United States Copyright Office
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December 30, 2011

Adam M. Cohen, Esq.
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New York, NY 10019-4896

RE: MILLE NUITS 18-LIGHT CHANDELIER
Control No. 61-322-7727(K)

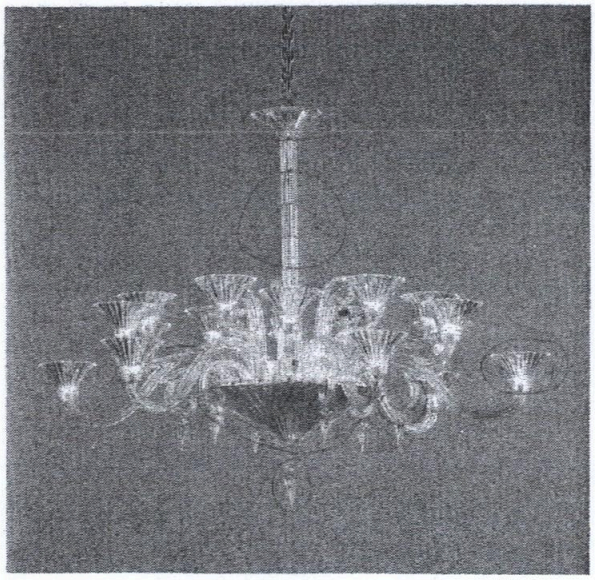
Dear Mr. Cohen:

I am writing on behalf of the Copyright Office Review Board in response to your letter dated February 1, 2006, requesting a second reconsideration of a refusal to register a work entitled "Mille Nuit 18-Light Chandelier" on behalf of your client, Baccarat S.A. We apologize for the long delay in getting the Review Board's decision to you. The Board has carefully examined the application, the deposit, and all correspondence in this case and affirms the denial of registration of this work.

I. DESCRIPTION OF THE WORK

The subject chandelier consists of a beveled-glass exterior, including a small dish at the top, cylindrical segments from the small dish to the main body of the chandelier, a large dish from which eighteen arms, each in the shape of a sideways "s," emerge. Each of those arms ends in an upward-facing small dish housing a light bulb. There are additional curved beveled glass arms emerging from the large dish from which arrow-shaped ornaments hang, and an additional arrow-shaped ornament hangs from the large dish itself.

A reproduction of the deposit photo is set forth below.



II. ADMINISTRATIVE RECORD

A. Initial submission and refusal to register

On May 2, 2005, the Copyright Office received a Form VA application and a request for Special Handling on behalf of your client, Baccarat S.A., to register a cut-glass chandelier as three-dimensional sculpture. In a letter dated May 10, 2005, Visual Arts Division Assistant Chief William R. Briganti refused registration of this work because it lacked the artistic or sculptural authorship necessary to support a copyright claim. Letter from Briganti to Brendan McFeely of Kane Kessler, P.C., of 5/10/2005, at 1. Mr. Briganti explained that the design of a useful article is considered copyrightable only to the extent that the design incorporates a pictorial, graphic, or sculptural feature that is physically or conceptually separable from the utilitarian aspects of the article. *Id.* He noted that some features of the chandelier at issue here can, indeed, be identified as separable; and, he also noted that a copyrightable sculpture must contain at least a minimum amount of original artistic material and that the ideas or concepts embodied in such a work are not protected by copyright. *Id.* at 1-2. Lastly, Mr. Briganti noted that copyright does not protect familiar symbols and designs, minor variations of basic geometric shapes, lettering and typography, or simple combinations of these elements and concluded that this chandelier, although having some separable elements, did not have copyrightable separable elements. *Id.*

B. First request for reconsideration; Office refusal of this first request

The Office then received your June 16, 2005 request to reconsider its refusal to register MILLE NUITS 18-LIGHT CHANDELIER. You asserted that the design contains the requisite modicum of creativity. Letter from Cohen of 6/16/2005, at 1. You stated that courts have been willing to find sufficient originality even in features of a "relatively mundane nature." *Id.* at 2. In support of this position, you cited Mattel, Inc. v. Goldberger Doll Manufacturing Co., 365 F.3d 133 (2d Cir. 2004); Pivot Point International, Inc. v. Charlene Products, Inc., 372 F.3d 913 (7th Cir. 2004). You also noted, *Id.*, that the Copyright Office has registered chandeliers in the past, citing 1 Nimmer on Copyright, Section 2.08[B](3) at 2-91.

In support of this assertion, you described five aspects of the chandelier that you believe meet the originality requirement: the hanging ornaments, the large and small dishes, the cylindrical segments, the small dishes housing the light bulbs, and the shape of the arms from which the ornaments hang. Letter from Cohen of 6/16/2005, at 2. Finally, you stated that the selection and arrangement of these elements constitutes sufficient creativity to support copyright registration. *Id.* at 3.

In a letter dated November 3, 2005, Attorney Advisor Virginia Giroux-Rollow of the Registration Program replied that she had reviewed your client's work in light of the points raised in your request for reconsideration dated June 16, 2005, and determined that no copyright registration could be made "either as a '3-d sculpture' or in the 'selection and arrangement of elements'...because the work is a useful article that does not contain any authorship that is **both** separable **and** copyrightable." Letter from Giroux-Rollow to Cohen of 11/3/2005, at 1(emphasis in original). She explained that "it is not the material of which a work is made that determines copyrightability. Therefore, the fact that this work is composed of beveled cut crystal does **not** contribute to the copyrightability of the work.." *Id.* (emphasis in original).

Ms. Giroux-Rollow then set forth the definition of a useful article under the Copyright Act and the extent to which such a work is copyrightable. She explained that the Office examines useful articles first to determine whether the work contains any pictorial, graphic, or sculptural authorship that is physically or conceptually separable from the work's utilitarian aspects. She noted that examiners do not make aesthetic judgments and do not consider the design's attractiveness, uniqueness or its look or feel. *Id.*

She distinguished the Denicola test for separability (employed by some courts in Mattel and Pivot Point) from the test the Copyright Office uses, as set forth in Esquire v. Ringer, 591 F.2d 796 (D.C. Cir. 1978), but nonetheless agreed that there were elements of the work that were conceptually separable. Letter from Giroux-Rollow of 11/3/2005, at 2-3. However, she found that these elements– examined individually and as a whole– were not copyrightable. She described the hanging ornaments and all the beveled dishes as appearing to be pre-existing or previously published elements. Moreover, she observed that, even if they were original to the author, they consist of familiar geometric shapes in the public domain that are not copyrightable. Letter from Giroux-Rollow of 11/3/2005, at 3. Likewise, she found that the combination and arrangement of these shapes did not rise to the level of copyrightable authorship needed to support a copyright registration. She then cited cases to support her determination. *Id.* at 3.

Finally, Ms. Giroux-Rollow cited from the portion of the legislative history of the 1976 Copyright Act which clearly stated Congress' intent in crafting the existing law, and its emphasis on the need for separable authorship to stand on its own and that no protection will be accorded a useful article's overall shape or design. *Id.* at 4.

C. Second request for reconsideration

In a letter dated February 1, 2006, you again requested reconsideration of the Office's refusal to register MILLE NUITS 18-LIGHT CHANDELIER. To assist the Board in its examination, you also provided: 1) a color photo of the chandelier in question and 2) a brief biography of the artist.

You acknowledge that the chandelier at issue here is a useful article and assert that the elements that were noted in the Giroux-Rollow letter as separable are in fact sufficiently original to support copyright registration. Specifically, you note 1) the "arrow/conical" shape of the hanging ornaments; 2) the "beveled and grooved cuts and shapes" and "intricate design" of the large dish; 3) the "frayed, cut quality and beveled grooves" of the small dish at the top; and 4) the "beveled groove cut" of the dishes surrounding each light bulb. Letter from Cohen to the Review Board of 2/1/2006, at 3 (citing Runstadler Studios, Inc. v. MCM Limited Partnership, 768 F. Supp. 1292, 1295 (N.D. Ill. 1991). In further support of this assertion, you cite Collezione Europa USA v. Hillsdale House, 243 F. Supp.2d 444 (M.D.N.C. 2003); Sunset Lamp Corp. v. Alsy Corp., 698 F. Supp. 1146 (S.D.N.Y. 1988); and Softel, Inc. v. Dragon Medical and Scientific Communications, Inc., 118 F.3d 955, 964 (2d Cir. 1997).

You also assert that, even if the individual separable elements are not sufficiently original in and of themselves, the "selection and arrangement" of those elements is "sufficiently original to warrant copyright registration." Letter from Cohen of 2/1/2006, at 5. Lastly, you assert that "the curved arms providing support for the hanging ornaments...and the cylindrical shell over the support

from which the chandelier hangs" are conceptually separable. *Id.* at 6. You also conclude that those elements are copyrightable because of the "beveled cuts in the glass and the spiraling shape" of the arms and the "beveled cuts in the glass and modular construction" of the cylindrical shell. You state that the separable features embodied within the chandelier at issue here meet the low quantum of originality required for registration. *Id.*

III. DECISION

After reviewing the application and arguments presented, the Copyright Office Review Board affirms the Registration Program's refusal to register the Mille Nuits 18-Light Chandelier because, although there is one element that is conceptually separable from the utilitarian aspects or function of the work, that element individually does not contain a sufficient amount of original and creative authorship to support a copyright registration; nor does the selection and arrangement of the constituent elements, taken together, support a copyright registration.

A. Useful articles; separability

A useful article may be entitled to copyright protection if it contains 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 (definition of pictorial, graphic or sculptural works) (emphasis added).

The Office employs a separability test, set forth in section 505.02 of the *Compendium of Copyright Office Practices, Compendium II,* (1984) ("*Compendium II*"), which states that:

> Registration of claims to copyright in three-dimensional useful articles can be considered only on the basis of separately identifiable pictorial, graphic, or sculptural features which are capable of independent existence apart from the shape of the useful article. Determination of separability may be made on either a conceptual or physical basis.

You do not dispute that the chandelier is a useful article, and the Board acknowledges that protection is being sought only for the conceptually separable elements and not for the overall shape of the useful article itself. Therefore, the Board must determine whether any pictorial, graphic or sculptural features of the chandelier are either physically or conceptually separable from the work's utilitarian function.

Physical Separability. The test for physical separability is as follows: "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." *Compendium II,* § 505.04. You do not put forth an argument that there are any physically separable pictorial, graphic or sculptural features in the chandelier design. The Board finds that there are no physically separable elements and must determine whether there are any pictorial, graphic or sculptural elements that are conceptually separable.

Conceptual Separability. Conceptual separability exists when pictorial, graphic, or sculptural features are "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." *Compendium II*, § 505.03. Section 505.03 provides a useful example: "Thus, the carving on the back of a chair, or pictorial matter engraved on a glass vase, would be considered for registration."

The Board notes that the enumerated portions, or elements, of the chandelier at issue are: 1) hanging, arrow-shaped ornaments; 2) a large, generally conical-shaped dish to which many other chandelier features are attached; 3) small, splayed conical dish at top of the chandelier; 4) small, slightly less splayed dishes which surround the lights of the chandelier; 5) a number of beveled-cut arms, some ending in a single curl shape while others are a more linear S-shape that end in a dish containing a chandelier light; finally, 6) a single, cylindrical, vertically hanging post connected to the small, uppermost dish [(3)] and most likely covering electric wires.

Although Ms. Giroux-Rollow determined that the hanging, arrow-shaped ornaments as well as the small and single large dishes [2) and 3)] and the small dishes surrounding the lights of the chandelier are conceptually separable [Letter from Giroux-Rollow of 11/3/2005, at 3], the Review Board finds only the hanging, arrow-shaped ornaments, as features of the chandelier at issue, to be conceptually separable. Further, in agreement with Ms. Giroux-Rollow [*Id.*] and for the sake of argument, the Board does not find these features copyrightable in themselves. Our reasoning regarding conceptual separability follows; the issue of copyrightability follows that.

Under *Compendium II's* guidelines, 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 Esquire, Inc. v. Ringer, 591 F.2d 796 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 908 (1979), 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], [2] Section 505 of *Compendium II*, cited above, is a valid interpretation of copyright law because it is a direct successor to the Copyright Office regulation that was affirmed in Esquire. The Copyright Office relies on the authority of Esquire for the analysis it follows to determine whether pictorial, graphic or sculptural works are separable from the utilitarian objects in which they are incorporated.

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[1] Although *Esquire* was decided under the 1909 version of the Copyright Act, its reasoning is, nevertheless, 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.

[2] Similarly in *Norris Industries, Inc. v. International Telephone & Telegraph Corp.*, 696 F.2d 918, 924 (11th Cir. 1983), *cert. denied,* 464 U.S. 818 (1983), 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 axles from damage and dust.

Relying on explicit statements in legislative history, the Esquire court found that the Office's regulation was an authoritative construction of the copyright law. *Id.* at 802-803. This and later cases held that, despite an aesthetically pleasing, novel or unique shape, the overall design or configuration of a utilitarian object may not be copyrighted if it is not "capable of existing as a work of art independent of the utilitarian article into which [it is] incorporated." *Id.* at 803-804. In that case, a light fixture, notwithstanding how aesthetically pleasing the useful article's shape or configuration may have been, was held not protectible. *Id.* at 800. The Office considers its separability test consistent with the stated intention which Congress put forth in the House Report accompanying the 1976 Act; that stated intention has served as a guidepost for the concept of separability under the current law.

Our analysis of the non-separability of the various chandelier features which you have enumerated must start with the fact that the object which you are seeking to register is a particular, specifically-designed chandelier. The shape of this useful article is determined by the individual features which are related to reach other; in this case, those features are connected to each other and, as a whole, constitute this particular chandelier. [*See* illustration, above at I.] If one were conceptually to remove the splayed, smaller dishes that surround the actual lights, or if one were to imagine the chandelier object without the large dish at the bottom of the chandelier, one would not be able to imagine these features, conceptually juxtaposed next to this specific chandelier, without having changed the shape, *i.e.*, the configuration, of the chandelier object itself. Although the smaller dishes, the large dish, and the beveled extended arms of the chandelier may be aesthetically pleasing– beautiful– features in themselves, they are integral parts or features of this admittedly useful article and their removal from the chandelier– either a physical or conceptual removal– alters the shape of the chandelier and, thus, under *Compendium II's* test, one is left with something other than this particular useful article standing side by side with the removed features.

The Office's *Compendium II* test was confirmed in an action against the Copyright Office in Custom Chrome, Inc. v. Ringer, 1995 U.S. Dist. LEXIS 9294 (D.D.C. 1995). Custom Chrome was an action brought under the Administrative Procedure Act [APA], 5 U.S.C. §§ 701-706, based on an assertion that the Copyright Office's action refusing registration for twenty-three motorcycle parts was arbitrary and not in accord with the law. Custom Chrome, at *1. The District Court for the District of Columbia held that the Office's determination, under the Office's *Compendium II* separability test, (that the motorcycle parts did not contain separable features) was reasonable and consistent with the copyright statute and with "declared legislative intent." Custom Chrome, at *12.

Because Custom Chrome was an APA action, the Court did not determine which of the several separability tests proffered by legal scholars or derived from case law was the correct one. The Court simply stated that "so long as the Copyright Office has offered a reasonable construction of the copyright statute, its judgment must be affirmed even if this Court were to accept Custom Chrome's assertions that the duality test would support its copyright claims." Custom Chrome, at *15. We point out Custom Chrome to emphasize that *Compendium II's* separability test, centering on the general shape of the useful article, is consistent with "later cases decided under the present law and the legislative history," *id.*, at *16, in denying protection to the shape of an industrial product even though it may be aesthetically pleasing. Further, *Compendium II* states that the shape

or configuration of supposedly artistic features cannot be considered to provide the requisite separability merely because the features are nonfunctional.[3] *Id., at § 505.03.*

Although the Review Board has decided that this chandelier, MILLE NUITS 18-LIGHT, under the Copyright Office's *Compendium II* test, possesses only one separable feature, the arrow-shaped hanging ornaments,[4] we nevertheless will comment on the copyrightability of the other features found separable at the first request for reconsideration stage as if they were separable (although we have determined they are not) since many of your arguments in the February 1, 2006 second request for reconsideration address the copyrightability of these features. We are compelled to comment.

B. De minimis authorship of the whole; further, individual features not copyrightable in themselves

1. Feist

As you acknowledge, and the courts have held, originality has two components: 1) independent creation by the author and 2) a modicum of creativity. Feist Publication, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 345 (1991). The Board does not dispute that the overall design, *i.e.*, the MILLE NUITS 18-LIGHT chandelier in its entirety, was independently authored by the artist known as Matthias on behalf of your client, Baccarat S.A.; thus, the sole issue on which the Board is left to comment is whether these elements, one of which may be separable, contain a modicum of creativity.

In determining whether a work has a sufficient amount of original artistic authorship necessary 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 to support a copyright. 499 U.S. at 345. However, the Court also ruled that some works (such as the work at issue in Feist) fail to meet the standard. The Court observed that "as 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 a work in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359. While "the standard of originality is low, . . . it does exist." *Id.* at 362.

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[3] Again, examining the chandelier at issue here, many of the features which you have pointed out are, indeed, functional as they exist as part of this particular chandelier. The splayed, smaller dishes surround the actual lights and thus play a part in covering the multiple sources of light emanating from this chandelier. The vertical, equally-segmented post from which the rest of the chandelier is connected to the ceiling anchor is useful in its nature. The features, although decorative in their presentation, cannot be said to be conceptually separable, or even non-functional, under *Compendium II.*

[4] You have also cited Pivot Point International, Inc. v. Charlene Products, Inc., 372 F.3d 913 (7th Cir. 2004), as support for your arguments concerning separability. Letter from Cohen of 2/1/2006, at 4. We point out that in Pivot Point, the Seventh Circuit found the features / aspects of the mannequin head at issue to "meet the requirements for conceptual separability:" the MARA mannequin head was the "product of a creative process unfettered by functional concerns, its sculptural features 'can be identified separately from, and are capable of existing independently of,' its utilitarian aspects." 372 F.3d at 932.

Compendium II has long recognized this principle: "[w]orks 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, the class within which the Mille Nuits 18-Light Chandelier falls, 17 U.S.C. § 102(a)(5), *Compendium II* states that a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." Compendium II, § 503.02(a). *Compendium II* recognizes that it is the presence of creative expression that determines the copyrightability of a work, and that

> registration cannot be based upon the simplicity of standard ornamentation . . . Similarly, it is not possible to copyright common geometric figures or shapes . . . a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations [also cannot support a copyright].

Id. See also 37 C.F.R. § 202.1(a) ("familiar symbols or designs" are "not subject to copyright and applications for registration of such works cannot be entertained.").

If the Board had applied these principles to the one separable feature it had identified, it would have determined that the 3-dimensional, sculptural feature, the hanging, arrow-shaped ornaments, did not possess the necessary quantum of authorship to sustain copyright registration. That feature, in the shape of a common arrow, even though sculpturally fixed, has only several sides, or facets, running longitudinally down the arrow to the end-point. The top of the arrow is a flanged-covering that extends to fit the arrow's facets. The arrow is attached to a small dish element that splays out as do the other dish elements, all having a regular fan-like shape. Even though the features of this chandelier are 3-dimensional in characteristics, the features do not display more than a few shapes and configurations that do not support copyright registration. You have cited Runstadler Studios, Inc. v. MCM Limited Partnership, 768 F. Supp. 1292 (N.D. Ill. 1991), as supporting the registration of the chandelier at issue. We do not disagree with your general statement that "cut glass sculptural elements" can "merit copyright protection." Letter from Cohen of 2/1/2006, at 3. The sculptural works at issue in Runstadler were not, however, useful lighting objects as is the chandelier at issue here. The Runstadler Court, after describing both the plaintiff's and defendant's works, did not find infringement of the plaintiff's sculptural work by the defendant; both works were found sufficiently different from each other in their configuration. 768 F. Supp 1297-1299. The Court stated that "[B]oth works are sculptures of spirals that use rectangular planes..." *Id.* at 1296. Although sculptural authorship appears in the chandelier at issue here, the overall shape cannot be the focus of the copyrightability analysis. As we have explained, above at *III.A.*, Congress did not mean the overall shape of useful articles to be protected. The configuration of this chandelier is composed of elements that are functional in nature– the dishes, large and small, that hold the lights and that are attached by arms to the lower large dish holding the great part of this chandelier, the longitudinal stem that connects the chandelier lighting features to the chain attaching to the ceiling; the only non-functional feature is the non-copyrightable arrow drop.

Our copyrightability analysis, thus, is confined to the small, arrow-shaped hanging element which does not reflect a sufficient quantum of originality in its 3-dimensional sculptural authorship, The feature possesses an overall, simple arrow shape with several facets running down the arrow. The top of the sculptural arrow is a simple, faceted ending to the arrow shape, having as many small

faces necessary to actually cover the endings of the few longitudinal facets. Case law confirms these principles of non-protection for common, standard shapes. *See* Forstmann Woolen Co. v. J.W. Mays Inc., 89 F. Supp. 964 (E.D.N.Y. 1950) (label with words "Forstmann 100% Virgin Wool interwoven with standard *fleur-de-lis* could not support a copyright claim without original authorship); Bailie v. Fisher, 258 F.2d 425 (D.C. Cir. 1958) (cardboard star with two folding flaps allowing star to stand for retail display not copyrightable work of art); Magic Marketing, Inc. v. Mailing Services of Pittsburgh, 634 F. Supp. 769 (W.D. Pa. 1986) (envelopes with black lines and words "gift check" or "priority message" did not contain minimal degree of creativity necessary for protection); Tompkins Graphics, Inc. v. Zipatone, Inc., 222 U.S.P.Q. 49 (E.D. Pa. 1983) (collection of various geometric shapes not copyrightable); John Muller & Co., Inc. v. N.Y. Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986)(logo consisting of four angled lines forming an arrow, with the word "Arrows" in cursive script below, found not copyrightable); Jon Woods Fashions, Inc. v. Curran, 8 U.S.P.Q.2d 1879 (S.D.N.Y. 1988)(upholding Copyright Office's refusal to register design consisting of striped cloth over which was superimposed a grid of 3/16" squares); Homer Laughlin China Co. v. Oman, 22 U.S.P.Q.2d 1074 (D.D.C. 1991)(upholding Copyright Office's refusal to register chinaware design pattern).

We note that you have also cited Collezione Europa U.S.A. *v.* Hillsdale House, 243 F. Supp. 2d 444 (M.D. N.C. 2003) for support that the chandelier at issue here reflects copyrightable authorship. Letter from Cohen of 2/1/2006, at 4. The works at issue in *Collezione Europa* were items of furniture– dinette table, chairs, baker's rack, bar stool. The feature that the Court found separable and copyrightable were sculpted leaves. The District Court found these leaves comparable to the ornamental design on the belt buckles in Kieselstein-Cord (Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989, 993 (2d Cir. 1980)) – separable features – and to the "intertwined banana leaf design," found to be separable from the lamp base in Sunset Lamp Corp. v. Alsy Corp., 698 F. Supp. 1146, 1151 (S.D.N.Y. 1988). The Review Board has determined that only the arrow feature may be called separable within this chandelier and, unlike a banana leaf or the wavy design on Kieselstein-Cord's buckle, a common, standard arrow sculpture lacks the necessary quantum of originality that Feist requires.

2. Individual features taken as a whole not a copyrightable work

We note again the considerable case law sustaining Copyright Office decisions of refusal to register simple designs; the Office, nevertheless, recognizes that the use of public domain elements and/or commonly known shapes can result in a copyrightable work as long as the overall resulting design or overall pattern, taken in its entirety, constitutes more than a trivial variation of such elements. Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99, 103 (1951); *see Compendium II*, § 503.02(a). The Board applies this standard by examining a work to determine whether it contains elements, either alone or taken as a whole, on which a copyright can be based. This principle does not take us far since the Board has explained, above at *III. A*, the very limited feature of this chandelier which it finds separable. Further, *if* the Board were to have found the overall shape and configuration of this chandelier used to light a space separable, which it did not, the Board would, nevertheless, concur with Ms. Giroux-Rollow that the MILLE NUITS 18-LIGHT CHANDELIER consists of common and familiar geometric shapes: arrows, spirals, funnels and lines in the cut-glass and that the overall pattern results from a mere bringing together of standard shapes with minor variations thereof. Such a combination fails to rise to the level of creativity required to support a copyright registration. As stated in *Compendium II*, § 503.02(a): "It is not possible to copyright . . .

a simple combination of a few standard symbols such as a circle, a star, and a triangle with minor linear or spatial variations." Thus, the chandelier at issue here, *if the Board had found separable its general configuration or a greater number of its features*, nevertheless consists of simple variations of standard shapes and simple, rather standard, arrangements, which, while aesthetically pleasing, do not contain the minimal amount of original artistic authorship in combination, *i.e.*, as a whole, needed to support a copyright registration; the courts have consistently upheld the Office's refusal to register such works.[5]

You have argued that "the selection and/or arrangement of these individual, separable elements is sufficiently original to warrant a copyright registration." Letter from Cohen of 2/1/2006, at 5, citing Kay Berry, Inc. v. Taylor Gifts, Inc., 421 F.3d 199, 207 (3d Cir. 2005). You cite Kay Berry for the concept that a work consisting of individually uncopyrightable elements may, nevertheless, be copyrightable in its entirety if the combination taken together meets the Feist standard of protection which, we admit, need not be great or even much. Feist, 499 U.S. at 345. The Review Board, as explained above, has analyzed the chandelier as a whole and has concluded that, in its entirety, the chandelier does not manifest the necessary quantum of authorship needed to sustain registration. We point out, again, that such analysis of the overall work can only be applied at the examination of copyrightability stage. Only the small arrow-shaped hanging element was found separable but not copyrightable by the Review Board. The copyrightability assessment of this chandelier as a whole was undertaken by the Review Board because several individual elements had been found separable at the first reconsideration stage; the Board, finding only one element separable, nevertheless, considered, *arguendo*, the copyrightability of the whole and found it lacking.

Finally, you have argued that the chandelier at issue here contains sufficient creativity to support a copyright registration because you are "unaware of any similar designs in existence." Letter from Cohen of 2/1/2006, at 4. Such comparison with other existing chandelier designs is not

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[5] We also note *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. 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.") (citations omitted) (emphasis in original). The Board also accepts the general principle that an arrangement of common or geometric shapes *may* be copyrightable. Nevertheless, after reviewing the applications and deposits, the Board, *if it had found separability to a greater extent,* concludes that the chandelier at issue here, would not contain sufficient creative authorship to support registration.

We also note that the case law you have cited for the proposition that the selection and/or arrangement of individual, separable elements as sufficiently original to warrant copyright protection when considered together as a unity or aggregation is not persuasive in this particular claim before the Review Board. Softel, Inc. v. Dragon Medical and Scientific Communications, Inc, 118 F.3d 955 (2d Cir. 1997), a case concerning computer program authorship, cited Feist, at 344-351, in stating that "a compilation of non-protectible elements can enjoy copyright protection even though its constituent elements do not." Stating that the Copyright Office adheres to this principle, we must nevertheless further state that the chandelier at issue before the Board, having only one separable feature, is not registrable. And, if our analysis had gone beyond finding one feature as separable, that analysis would still have determined that the particular combination of individually uncopyrightable elements would not have been sufficient.

determinative of a work's copyrightability which depends on whether the work in question constitutes copyrightable subject matter and whether all other legal and formal requirements have been met. 17 U.S.C. § 410(a). The work at issue here does not fill such requirements. We also point out *Compendium II*, § 108.03, where we find that the Office does not generally make comparisons of copyright deposits in order to determine whether or not a particular work or particular material has already been registered. Further, the Office does not judge, as part of its examining procedures, the commercial, artistic or aesthetic worth of a given work. As stated in *Compendium II* § 503.02(b): "The requisite minimal amount of original sculptural authorship necessary for registration in Class VA does not depend on the aesthetic merit, commercial appeal or symbolic value of a work." Thus, nothing can be concluded about the protectibility of the chandelier in question here as it compares to other glass or other chandelier designs.

Again, focusing solely on the authorship in the MILLE NUITS 18-LIGHT CHANDELIER in both its individual elements as well as with respect to its overall composition when, for the sake of argument, it is regarded as an entirety, the Board has concluded that the design at issue reflects only one design element that is separable in itself and that element does not contain a sufficient quantum of creativity.

For the reasons stated above, the Copyright Office Review Board affirms the refusal to register MILLE NUITS 18-LIGHT CHANDELIER. This decision constitutes final agency action in this matter.

Sincerely,

/s/

Nanette Petruzzelli
Associate Register, Registration Program
for the Review Board
United States Copyright Office