United States Copyright Office
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January 10, 2011

Valauskas & Pine, LLC
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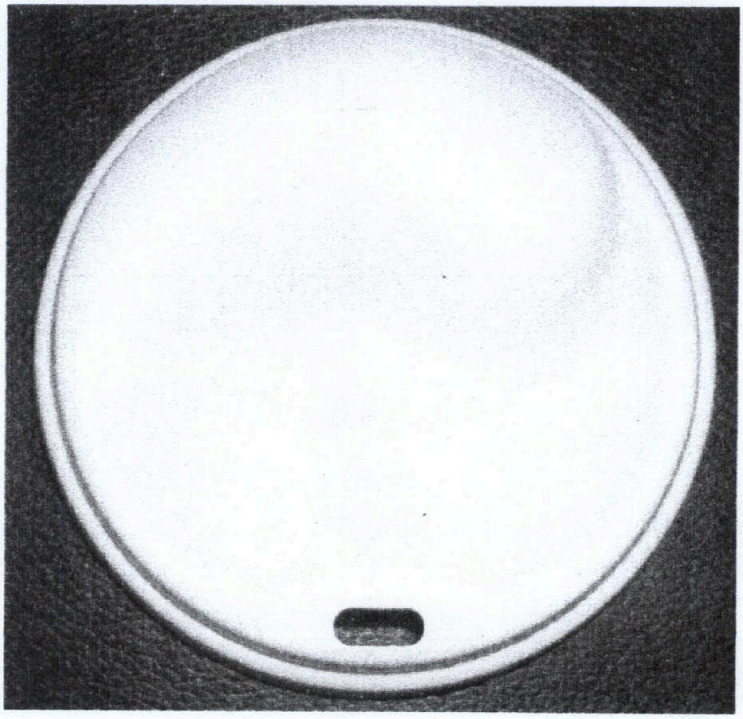
Re: YIN YANG
Correspondence ID: 1-39L0R8

Dear Mr. Valauskas:

I write on behalf of the U.S. Copyright Office Review Board ("Board") in response to your letter, received on February 18, 2010, in which you requested a second reconsideration of the Copyright Office's ("Office's") refusal to register the work entitled YIN YANG ("the work"). The Board has carefully examined the application, the deposit and all correspondence concerning the application, and affirms the denial of registration of this work.

I. DESCRIPTION OF THE WORK

YIN YANG is a plastic lid or cover for a cup. Its sculptural elements consist of a partially-raised swirled element, including raised rounded contours and raised rounded edges merged with a partially-recessed swirled element that includes recessed rounded contours and recessed rounded edges. The design of the sculptural elements, like the name of the design, is related to a familiar Chinese symbol representing the interaction of opposite forces. A visual representation of the work is set forth below.



II. ADMINISTRATIVE RECORD

A. Initial Submission and Office's Refusal to Register

On March 20, 2009, the Office received an application along with the required deposit and fee for the work: YIN YANG. The submission was made on behalf of Mighty Leaf Tea. In a letter dated May 26, 2009, the U.S. Copyright Office refused registration of the Design. Letter from Registration Specialist Wilbur King to Charles C. Valauskas of 5/26/2009.

Mr. King explained that copyright law protects pictorial, graphic, and sculptural works, but not their mechanical or utilitarian aspects. *Id.* at 1. The design of a "useful article" must have pictorial, graphic, or sculptural authorship that is either physically or conceptually separable from the utilitarian aspects of the article. *Id.* (citing H.R. Rep. No. 94-1476, 94th Cong. 2d Sess. (1976)).

Mr. King noted that *physical* separability means that pictorial, graphic, or sculptural features can be physically separated by ordinary means from the utilitarian item. *Id.* (citing 17 U.S.C. § 101; *Compendium of Copyright Office Practices II, (Compendium II)* Ch. 500 (1984)). Mr. King further explained that *conceptual* separability means that the pictorial, graphic, or sculptural features "can be visualized on paper, for example, or as a free-standing sculpture, as another example, independent of the shape of the article, *i.e.*, the artistic features can be imagined separately and independently from the useful article without destroying the basic shape of the useful article." *Id.* at 1. (citing *Compendium II*, Ch.500 (1984)) (emphasis in original). Even where a work has non-functional features or elements that could have been designed differently, "if those features are an integral part of the overall shape or contour of the useful article, no registration is possible." *Id.* at 2.

Mr. King noted that because all of the elements of the deposited work are either utilitarian or subsumed within the overall shape, contour, or configuration of the article, the work is neither physically nor conceptually separable in its authorship. *Id.* As a result, the work did not contain sufficient elements needed to support a claim to copyright under the meanings of the copyright statute and settled case law. *Id.*

B. First Request for Reconsideration

In a letter dated August 17, 2009, you requested reconsideration of the decision to refuse registration of the work. Letter from Charles C. Valauskas, Valauskas & Pine LLC to Copyright RAC Division of 8/17/2009. In this letter, you argued that YIN YANG is copyrightable because the work contains original and creative design elements that can stand alone, separate from the functional elements. *Id.* at 1.

You noted that an article may receive copyright protection despite its usefulness. *Id.* at 1-2 (citing 17 U.S.C. § 101; *Mazer v. Stein*, 347 U.S. 201 (1954); *Kieselstein-Cord v. Accessories By Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980)). You then offered the factors involved in determining physical and conceptual separability, explaining that "creative elements must be able to stand alone as creative works, separately from the functional elements." *Id.* at 2 (citing

Chosun International v. Chrisha Creations, Ltd., 413 F.3d 324 (2d Cir. 2005); *Pivot Point International v. Charlene Products, Inc.*, 372 F.3d 913 (7th Cir. 2004).

In describing the design for YIN YANG, you explained that the work includes elements that serve a utilitarian purpose in addition to fanciful sculptural features on the top, bottom, and side surfaces of the work. *Id.* at 2. Pointing to Exhibits A through K as examples of similar works reflecting independent artistic judgment, which you submitted along with your letter, you explained that the work's fanciful sculptural features were the result of the author's creative effort and independent artistic judgment based on a variety of design elements. *Id.* at 2-3 (citing *Brandir International v. Cascade Pacific Lumber, Co.*, 834 F.2d 1142, (2d Cir. 1987); *Pivot Point*, 372 F.3d at 931).

You argued that the "fanciful sculptural features" of the work included shapes, lines and contouring which, you asserted contain fanciful sculptural features "that are not an integral part of the overall configuration of the article." *Id.* at 3. You stated that because these features were not dictated by the functions to be performed by the article, they are separable and therefore entitled to copyright protection. *Id.*

Finally, you noted that the work contains sufficient authorship to satisfy the modicum of originality required by the Supreme Court. *Id.* (citing *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991)).

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

After receiving your letter on August 25, 2009, Attorney Advisor Virginia Giroux-Rollow of the Examining Division [now part of the Copyright Office's Registration and Recordation Program] reexamined the application. Ms. Giroux-Rollow determined that the U.S. Copyright Office is not able to register a copyright claim in the work because it is a useful article that does not contain any authorship that is *both* separable *and* copyrightable. Letter from Virginia Giroux-Rollow, Attorney Advisor, Examining Division, U.S. Copyright Office to Charles C. Valauskas of 11/4/2009 (on file with the U.S. Copyright Office) (emphasis original).

Ms. Giroux-Rollow explained the meaning of the term "useful article" as it is defined in Section 101 of the Copyright Act. *Id.* at 1 (citing 17 U.S.C. § 101). A useful article has an intrinsic function that is "'not merely to portray the appearance of an article or to convey information.'" *Id.* A work only fits within the category of a pictorial, graphic, or sculptural work if its pictorial, graphic, or sculptural features can be considered apart from the utilitarian aspects of the work. *Id.*

In examining a useful article, the Copyright Office applies the tests of physical and conceptual separability. *Id.* at 1. In order for a useful article to be regarded as a "work of art," the Copyright Office must determine whether the work has elements that are physically or conceptually separable *apart from the shape of the article*. *Id.* (emphasis in original). The Office does not consider attractiveness of the design, its uniqueness, its visual effect or appearance, the time that it took to create, the possibility of choices, or its commercial success in the marketplace. *Id.* at 1, 4.

Ms. Giroux-Rollow stated that the Copyright Office follows a test for conceptual separability *different* from the tests set forward in *Brandir International v. Cascade Pacific Lumber Co.*, 834 F.2d 1142, (2d Cir. 1987) and *Pivot Point International v. Charlene Products, Inc.*, 372 F.3d 913 (7th Cir. 2004). She pointed out that the Copyright Office follows a test for conceptual separability enunciated in *Compendium II,* Ch. 500, § 505.05. *Id.* at 2. *Compendium II* states that conceptual separability occurs "when a pictorial, graphic, or sculptural work can be visualized on paper, for example, or as a free standing sculpture, as another example, independent of the shape of the article." *Id.*

Citing case law, Ms. Giroux-Rollow further explained that if distinctive features are an integral part of the shape, styling, and contours of the useful article, no registration is possible. *Id.* (citing *Esquire, Inc. v. Ringer*, 591 F.2d 796 (D.C. Cir. 1978)). She explained that "the only basis for a registration of a useful article is whatever aspect that can be viewed as separable and that is also copyrightable as a 'work of art.'" *Id.* (citing *Norris Industries, Inc. v. International Telephone & Telegraph Corp.*, 696 F.2d 918 (11th Cir.1983)).

Citing to *Compendium II,* Ms. Giroux-Rollow noted that aesthetic appeal or distinctiveness does not mean that a work is a copyrightable "work of art." *Id.* at 3 (citing *Compendium II*, Ch. 500, § 505.05). Furthermore, she noted that even if the Office were to concede that YIN YANG contained non-utilitarian, separable elements that distinguished the work, these elements consist of common and familiar shapes that would not support a registration as a work of art. *Id.* (citing *Compendium II*, Chapter 500, §§ 503.02(a)-(b)).

Ms. Giroux-Rollow distinguished the cases that you cited in your First Request for Reconsideration, noting that your work does not have comparable authorship to the work at issue in *Kieselstein-Cord v. Accessories By Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980), nor are the sculptural elements embodied in your work copyrightable independent of incorporation into a useful article. *Id.* at 3 (citing *Mazer*, 347 U.S. 201 (1954)). Citing to *Feist,* Ms. Giroux-Rollow also noted that the work does not contain the requisite separable authorship to support a copyright registration as a copyrightable "work of art." *Id.* Ms. Giroux-Rollow also pointed out that *Chosun Int'l, Inc.*, was inapplicable because in that case the court did not apply any separability analysis. *Id.* at 4.

In conclusion, Ms. Giroux-Rollow noted that Congress's House Report on the current copyright law, H.R. Rep. No. 94-1476, explicitly states Congress's intent to protect only those elements of a useful article that contain separable authorship; *the design of a useful article is not to be protected. Id.* (citing H.R. Rep. No. 94-1476, at 55) (emphasis in original). Because all of the sculptural elements of this work are either related to the utilitarian function of the lid or, if separable, do not contain any copyrightable authorship, Ms. Giroux-Rollow once again refused copyright registration to your work.

D. Second Request for Reconsideration

In a letter dated February 1, 2010, you submitted a second request for reconsideration. Letter from Charles C. Valauskas, Valauskas & Pine LLC, to Virginia Giroux-Rollow of 2/1/2010. You appear to have acknowledged that the YIN YANG work is a useful article subject to the separability tests described in *Compendium II*, Ch. 500, § 505.02. *Id.* at 2. You

also stated that the work should be evaluated based on the conceptual separability test because, "the sculptural feature of the YIN YANG work is molded atop the article and therefore cannot be separated by ordinary means." *Id.* at 3.

You asserted that copyright protection does extend to the sculptural feature of "a partially-raised swirled element–including raised rounded contours and raised rounded edges with a partially-recessed swirled element including recessed rounded contours and recessed rounded edges . . ." *Id.*. You argued that this aspect of the work is separable because it is used to embellish industrial products. *Id.* (citing H.R. Rep. 94-1476, at 55). You posited that an attempt to mentally conceptualize the sculptural feature, described as a partially-raised swirled element, including raised rounded contours and raised rounded edges merged with a partially-recessed swirled element that includes recessed rounded contours and recessed rounded edges, segregated out from the rest of the lid does not destroy the shape of the lid. You also asserted that the sculptural feature was not created for functional reasons. *Id.* at 4. You then went on to assert that the sculptural feature can exist side by side with a visualization of the unadorned lid (conceptually intact) just as a carving on the back of a chair or engraving on a glass vase. *Id.* (citing *Compendium II*, Ch. 500 § 503.03). In this regard you stated that you were amenable to clarifying the application in order to exclude the "lid" as opposed to the sculptural features under the "Claim Limitations" of the copyright application. *Id.*

Next, you argued that YIN YANG's sculptural feature satisfies the standard of originality set forth in *Feist*. You noted that the sculptural feature was independently created by the author and that it satisfies the *de minimis* standard for creative authorship outlined in *Feist* and *Compendium II*, Ch. 500 § 503.02(b). *Id.* at 5. You claim that the sculptural feature of YIN YANG is "not a standard design or a combination of common geometric figures or shapes in three-dimensional form such that it lacks originality." *Id.* at 5-6. Therefore, you asserted, that the separable sculptural feature of the YIN YANG work are sufficiently creative to constitute original authorship. *Id.* at 6.

III. DECISION

After reviewing the application, deposit and arguments in favor of registering Applicant's work, the Review Board upholds the Examining Division's decision to refuse registration of YIN YANG. The Board determines that the work has no separable artistic expression and that even if the sculptural elements that you point out in YIN YANG were conceptually separable from the underlying useful object, it would not meet the *de minimis* standard of creativity set forth in *Feist*.

IV. ANALYSIS

In determining whether a work submitted for copyright registration is copyrightable, a threshold determination is made about whether a work is a useful article or not. *See* 17 U.S.C. § 101. If it is a useful article, the Copyright Office must determine whether the work has any elements that are separable from its utilitarian function. *Id.* (defining "pictorial, graphic, and sculptural works"). In your letter dated February 1, 2009, you acknowledged that the YIN YANG work is a useful article subject to the separability analysis required by copyright law.

Letter from Charles C. Valauskas, Valauskas & Pine LLC to Virginia Giroux-Rollow of 2/1/2010.

A. Legal Standards for Useful Articles and Separability

A useful article is defined as having "an intrinsic function that is not merely to portray the appearance of the article or to convey information." 17 U.S.C. § 101. The purpose of the separability analysis is to ensure that the utilitarian aspects of useful articles do not receive copyright protection. Written guidelines for the separability analysis found in Chapter 500 of *Compendium II* state the following:

> 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.

Compendium II, Ch. 500, § 505.02.

As explained in the legislative history of the Copyright Act of 1976, Congress did not extend Copyright protection to utilitarian articles:

> [A]lthough the shape of an industrial product may be aesthetically satisfying and valuable, the Committee's intention is not to offer it copyright protection under the bill. Unless the shape of an automobile, airplane, ladies' dress, food processor, television set, or any other industrial product contains some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of the 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 the article is determined by aesthetic (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 overall configuration of the utilitarian article as such.*

H.R. Rep. No 94-1476, at 55 (1976) (emphasis added).

Physical separability means that the subject pictorial, graphic, or sculptural features must be able to be separated from the useful article by ordinary means. *Compendium II*, Ch. 500, §§

505.03-505.04. On the other hand, conceptual separability means that the subject features have the following characteristics:

> [They are] clearly recognizable as a pictorial, graphic, or sculptural work which can be visualized on paper, for example, or as freestanding 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, Ch. 500, § 505.03.

For example, while the engraving on a silver fork cannot be readily physically separated from the fork, it can be conceptually separated because one could imagine the engraved design existing as a drawing. The fork, meanwhile, would still remain a useful article, having retained its basic shape, even absent the engraving. The engraving would therefore qualify as conceptually separable. The *Compendium II* also explains that "the 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." *Id.*

As explained in *Esquire v. Ringer*, copyright protection is not available for the "overall shape or configuration of a utilitarian article, no matter how aesthetically pleasing that shape may be." 591 F.2d 796, 800 (D.C. Cir. 1978), *cert. denied,* 440 U.S. 908 (1979). In that case, the Office had refused to register an outdoor lighting fixture, which arguably contained nonfunctional, purely aesthetic features. The court upheld the Office's refusal, noting "Congress has repeatedly rejected proposed legislation that would make copyright protection available for consumer or industrial products." *Id.*[1] Similarly in *Norris Industries v. Int'l Tel. & Tel.*, 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 corrosion, and it did not contain any sculptural design features that could be identified apart from the wheel cover itself. 696 F.2d 918, 924 (11th Cir. 1983), *cert denied*, 464 U.S. 818 (1983).

You have conceded that the sculptural feature of the YIN YANG works is molded atop a useful article, a lid, and therefore cannot be physically separated by ordinary means. Letter from Valauskas of 2/1/2010, at 3. Therefore, the physical separability test does not apply to the work. As indicated above, the Office applies the test of separability adopted in *Esquire* and found in *Compendium II*, in carrying out its mandate at 17 U.S.C. 410(a) to examine works submitted for registration under the copyright law. The Office's *Compendium II* test for conceptual

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[1] Although *Esquire* was decided under the 1909 version of the Copyright Act, it was decided after the enactment of the 1976 Act and the court made clear that its reasoning is 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 803. Since pre-1976 case law in part formed the basis for the 1976 Act, the reasoning of these earlier cases remains relevant to cases arising under the Act.

separability was upheld in the case *Custom Chrome, Inc. v. Ringer*, 35 U.S.P.Q.2d 1714 (D.D.C. 1995). *Custom Chrome* was a case that raised the assertion that the Copyright Office's use of the *Compendium II* separability test was arbitrary and not in accord with the law. The court in that case stated that "so long as the Copyright Office has offered a reasonable construction of the copyright statutes, 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.

The Office applies the test of separability found in the *Compendium II* in carrying out its mandate at 17 U.S.C. 410(a) to examine works submitted for registration. Although the Board disagrees with your separability analysis, the Board finds that the work does not exhibit separable features under the alternative test that you propose.

B. Separable Features are not Present under any of the Separability Tests

1. *Compendium II* Test for Conceptual Separability

You have put forth the argument that YIN YANG may be registered because "the fanciful sculptural features of the work are original and creative design elements that are not dictated by the functions to be performed by the article." Letter from Valauskas of 8/17/2009, at 3. Your argument for conceptual separability fails to meet the test set forth in *Compendium II.* Removal of the fanciful "shapes, lines, and contours on the surface of the work" would destroy the overall shape and configuration of the work. Furthermore, the "partially-raised swirled element including raised rounded contours and raised rounded edges merged with a partially-recessed swirled element" is not conceptually separable as it contributes to the lid's utilitarian function.

The raised element of the Mighty Leaf lid is functional for purposes of holding the end of a tea bag string, which, when tied taut to the top of the lid, remains suspended above the water in the cup below. The raised element of the YIN YANG shape is functional because the domed area of the lid allows you to pull a spent tea pouch up into the domed area.[2] Pulling up on a tea string from the raised portion of the YIN YANG shape squeezes extra liquid from the pouch into the beverage below for extra flavor, and suspends the pouch above the beverage so that it will not over-infuse.[3] The fact that the lid may have been designed differently does not alter its functional nature. In the words of *Compendium II,* "the mere fact that certain features are nonfunctional or could have been designed differently is irrelevant" under the statute. *Compendium II*, Ch. 500, §§ 500.03; 505.03.

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[2] *See, e.g.,* http://www.mightyleaf.com/teawarecups/tea-top-brew-mug/, where your client describes the function of a similarly shaped lid.

[3] *See id.*

2. Denicola Test for Conceptual Separability

Having analyzed the work under the provisions of *Compendium II's* test for separability and having found that the raised swirled element is not a separable feature, we now turn to the alternative separability test under which you previously argued the work would be registrable because separability would be apparent. In your request for reconsideration, you cited to Professor Denicola's test as adopted by the *Brandir* and *Pivot Point* courts. Letter from Valauskas of 8/17/2009, at 2 (citing *Chosum Int'l*, 413 F.3d 324; *Pivot Point Int'l,* 372 F.3d 913; *Brandir Int'l*, 834 F.2d, 1121, 1145). The Copyright Office does not normally judge a creator's intent, the circumstances of creation, or whether "the designer's artistic judgment has been exercised independently of functional influences." *See, e.g., Brandir Int'l,* 834 F.2d at 1145. Such judgments would necessarily rely on interpreting the specific actions surrounding the creation of a work, despite the fact that these actions occur outside the registration process and cannot be discerned from a review of the work itself. Any investigation of the method and circumstances of creation lies beyond the administrative capability of the Office. *See, e.g., Compendium II,* § 108.05. Thus, the Office applies the separability tests from *Esquire* and *Compendium II,* Ch. 100, which involve an objective review of the useful article itself rather than a review of extrinsic evidence relating to intent and other matters, in carrying out its mandate at 17 U.S.C. 410(a) to examine works submitted for registration. However, even under the Denicola test, the Review Board finds that the work does not contain separable copyrightable elements.

You argue that the work's design elements can be identified as reflecting the designer's aesthetic judgment exercised independently of functional considerations. Letter from Valauskas of 8/17/2009, at 3. We recognize that the lid contains features that are arranged so that it serves its useful function of suspending used teabags above the contents of the cup the lid is covering, while also appearing attractive. However, these features are nevertheless aspects of an article that have a utilitarian purpose. Under the Denicola test, "copyrightability ultimately should depend on the extent to which the work reflects artistic expression *uninhibited* by functional considerations." Robert C. Denicola, "Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles," 67 *Minn. L. Rev.* 707, 741 (1983) (emphasis added). Additionally, in the words of the *Brandir* court, "if design elements reflect a merger of aesthetic and functional considerations, the artistic aspects of a work cannot be said to be conceptually separable from the utilitarian elements." *Brandir*, 834 F.2d at 1145. Such is the case with the partially raised swirled element of the lid because it is responsive to users' utilitarian demands. While the work may be novel and aesthetically pleasing, it is nevertheless created in a way that allows the device to work as a novel type of tea lid. As indicated previously, YIN YANG meets the utilitarian and functional demands of a beverage lid, namely securing used teabags. The work thus fails the Denicola test because its form does not, in Professor Denicola's words, "reflect purely aesthetic visions." 67 *Minn. L. Rev.* at 743.

You have also cited the seminal case *Mazer v. Stein,* 347 U.S. 201 (1945) for the proposition that "works that would be otherwise considered sculptural are not denied protection simply because they are put to a utilitarian function." Letter from Valauskas of 8/17/2009, at 2. Although *Mazer* teaches that works of art may be used in commercial or industrial products and still retain copyright protection, we nevertheless do not consider *Mazer* to be support for your separability arguments. In *Mazer*, a sculpture of a Balinese dancer was created and registered as

a work of art, but was later incorporated into a lamp, functioning as the base of the lamp. The court found that this incorporation did not bar copyright protection. While the Office admits the possibility that a useful article may contain separable features, *i.e.*, features which may, in themselves, be works of art protectable by copyright; we point out that *Mazer* provides no detailed analysis or framework that can be used in support of your position that the features of the beverage lid which you have enumerated are conceptually separable. In any event, nothing about the design of the lid suggests that its shape was first created for purely artistic purposes, having nothing to do with serving the function of a tea lid, but then put to a utilitarian function.

C. Requirements for Originality

1. The *Feist* Decision

Although we do not find the design at issue here separable from the functional aspects of the cup, we nevertheless provide the following analysis of the design as if it were separable merely as further support for the conclusion that the YIN YANG design does not support a claim for registration.

Even if an artistic feature may be separable from a utilitarian object, such separability does not necessarily mean that it will 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 components: (1) independent creation and (2) sufficient creativity. *See Feist*, 499 U.S. at 345 (1991). First, the work must have been independently created by the author, i.e., not copied from another work. The Office accepts that your client, Mighty Leaf, independently created the YIN YANG. Therefore, the first required component of the term "original" is not at issue here. The second required component for a work of authorship to be original and therefore protected by copyright is that the work must possess sufficient creativity. In determining whether a work embodies a sufficient amount of creativity to sustain a copyright claim, the Board adheres to the standard set forth in *Feist,* where the Supreme Court held that only a modicum of creativity is necessary. The Court stated that the requisite level of creativity is "extremely low"; "even a slight amount will suffice." *Feist*, 499 U.S. at 345.

Even prior to *Feist*, Copyright Office practices recognized a minimum 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*, Ch. 200, § 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 Ch. 500, § 503.02(a). In implementing this threshold, the Office, as well as courts, has consistently found that standard designs and geometric shapes are not sufficiently creative in themselves to support a copyright claim. *Id.* at Ch. 500, § 503.02(a). Of course, some combinations of common or standard design elements contain sufficient creativity with respect to how they are combined or arranged to support a copyright. *See Feist*, 499 U.S. at 358.

2. Any Conceptually Separable Elements of YIN YANG Do Not Embody Sufficient Creativity

In your second request for reconsideration, you described the base portion of the YIN YANG work as "a partially-raised swirled element including raised rounded contours and raised rounded edges merged with a partially-recessed swirled element including recessed rounded contours and recessed rounded edges molded atop a lid." Letter from Valauskas of 2/1/2010, at 3. You claimed that "[t]he sculptural feature is not a design or a combination of common geometric figures or shapes in three-dimensional form such that it lacks originality." *Id.* at 6. Yet, according to your description as well as the Board's examination, the overall shape of the "sculptural element" can at best be described as a trivial variation of a common symbol. It is in fact, as the title your client has selected suggests, a three-dimensional representation of the well-known and ancient Chinese Yin Yang symbol, sometimes called the Tai-Chi symbol.

As *Compendium II* states, "[I]t is not possible to copyright common geometric figures or shapes in three-dimensional form, such as the cone, cube, or sphere. . . [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." *Compendium II*, Ch. 500, § 503.02(b). Because the form of YIN YANG consists simply of a standard figure with nearly no – or at most trivial, *i.e. de minimis* – linear or spatial variations, the work does not rise to the level of creative expression that would entitle it to copyright protection.

V. CONCLUSION

For the reasons stated in this letter, the Copyright Office Review Board affirms the refusal to register YIN YANG. This decision constitutes final agency action in this matter.

Sincerely,

/s/

Robert J. Kasunic,
Deputy General Counsel
for the Review Board
United States Copyright Office