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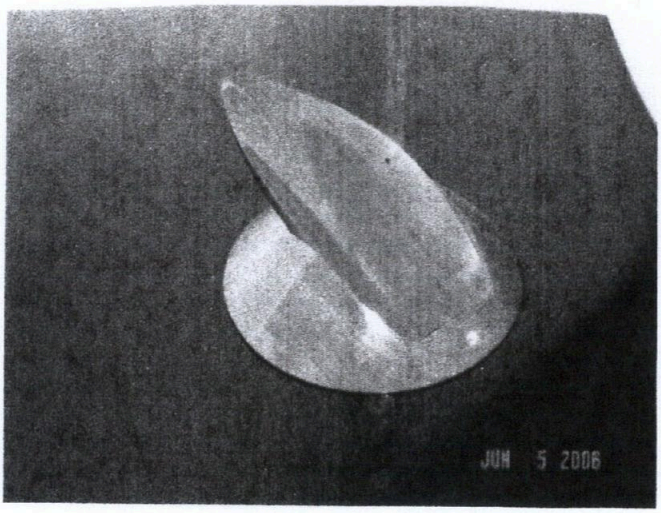
Re: STRETTO
Copyright Control Number: 61-414-1478(G)

Dear Mr. Andrews:

I write on behalf of the Copyright Office Review Board (Board) in response to your letter of May 9, 2007, in which you requested a second reconsideration of the Copyright Office's (Office) refusal to register a 3-dimensional sculpture entitled STRETTO. The Board has carefully examined the application, the deposit and all correspondence concerning this application, and affirms the denial of registration of this work.

I. DESCRIPTION OF THE WORK

The subject work, "STRETTO," is described on the registration application form as a "wine bottle holder/sculpture." The work is made of two carved wood parts, the base and the stem. The rounded base is essentially a spherical cap with a section carved out along one axis approximately half way up the base's progression toward a rounded top. A large circular diamond is embedded in the base just below the carved out section that holds the stem. The stem is a concave ellipse with approximately one quarter of the length of the full ellipse cut off by a plane. The stem is affixed to the base at an angle so that the elongated end of the stem rests higher than the end which is cut off by a plane. The lower end of the stem meets the base to create a notch or v-shaped indentation.



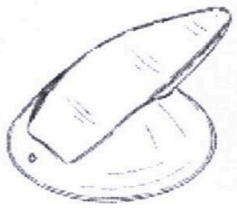


FIG. 1

FIG. 2



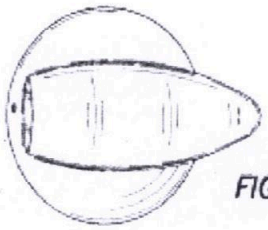


FIG. 3

Submitted photograph and sketched images of "STRETTO" appear above.

II. ADMINISTRATIVE RECORD

A. Initial submission and Office's refusal to register

On June 27, 2006, the Office received a Form VA application along with the required deposit and fee for the work: "STRETTO" ("the Work"). You made the submission on behalf of your client, Arthur Tabrizi, LLC. In a letter dated August 28, 2006, Copyright Examiner Sandra D. Ware refused registration of the Work because she determined that it was a useful article that does not contain any separable authorship needed to sustain a claim to copyright. *Letter from Ware to Andrews of 8/28/2006*, at 1.

Ms. Ware 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 is protectable 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.* (*citing* 17 U.S.C. § 101 and H.R. Rep. No. 1476, 94th Cong., 2d Sess. (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. *Id.* (*citing* Compendium of Copyright Office Practices II, Ch. 5 (1984)) [hereinafter Compendium II]. Ms. Ware 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" cannot be perceived as having a separate, independent existence from the useful article. She also noted that regardless of whether 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 1-2.

Ms. Ware concluded that the Office could not register this claim because "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, [and, thus] there is no physically or conceptually 'separable' authorship as such." *Id.* at 2.

B. First request for reconsideration

In a letter dated October 11, 2006, you requested reconsideration of the decision to refuse registration of the Work. *Letter from Andrews to Examining Division of 10/11/2006*, at 1. In this letter, you contested the Office's conclusions that the Work does not contain any separable authorship and that all elements of the Work are utilitarian. Although you conceded that the Work contains a functional feature, you asserted that this functional feature was secondary to the Work's primary sculptural and artistic purpose. You then made particular note of the large circular diamond embedded in the base of the Work, arguing that it constituted clear separable authorship. *Id.*

You pointed out that the Supreme Court has repeatedly held that a work may be functional and still have protected creative expression. *Id.* (*citing* Mazer v. Stein, 347 U.S. 201 (1954)). Despite the fact that the Work has a functional purpose, you argued that the Work also contained elements that are not utilitarian in any sense. You argued that the wood stem, the round base and the embedded diamond were incorporated specifically for their aesthetic value and not for any utilitarian reason. You asserted, therefore, that these elements meet the standard of copyrightable protection. *Id.* at 1-2.

C. Examining Division's response to first request for reconsideration

Attorney Advisor, Virginia Giroux-Rollow, Examining Division, reexamined the application and the deposit which had been submitted for this Work. Ms. Virginia Giroux-Rollow responded in a letter dated February 9, 2007; she upheld the refusal to register the Work as a 3-d sculpture

because she found it, a wine bottle holder (as described on the application form originally submitted June 27, 2006), to be a useful article that did not contain any authorship that is both separable and copyrightable. *Letter from Giroux-Rollow to Andrews of 2/9/2007*, at 1.

Ms. Giroux-Rollow first noted that it is not the material of which a work is made that determines copyrightability. She added that the fact that the Work at issue here is carved wood and is embellished with a diamond or any other kind of gemstone does not contribute to copyrightability of the Work. *Id.* In response to your suggestion that the Work is not a "useful article," she stressed that a wine bottle holder may serve as a decorative piece and still fall within the "useful article" category. She noted that "useful articles" need only have "an intrinsic function" under the definition of useful article in section 101 of the copyright law. *Id.* In classifying the Work a useful article, Ms. Giroux-Rollow explained that copyright protection could be extended if, and to the extent that, a work has any pictorial, graphic, or sculptural authorship that is either physically or conceptually separable from the utilitarian aspects of the article without destroying its basic shape. *Id.* She added that, in making this determination, examiners do not make aesthetic judgments nor are they influenced by the attractiveness of a design, its visual effect or appearance, its uniqueness, its symbolism, the amount of time and effort it took to create, or its commercial success in the marketplace. *Id.* at 2.

Ms. Giroux-Rollow noted that you do not dispute the fact that the Work, a wine bottle holder, is functional. Rather your contention is that it contains non-functional sculptural design elements that are based on aesthetic rather than utilitarian concerns, and as such, contains separable authorship that is copyrightable. She clarified that the question of whether the Work contains a sufficient amount of original and creative authorship that is both separable and copyrightable is to be determined within the meaning of the copyright law and settled case law. *Id.*

The Office's test for conceptual separability, she pointed out, is enunciated in Compendium of Copyright Office Practices, Compendium II, 505.03 (1984), which generally follows the separability principle set forth in Esquire v. Ringer, 591 F.2d 796 (D.C. Cir. 1978). Compendium II, she noted, provides that conceptual separability occurs when the pictorial, graphic, or sculptural features, while physically inseparable by ordinary means from the utilitarian item, are nevertheless clearly recognizable as a pictorial, graphic, or sculptural work which can be visualized on paper, for example, or as a free-standing sculpture, as another example, independent of the shape of the article, without destroying the basic shape of the article. *Id.* Ms. Giroux-Rollow further stated that conceptual separability could not be met by analogizing the general shape of a useful article to modern sculpture, or by arguing that certain features are non-functional, or could have been designed differently. *Id.* at 2. She further contended that Esquire upheld the Office's position of not registering useful articles on the basis of the overall shape or configuration of a utilitarian article, no matter how aesthetically pleasing that shape might be. Similarly, she cited Norris Industries, Inc. v. International Tel. & Tel. Corp., 696 F.2d 918 (11th Cir. 1983), *cert. denied*, 464 U.S. 818 (1983), which held that a wire-spoked wheel cover was not copyrightable because it did not contain any sculptural design that could be identified apart from the wheel cover, a useful article. *Id.*

Ms. Giroux-Rollow determined that the Work at issue here, a wine bottle holder, is a useful article. She reached this conclusion because the shape of the stem as well as the rounded base are all part of the overall shape. Except for the embedded diamond, which is not copyrightable in itself,

the design elements cannot be perceived as physically or conceptually separable from the useful article itself without destroying their basic shape. *Id.* at 3. She further explained that the fact that a work consists of a unique or distinctive shape for purposes of aesthetic appeal does not mean that the work constitutes a copyrightable "work of art." As stated in Compendium II, § 505.05, the aesthetics of a design or the fact that the design could have been designed differently are not relevant considerations in determining copyrightability. Finally, Ms. Giroux-Rollow cited language in Congress' House Report to the 1976 Act (current copyright law), clearly stating the need for separable authorship to stand on its own and that the non separable elements of a useful article are not to be protected. *Id.*

D. Second request for reconsideration

In a letter dated May 9, 2007, you dispute the previous refusal's determination that the Work is a "useful article that does not contain any authorship that is both separable and copyrightable" and request a second reconsideration. *Letter to Giroux-Rollow of 5/9/2007,* at 1.

You argue that the "holder" portion of the Work is not an intrinsic function under the meaning of section 101 of the copyright law. Instead you maintain that, in its basic form, the Work is a sculptural work of art. Under your argument, the fact that the sculptural work can also be used to hold a wine bottle is an incidental and insignificant factor to its artistic appeal and copyrightability. You went on to claim that the creative authorship of the sculpture is separable from any intrinsic utility that the Work may have. You added that the author is not attempting to make claims to any functional instruments. Rather, he is attempting to protect the artistic sculpture, which you assert is "capable of existing independently of the utilitarian aspects of the article." *Id.* at 1-2 (*citing* 17 U.S.C. § 101).

You dispute the previous refusal's conclusion that any utilitarian or intrinsic function in a sculpture renders the artistic work at issue here non-copyrightable, and argue that, if this were the case, section 101 would hold little or no weight. In support of this argument you note that even the most abstract sculptural piece can be used in some utilitarian fashion. You then advance an alternative view that as long as the artistic rather than the functional design is submitted, a sculpture should be granted copyright registration. *Id.*

Submitting that Compendium II, sec. 505, actually supports grounds for registration of the Work at issue here, you cite selected excerpts of Compendium II, sec. 505.02, for the position that useful articles can be considered for copyright if the sculpture contains features which are capable of "independent existence apart from the shape of the useful article." *Id.* at 1-2 (*citing* Compendium II, sec. 505.02). You go on to assert that, under a physical or conceptual basis, creative aspects of the Work are clearly separable from any utilitarian function. You further assert that it is irrelevant to copyrightability that the particular artistic design incorporates concave space. You also contend that incidental utility should have no bearing on copyrightability, citing the hypothetical example of a statue having the inadvertent utilitarian role as a place to hang a coat, followed by an assertion that such utilitarian aspects should not immediately designate a work as "inseparably functional." *Id.* at 2.

With respect to separability, you cite the conceptual basis test set forth in Compendium II, 505.03, noting that the works cited as not subject to copyright due to their inherent functionality belong in a different category than the Work at issue here. You argue that, unlike the works cited in Compendium II, the intent of the Work at issue "is not to be used for a particular purpose." You go further to assert that "[w]hether or not an individual decides to use the sculpture for a secondary function is irrelevant." *Id.* at 3.

In response to the previous refusal's citation of Esquire v. Ringer, you contend that the case does not apply to the Work in question here because unlike a light fixture, that necessarily provides utility through its design, this Work "does not have a primary inherent function." You go on to assert that the Work "was designed and intended to be displayed for its design own value with no additional uses." *Id.* Turning to the legislative history which indicates the need for separable authorship to stand on its own and that the non-separable elements of a useful article are not to be protected, you attempt to exclude the Work from being placed in the same category as those discussed in the House Report. You then go on to cite both Mazer v. Stein and Rosenthal v. Stein, for the proposition that a work may be functional and still have protected creative expression. *Id.* (*citing* Mazer v. Stein 347 U.S. 201 (1954) and Rosenthal v. Stein 205 F.2d 633, 635 (1953)).

In requesting reconsideration, you made clear that you are not seeking any estimation of the Work's artistic merit. Rather you requested that examination of the Work be done separately from any incidental or secondary uses that may be found within it. *Id.*

III. DECISION

After reviewing the application and deposit submitted for registration and the arguments that you have presented, the Copyright Office Review Board affirms the Examining Division's refusal to register the Work, "STRETTO." The Board concludes that the Work is a useful article that does not contain sufficient authorship that is both separable and copyrightable.

A. Useful articles and separability

1. Work is a useful article, subject to the separability requirement

The Board agrees with Examiner Ware's and Attorney-Advisor Giroux-Rollow's determinations that the wine bottle holder is a useful article for purposes of copyright law. Indeed, in both your first [*Letter from Andrews of 10/11/2006,* at 1] and second [*Letter from Andrews of 5/9/2007,* at 2] requests for reconsideration, you refer to the Work's utilitarian feature. While you concede that the Work at issue here contains a functional feature, you assert that the Work is not a useful article because the "holder" portion of the work is not an intrinsic function under the meaning of section 101 but instead is an incidental and insignificant secondary function. *Letter of 5/9/2007,* at 2. We conclude that such an argument represents an inaccurate application of the law.

Defined under the 1976 Copyright Act, a "useful article" is 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 (definitions). The Board notes that, under the copyright law, an article qualifies as a "useful article" as long as it has "*any* intrinsic utilitarian function." *See e.g.*,

Fabrica, Inc. v. El Dorado Corp. 697 F.2d 890, 893 (1983), citing the House Report to the 1976 Act: "... The test of separability ... does not depend on the nature of the design...." [H.R. Rep. No. 1476, 94th Cong., 2d Sess. 55 (1976).] The Ninth Circuit in the Fabrica case pointed out the distinction between the 1909 copyright law and the major copyright law revision that became effective January 1, 1978: "The significant change from the prior law is that courts need no longer determine whether an article's function is solely utilitarian. Now, if an article has any intrinsic utilitarian function, it can be denied copyright protection except to the extent that its artistic features can be identified separately and are capable of existing independently as a work of art." Fabrica, 697 F.2d at 893. A *sole* or *primary* intrinsic function is not necessary. That the Work in question is intended to serve as a sculptural work in addition to its intrinsic function is immaterial to the determination of whether it qualifies as a useful article for copyright registration purposes.

As you have asserted in both your requests for reconsideration [see above], the Work at issue here does, indeed, serve a function– it holds a wine bottle (description given on the originally submitted application form). Although you have stated that the Work is a sculptural work that can also be used to hold a wine bottle, you add that this fact is "incidental and insignificant" with respect to the Work's "artistic appeal and copyrightability." *Letter from Andrews of 5/9/2007,* at 2. Because of the change that occurred in the copyright law's definition of useful article that we have just pointed out [above], the Work's usefulness as a holder of a wine bottle is not insignificant as we determine whether it is a useful article or not– it is.

2. Separability requirements

As you have correctly noted, even works of artistic craftsmanship, which may be useful articles themselves, may receive protection as pictorial, graphic or sculptural works pursuant to the current statute, 17 U.S.C. § 101. This protection is limited, however, in that it extends only "insofar as their form but not their mechanical or utilitarian aspects are concerned." Ms. Giroux-Rollow explained this principle in her February 9, 2007 Letter: 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. at 1.* This separability may 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. 1476, 94th Cong., 2d Sess. 55 (1976).] at 55.

You have asserted that the "author is not attempting to protect a certain design of a bottle holder, or make any claims to the increased functionality of the submitted work for a particular purpose. Rather, the author is attempting to protect the creative design of his artistic sculpture, which is undoubtedly 'capable of existing independently of the utilitarian aspects of the article." *Letter from Andrews of 5/9/2007,* at 2. You go on to say that "... we do not believe that the inclusion of any utilitarian or instrinsic function in a sculpture renders the artistic work non-copyrightable. ... [e]ven the most abstract sculptural showpiece" may have a use; you have also said that "as long as the artistic rather than the functional design is submitted, a sculpture should be granted copyright registration." *Id.*

The Review Board has concluded that you have misunderstood the concept of "useful article." We have referred to the House Report [above] because it clearly explains Congress's intention to continue to include pictorial, graphic, and sculptural works as applied art protected by federal copyright law, consistent with the decision in Mazer v. Stein, 347 U.S. 201 (1954); the Supreme Court in Mazer recognized the distinction between applied art and works of industrial design. You have cited Mazer to support the proposition that "a work may be functional and still have protected creative expression." *Letter from Andrews of 5/9/2007,* at 3. We agree: ornamental features on a useful article, when not contributing to the utilitarian functions, may be considered conceptually separable. Although Mazer is an important case which teaches that works of art may be used in commercial or industrial products and still retain copyright ("We find nothing in the copyright statute to support the argument that the intended use or use in industry of an article eligible for copyright bars or invalidates its registration. We do not read such a limitation into the copyright law." 347 U.S. at 218), we nevertheless do not consider Mazer to be support for your separability argument for the bottle opener here. The Office admits the possibility that a useful article may contain separable features, *i.e.*, features which may, in themselves, be works of art protectible by copyright; but we point out that Mazer did not explicitly address the separability issue and, thus, provides no detailed analysis or framework that can be used in support of your position that the particular features of this bottle holder which you have indicated are separable.[1]

Summarizing the history of copyright in useful articles, the House Report to the 1976 Act describes a painting, drawing, or graphic work that "can be applied to utilitarian articles such as textile fabrics, wallpaper, *containers*, and the like." H.R.Rep. No. 1476, at 55 (emphasis added). The Review Board thus points out that a "useful article" is not necessarily an automobile or a television in order to be classified, under Congress's intention, as a "useful article," *i.e.*, a work of

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[1] You have also cited a similar case, Rosenthal v. Stein, 205 F2d 633 (9th Cir. 1953), again concerning statuettes as lamp bases. The Court stated essentially the same principle as did the Supreme Court that copyright does not give the owner of the copyright in a particular work the right to any mechanical or utilitarian uses of the work. 205 F.2d at 636. Again, this case provides no support to overcome the Office's previous regulations under the 1909 Act and/or Congress's intent that the 1976 Act protects a work of art only to the extent that the artistic features can be identified (physically or conceptually) separately from the object of in which it may be embodied.

industrial design. The distinction consists in the concept of a work of applied art as opposed to that of a work of industrial design. To give you examples of works that courts have considered useful articles and, thus, works of industrial design, the Board cites Pivot Point International, Inc. v. Charlene Products, Inc., 372 F.3d 913 (7th Cir. 2004). In that case, a mannequin head was held by the Seventh Circuit to be a useful article, marketed and used to practice the art of makeup application and hair styling. Pivot Point, 372 F.3d at 920. The Court, emphasizing the difficulty courts have found in drawing the "fine line" that runs "between [the] protectible pictorial, graphic, and sculptural works and unprotectible utilitarian elements of industrial design," 372 F.3d at 921, also confirmed that "... Congress wisely chose to provide only general policy guidance to be implemented on a case-by-case basis through the Copyright Office and the courts." *Id.* The Copyright Office has issued practices regarding the registration of works of authorship, Compendium of Copyright Office Practices, Compendium II (1984), including works that fall under works of the visual works– pictorial, graphic, or sculptural works– to the extent that such pictorial, graphic or sculptural features can be "identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." 17 U.S.C. § 101.

Physical separability means that the subject pictorial, graphic or sculptural features must actually be physically separated from the useful article by ordinary means, leaving the overall useful article intact. This principle is found in the manual of examining and registration practices which the Copyright Office uses, Compendium II, sec.505.03 -505.04 . The Copyright Office also applies the test for conceptual separability that is found in Compendium II. Conceptual separability, under the Compendium test, 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, sec.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.

3. Work at issue a useful article but separable features not present

Again, physical separability means that the subject pictorial, graphic, or sculptural features of a work must be able to be separated from the useful article by ordinary means. In examining the Work at issue here, STRETTO, a wine bottle holder, in which the base and stem are affixed to one another to form a singular piece, the Board does not find it apparent that any copyrightable portion of the Work can be physically removed regarding any of its utilitarian aspects. The Work is configured to be a sweeping, continuous wooden container, amenable to holding a bottle.

And, unlike the statuettes in Mazer, this Work has not been shown to have a preexisting or independent existence as a work of art. We do not consider Mazer [see above] to be support for your argument that the "basic shape of the Work is not functional or useful... [I]t is an artistic expression meant to be displayed for no purpose other than its aesthetic value." *Letter from Andrews of 5/9/2007,* at 3. The Office admits the possibility that a useful article may contain separable features,

i.e., features which may, in themselves, be works of art protectible by copyright; but we again remind you that Mazer did not explicitly address the separability issue and, thus, provides no detailed analysis or argumentation that can be used in support of your position that the any of the particular features of the Work at issue here are separable.[2]

With regard to conceptual separability, you argue that the examples cited in Compendium II are different from the Work at issue. *Letter from Andrews of 5/9/2007,* at 3. You have stated that the Work here should be treated as a work of art "standing alone, and without the need of any incidental uses to gain its instrinsic value." 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." Again, Compendium II, [above], sec. 505.03.

The Review Board finds that the sculptural features of the holder cannot be imagined separately and independently from the useful article without destroying the basic shape of the useful article. Without the rounded base, the basic shape of the holder would be destroyed. Similarly, without the specific concave shape of the stem that is fitted to hold a wine bottle, and the stem's placement at a precise up-tilted angle to show the Work as a unified whole, the basic shape of the holder would be destroyed and it could not hold a wine bottle as intended. While each of these features could have been designed differently, individually or in combination, all of the individual parts are components of the overall useful article. One cannot imagine a work of art, *i.e.*, a sculpture, of this exact configuration or shape as standing next to the Work of the bottle holder without destroying the Work itself: the shape of the "sculptural work" is the shape of the bottle holder. You have repeatedly made the argument that the Work at issue here is a sculpture, not a useful article, and that "whether or not an individual decides to use the sculpture for a secondary function is irrelevant." *Letter from Andrews of 5/9/2007,* at 3. The Board, again, points out that the statutory definition of "an intrinsic utilitarian function" [see above] is inclusive of any function– primary, secondary, or otherwise– for which an article may be able to serve.

Although you have stated that the Work at issue here is not an industrial design and have cited Esquire, we must, again, point out that as explained in Esquire, Inc. v. Ringer, 591 F.2d 796, 800 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 908 (1979), 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

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[2] As Ms. Giroux-Rollow noted in her February 9, 2007, Letter, at 2: When evaluating and analyzing the fixed expression of a work, "Examiners do not make aesthetic decisions; nor are they influenced in any way by the attractiveness of a design, its visual effect or appearance, its uniqueness, ... or its commercial success in the marketplace.

available for consumer or industrial products." *Id.*[3] There is fair likeness as a "consumer" product between the lamp in Esquire and the bottle holder Work at issue here.

The wine bottle holder at issue here is composed as a rounded base attached to an elongated, oval-shaped stem that could not be conceptually removed from the shape of the overall Work without destroying, *i.e.*, significantly modifying, the shape of the Work. The Board sees no feature of the Work that could conceptually be visualized separately and independently of the useful article without destroying the basic shape of the article. The one exception is the large circular diamond embedded in the base just below the carved out section that holds the stem; this diamond, or jewel, in contrast to the sculptural elements, is conceptually separable [and, perhaps, even physically separable]. Nevertheless, as explained below, the Review Board finds that the diamond and its placement, individually or in combination, do not contain sufficient creative authorship to support the registration of a claim of copyright.

B. Creative authorship of the single jewel insufficient to sustain a claim to copyright

Copyright protection is only available for "original works of authorship." 17 U.S.C. §102(a). The Supreme Court has stated that originality consists of two elements– "independent creation plus a modicum of creativity." Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 346 (1991). *See also, e.g.,* Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 102 (2d Cir. 1951) ('Original' in reference to a copyrighted work means that the particular work 'owes its origin' to the 'author.' No large measure of novelty` is necessary.); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884). The Review Board does not refute that the Work at issue here was independently created, *i.e.*, not copied. Yet, the originality requirement dictates that the Work must "display some minimal level of creativity." Feist at 358. While it is true that most works meet or surpass this requisite level quite easily, the Feist decision itself makes clear that some works do not. "There remains a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent." Feist at 359.

While the Copyright Office does not judge the "worth" of any work, it is statutorily required to determine whether the material deposited constitutes copyrightable subject matter and whether the other legal and formal requirements of the law have been met. 17 U.S.C. § 410(a).

Office regulations state that "[w]ords and short phrases such as names, titles, and slogans; familiar symbols or designs, mere variations of typographic ornamentation, lettering or coloring. . . ." are not subject to copyright. 35 C.F.R. § 202.1(a). Under these established standards, the Board concludes that the single, large circular diamond placed in isolation in the wooden base of the Work at issue here constitutes an uncopyrightable, common geometric shape, *i.e.*, it is a simple little circle of a gemstone. In addition, the placement of this singular, separable item represents insufficient

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[3] 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.

creative authorship. The single gemstone does not even represent a pattern or a design on the surface of the bottle holder.

Although there is substantial support in case law for the principle that designs or combinations of a few basic shapes or simple or familiar symbols, the Work at issue here with it lone gemstone embedded in the wooden base does not exhibit such trivial designs or a simple pattern. *See, e.g.*, Homer Laughlin China Co. v. Oman, 22 U.S.P.Q.2d 1074 (D.D.C. 1991), upholding refusal to register chinaware design pattern composed of simple variations or combinations of geometric designs due to insufficient creative authorship to merit copyright protection; Jon Woods Fashions, Inc. v. Curran, 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988), upholding refusal to register fabric design consisting of striped cloth with small grid squares superimposed on the stripes where Register concluded design did not meet minimal level of creative authorship necessary for copyright; John Muller & Co., Inc. v. N.Y. Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986), upholding a refusal to register a logo consisting of four angled lines forming an arrow, with the word "arrows" in cursive script below, noting that the design lacked the minimal creativity necessary to support a copyright and that a "work of art" or a "pictorial, graphic or sculptural work ... must embody some creative authorship in its delineation of form." Thus, the only separable element in this Work is an uncopyrightable, familiar-shaped gemstone with no accompanying design features appearing on the surface of the Work to constitute any further conceptually or physically separable aspects.

IV. CONCLUSION

For the reasons stated herein, the Copyright Office Review Board affirms the refusal to register the work entitled "STRETTO." This decision constitutes final agency action on this matter.

Sincerely,

/s/

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