has not accepted as a registration practice any particular alternative separability test. The conceptual separability test of *Compendium II* thus governs and the design features which you have pointed out– angles, ridges, handle–are all, under that test, subsumed within the overall shape or contour of the container in which the ORTHO SEASON LONG design is embodied.

In contrast, in *Carol Barnhart*, 773 F.2d 411, the Second Circuit found that the anatomically accurate mannequins of the human torso contained no separable design features: "... to the extent the forms possess aesthetically pleasing features, even when these features are considered in the aggregate, they cannot be conceptualized as existing independently of their utilitarian function." 773 F.2d at 418. The Board finds that the container at issue here is more analogous to the mannequins in *Carol Barnhart* because all of the purported design features of ORTHO SEASON LONG are essentially part of the general contour of the article. Although the linear indentations, ridges and handle could arguably be included within another container, this fact does not mean that these design features are separable: even as embodied within another container, they would serve, if identical to the features of ORTHO SEASON LONG, as part of the configuration of the utility which is the container.

Again, you seem to argue that any design element that is not dictated by functional concerns is necessarily separable: "[T]he design features that comprise the ORTHO SEASON LONG work are not in any respect required and the functional aspects of the container would not be altered by the absence of the copyrightable elements." Letter from Wilson to Board of 12/14/04, at 3-4. The Board disagrees. *Compendium II*, the governing authority for the Office in its examination of useful articles, clearly states that "[T]he mere fact that certain features are nonfunctional or could have been designed differently is irrelevant under the statutory definition of pictorial, graphic, and sculptural works." *Compendium II*, § 505.03. Where a design element is inextricably integrated into the overall shape and contour of the useful article, its functionality is immaterial to the separability analysis under the *Compendium* test as that test is based on the explanation of the House Report to the 1976 Act, *above* at 6. It simply is not separable in that circumstance. Moreover, the Board notes that one of the design elements you identify for copyrightability, the container's handle, is most definitely a functional component of the container in addition to its being part of the general shape of the design embodied in ORTHO SEASON LONG.

Finally, you argue that the metallic-gray coloring of the container is a conceptually separable design element. For purposes of this work, the Board finds that the color gray is conceptually separable, although this determination does not mean that the work at issue here or that any design element of it is copyrightable. We continue with a discussion of the copyrightability of any separable feature.

B. Original works of authorship

1. The legal threshold

The separability of a design feature from a utilitarian object does not mean that the feature will necessarily merit copyright protection. All copyrightable works, be they sculptures, engravings or otherwise, must also qualify as "original works of authorship." 17 U.S.C. 102(a).

The term "original" consists of two required components: independent creation and sufficient creativity. *Feist*, 499 U.S. at 345. First, the work must have been independently created by the author, *i.e.*, not copied from another work. The Copyright Office accepts at face value that your client OMS Investments, Inc. acquired the copyright in this work by virtue of an assignment from the author Fisher Design, Inc. Therefore, the first component of the term "original" is not at issue in the analysis set forth 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*, 499 U.S. at 345, where the Supreme Court held that only a modicum of creativity is necessary.

As you properly note in your second request for reconsideration, the requisite level of creativity is extremely low; even a slight amount will suffice. *Feist*, 499 U.S. at 345. Letter from Wilson of 12/14/04, at 3. However, the Court also ruled that some works (such as the work at issue in that case) fail to meet the standard. 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," 499 U.S. at 363, and that there can be no copyright in 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) ("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* Court's 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*, § 202.02(a). With respect to pictorial, graphic and 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.* at § 503.02(a).

In implementing this standard, the Office has consistently stated that standard and commonplace designs, figures and geometric shapes are not sufficiently creative to support a copyright claim. *Id.* at § 503.02(a) ("[R]egistration cannot be based upon the simplicity of standard ornamentation . . . . Similarly, it is not possible to copyright common geometric figures or shapes . . . .").[2] Moreover, making minor alterations to these otherwise standard elements 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 design elements may contain sufficient creativity with respect to how they are combined or arranged to support a copyright. *See Feist*, 499 U.S. at 358 (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 Register's refusal to register a simple logo consisting of four angled lines which formed an arrow and the word "Arrows" in cursive script below the arrow. *John Muller & Co., Inc. v. New York Arrows Soccer Team*, 802 F.2d 989 (8th Cir. 1986). *See also*, *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) ("It is true, of course, that a *combination* of unprotectible elements may qualify for copyright protection. [citations omitted] But it is not true that *any* combination of unprotectible elements automatically qualifies for copyright protection. Our case law suggests, and we hold today, that a combination of unprotectible elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.") (emphasis in the original).

2. Any separable elements would not be copyrightable

Even though the gray coloring of the surface of the container at issue is conceptually separable, and even if any of the other purported design elements described above were

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[2] *See also*, *Compendium II* at § 202.02(j) ("Familiar symbols or designs, and mere variations of typographic ornamentation, lettering, or coloring, are not copyrightable."); *Id.* at § 503.03(b) ("No registration is possible where the work consists solely of elements which are incapable of supporting a copyright claim. Uncopyrightable elements include common geometric figures or symbols, such as a hexagon, an arrow, or a five-pointed star . . . ."); 37 C.F.R.§ 202.1(a) ("[F]amiliar symbols or designs" are "not subject to copyright and applications for registration of such works cannot be entertained.").

separable, none is, or would be, sufficiently creative to support a copyright claim. The requisite level of creativity is admittedly low, but it is not non-existent.

In this work, the majority of the purported design elements, considered for the sake of argument, consists of linear indentations and ridges. A line, even with a minor variation in its width, curvature or angle, simply is unable to embody a sufficient level of creativity to sustain a copyright registration within the meaning of *Feist*. The rectangular handle is simply a three-dimensional representation of a common geometric shape, and is therefore not subject to copyright protection. Finally, although the color gray is separable from the utilitarian container, the selection of a single color for a product does not express sufficient creativity to support a copyright registration.

You argue that the "combination and arrangement" of the design features, though, embodies the requisite amount of creativity. Letter from Wilson of 12/14/04, at 3. While creative combinations and arrangements of otherwise unprotectible design elements can in certain situations merit copyright protection, this situation is not one of them. The indentations and ridges, which essentially follow the basic outline of the container, are minor variations of simple lines, margins, or borders; the entire container is of one color–gray, which is not an element copyrightable in itself; and the handle is placed on top of the container as gravity would demand. Such a simplistic "combination and arrangement" of non-protectible elements cannot rise to the requisite level of creativity. *Compendium II*, § 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.").

IV. CONCLUSION

For the reasons stated herein, the Copyright Office Review Board affirms the refusal to register the purported design elements embodied in the container entitled ORTHO SEASON LONG. 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