United States Copyright Office
Library of Congress · 101 Independence Avenue SE · Washington, DC 20559-6000 · www.copyright.gov

August 9, 2013

Hyra IP, PLC
Attn: Clifford Hyra
11710 Plaza America Drive
Reston, VA 20190

Re: ***Horus Powercap***
Horus Small Crystal Rod Type A
Horus Large Crystal Rod Type B
Correspondence ID: 1-7QX39F

Dear Mr. Hyra:

I am writing on behalf of the Review Board of the United States Copyright Office ("Board") in response to your letter dated April 29, 2011 and supplement dated May 3, 2011, in which you requested a second reconsideration of the Copyright Office's (the "Office") refusal to register the works entitled *Horus Powercap*, *Horus Small Crystal Rod Type A*, and *Horus large Crystal Rod Type B* (the "Works"). The Board has carefully examined the application, the deposit, and all correspondence concerning this submission, and affirms the denial of registration of these works.

I. DESCRIPTION OF WORKS

The subject works are a cap design and two crystal rod designs. The work entitled *Horus Powercap* consists of a top with an inverted extended egg-shape which never reaches its end but flows smoothly into the gently curved top of a first round terrace. This terrace slopes from a first wide circumference at its top surface to a narrower bottom circumference which has its widest point on the upper part of the shape instead of the bottom. The first terrace flows smoothly into a second, larger circular terrace with a gently curved top that slopes into a bottom with a narrower circumference. This second terrace flows smoothly into a hollow cylindrical grooved base. The three circular grooves result in four peaks alternating with three valleys.

***Horus Powercap*:**

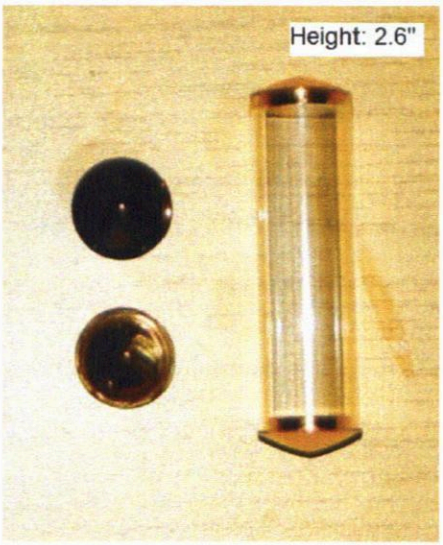






The work entitled *Horus Small Crystal Rod Type A* consists of a short, thick, clear hollow cylinder capped at either end by a gently sloped hollow conical top with an inner, hollow, concentric cylindrical ring extending downwards from the conical portion, each of which is visible in its entirety through the clear cylinder.

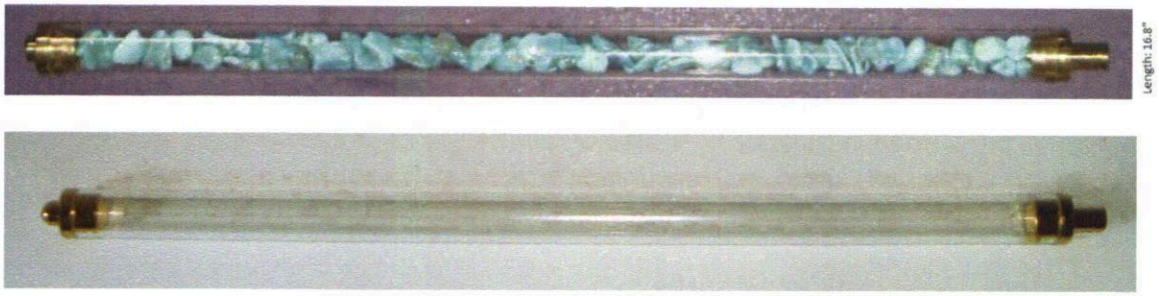
***Horus Small Crystal Rod Type A*:**





The work entitled *Horus Large Crystal Rod Type B* consists of a long, thick, clear hollow cylinder capped at one end by a half-oval shape and at the other end by a cylindrical top. The cylindrical body terminates at each end with a structure having three distinct segments. The first segment is a cylindrical portion extending into the clear hollow cylinder. The second segment is the middle rim portion, which is cylindrical and matches the circumference of the clear hollow cylinder. The third segment is a cylinder of smaller circumference extending out and away from the cylinder and first and second segments.

***Horus Large Crystal Rod Type B*:**



II. ADMINISTRATIVE RECORD

A. Initial Application and Office's Refusal to Register

After the Copyright Office received applications to register the Works, in a letter dated August 9, 2010, Registration Specialist, Guy Messier, refused registration finding that the Works lack the creative authorship necessary to support a copyright claim. *Letter from Messier to Hyra*, at 1 (March 26, 2010).

Citing *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), Mr. Messier noted that to be original, a work must be independently created by the author and possess at least a minimal degree of creativity. *Id.* He stated that a work of the visual arts must contain a minimum amount of pictorial, graphic, or sculptural authorship. *Id.* In addition, he clarified that copyright does not protect familiar symbols or designs or basic geometric shapes. *Id.* Furthermore, Mr. Messier cited *Bleistein v. Donaldson*, 188 U.S. 239 (1903) and *Feist* to note that aesthetic appeal, commercial value, and the amount of time and effort expended to create a work are not factors considered under copyright law when determining copyrightability. *Id.*

B. First Request for Reconsideration

On October 22, 2010, you requested reconsideration of the Office's decision to refuse registration of the Works. *Letter from Hyra to Register of Copyrights* (October 22, 2010) ("*First Reconsideration letter*"). In this letter, you argued that the Registration

Specialist incorrectly found that the Works lacked sufficient creative authorship for copyright registration. *Id.* at 2.

You first stated that the works at issue do not fall under the specific examples of works lacking sufficient originality listed by the Registration Specialist under 37 C.F.R. § 202.1. *Id.* You asserted that the Works are not "familiar symbols or designs, basic geometric shapes, words or short phrases, variations of typographic ornamentation, lettering or coloring, or any idea concept, system, or process" but rather are "unique sculptures which have designs and embellishments, materials, and forms selected for visual impact." *Id.*

To support your case, you noted that the Supreme Court has held that the amount of creativity required to support a copyright claim is extremely low and even a slight amount of creative authorship will suffice. *Id.* (citing *Feist,* 499 U.S. at 345; *Key Publ'ns, Inc. v. Chinatown Today Pub. Enters., Inc.*, 945 F.2d 509, 513 (2d Cir. 1991)). You then stated that a work may "be denied registration if it embodies only an 'age-old practice . . . so commonplace that it has come to be expected as a matter of course,' such as the alphabetical arrangement of names." *Id.* at 2-3 (citing *Feist*, 499 U.S. at 341). You further asserted that if "a work embodies something more than that, it is entitled to registration, 'no matter how crude, humble or obvious.'" *Id.* at 3 (citing *Feist*, 499 U.S. at 345).

You then stated that the relevant question is "whether the works submitted for registration are so age-old and commonplace as to be expected as a matter of course, similar to the alphabetical arrangement of names, or whether they have some creative spark, no matter how humble or obvious the design." *Id.* at 3. You described some of the designs of the submitted works and questioned whether each design is an "age-old design so commonplace as to be expected as a matter of course" or a "humble spark of creativity." *Id.*

You then argued that combinations of simple shapes are routinely granted copyright registration by the Copyright Office and accorded copyright protection in court. *Id.* at 3-4. You cited the D.C. Circuit in *Atari Games Corp. v. Oman* to state that "'[S]imple shapes, when selected or combined in a distinctive manner indicating some ingenuity, have been accorded copyright protection both by the Register and in court.'" *Id.* at 4 (citing *Atari Games Corp. v. Oman*, 888 F.2d 878, 883 (D.C. Cir. 1989) (hereinafter "*Atari I*") (citing *Soptra Fabrics Corp. v. Stafford Knitting Mills, Inc.*, 490 F.2d 1092, 1094 (2d Cir. 1974); *Tennessee Fabricating Co. v. Moultrie Mfg Co.*, 421 F.2d 279, 282 (5th Cir.), *cert denied*, 398 U.S. 928, 90 S. Ct. 1819, 26 L. Ed. 2d 91 (1970); *Concord Fabrics, Inc. v. Marcus Bros Textile Corp.*, 409 F.2d 1315, 1316 (2d Cir. 1969); *In Design v. Lynch Knitting Mills, Inc.*, 689 F. Supp. 176, 178-179 (S.D.N.Y.), *aff'd*, 863 F.2d 45 (2d Cir. 1988)).

You stated that the principal focus should be on each work as a whole rather than the individual elements. *Id.* at 4 (citing *Feist*, 499 U.S. at 358; *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1109 (9th Cir. 1970); *Atari I*, 888 F.2d at 883).

You then referred to the Ninth Circuit decision in *Satava v. Lowry* upholding copyright protection for a glass-in-glass jellyfish sculpture where the court recognized that "the author's copyrightable contribution in selecting and arranging certain hues and giving distinctive embellishments to the shape" met the "'extremely low' requirement for a modicum of creativity," despite the design being "primarily a combination of elements 'so commonplace in glass-in-glass sculpture and so typical of jellyfish physiology.'" *Id.* at 4-5 (citing *Satava v. Lowry*, 323 F.3d 805, 812 (9th Cir. 2003)).

You concluded that the sculptural works at issue here, each taken as a whole, demonstrate "sufficient creativity at least in the selection and arrangement of their shapes, colors, materials and design embellishments to support registration" and asserted that the "creativity goes far beyond the 'circle within a square within a circle' design of *Concord Fabrics* or the colored and embellished jellyfish of *Satava*, which were found to exhibit at least the modicum of originality sufficient to meet the 'extremely low' bar set by the Supreme Court." *Id.* at 5.

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

In response to your request, and after considering the points raised in your letter, Examining Division Attorney Advisor Virginia Giroux-Rollow reviewed the relevant applications and deposits and granted registration to eight previously refused works but concluded that the Works at issue here cannot be registered because "they do not contain a sufficient amount of original and creative sculptural authorship upon which to support a copyright registration." *Letter from Giroux-Rollow to Hyra*, at 1-2 (February 25, 2011) ("*Giroux-Rollow letter*").

Ms. Giroux-Rollow first noted that the material of which a work is made or adorned with does not determine its copyrightability. *Id.* at 2. She stated that "the fact that these works are made of brass, crystal, and adorned with gold and green pieces of elements does not contribute to the copyrightability of the works." *Id.*

Citing *Feist*, Ms. Giroux-Rollow stated that a work must not only be original and independently created by the author, but must also "possess more than a de minimis quantum of creativity." *Id.* She stated that "[i]n the case of a sculptural work of art, the originality must lie in the overall shape or configuration of the sculpture and must have originated with the author." *Id.* She elaborated that originality "means that the authorship must constitute more than a trivial variation or arrangement of public domain, pre-existing or noncopyrightable elements." *Id.* (citing *Alfred Bell v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951)). She also noted that the attractiveness or uniqueness of a design; its visual effect or impression; the amount of time, effort, and expense to create it; and the commercial success of the design in the marketplace are not factors considered when determining copyrightability. *Id.*

Ms. Giroux-Rollow described the *Horus Powercap* as a "simple cone shaped cap with a oval shaped top coupled with indentations and circular grooves some of which are used to screw it to the top of an article" and the *Horus Small Crystal Rod Type A* and *Horus Large Crystal Rod Type B* as each consisting of a "cylindrical shaped rod capped at each end." *Id.* at 2. She noted that "[c]ircles, cylinders, cones, and ovals, or any minor variation thereof, are common and familiar shapes, in the public domain and are, therefore, not copyrightable." *Id.* (citing 37 C.F.R. 202.1). She concluded that the Works and the combination and arrangement of the sculptural elements do not "reflect a sufficient amount of original and creative sculptural authorship to support a copyright registration." *Id.* She believed that the resulting designs are *de minimis*, "composed of one or two components arranged in a rather simple and common configuration." *Id.* (citing *Compendium II*, Copyright Office Practices, §§ 503.02(a), (b)).

Ms. Giroux-Rollow noted that "even a slight amount of creativity will suffice to obtain copyright protection and that the vast majority of works make the grade easily if they possess some creative spark." *Giroux-Rollow letter* at 3. She further noted that the Copyright Office regards *Feist* as "the articulation from the Supreme Court that the requisite level of creativity is very low; even a slight amount of original authorship will suffice." *Id.* at 3. She pointed out, however, that Nimmer in his treatise, *Nimmer on Copyright*, in § 201(b) states that "'there remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright.'" Ms. Giroux-Rollow found that the designs of the Works fall within this narrow area. Thus, she concluded, the shapes of the Works and the configuration of their elements fail to meet even the low threshold for copyrightable authorship set forth in *Feist*. *Giroux-Rollow letter* at 3.

Next, Ms. Giroux-Rollow clarified that designs are not registrable as compilations. *Id.* However, she noted that the Copyright Office will view a work "in its entirety, with individual noncopyrightable elements judged not separately, but rather in their overall interrelatedness within the work as a whole." *Id.* (citing *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970); *Atari Games Corp. v. Oman*, 979 F.2d 242 (D. D.C. 1992) (hereinafter "*Atari II*"). She stated that the treatment and arrangement of the elements or material resulting from the choices and judgment made must result in a new work of original and creative authorship to be eligible for copyright registration. *Id.* However, she concluded that "the shape and configuration of the elements embodied in these works simply do not rise to the level of copyrightability necessary to support a copyright registration." *Id.*

Ms. Giroux-Rollow distinguished the case law you cited as supporting your position. She noted and commented on the following cases you cited: *Soptra Fabrics v. Stafford Knitting Mills, Inc.*, 490 F.2d 1092 (2d Cir. 1974) (involving a fabric design consisting of numerous elements in addition to stripes of crescents scalloping between the stripes and multiple rows of semi-circles in a distinct pattern); *Tennessee Fabricating Co.*, 421 F.2d 279 (involving a room divider design made up of intercepting lines and arc lines described in a

filigree pattern which by definition was intricate ornamental work); *Concord Fabrics*, 409 F.2d 1315 (involving an intricate fabric design of circles within squares and frames around the outer border running in opposite directions and figures around the outer part of the circles; and *In Design*, 689 F. Supp. 176 (involving a fabric design of background and superimposed parallelograms of different sizes, orientations, and colors). *Id.* She stated that although these cases deal with the copyrightability of "a non-representational artistic or graphic design, in each case, the author created a design that was more than a trivial variation of a theme, either by selecting a variety of shapes or colors or by arranging them in a creative manner or both." *Id.* She found that this was not the case with the three sculptural works at issue. *Id.*

Ms. Giroux-Rollow then discussed *Satava*, 323 F.3d 805 involving glass-in-glass jellyfish sculptures. *Id.* at 4. She explained that the court held that a "combination of unprotectible elements is eligible for copyright protection only if the elements are numerous enough that the combination constitutes an original work of authorship." *Id.* She further elaborated that the principle focus is on whether the selection, coordination, or arrangement of the elements is sufficiently original and creative. *Id.* She found no such comparable authorship in the Works, either in the number of their elements or in their particular configuration. *Id.*

Ms. Giroux-Rollow noted that although all designs require choices, it is "not the possibility of choices that determines copyrightability, but rather whether the particular resulting expression or product contains copyrightable authorship." *Id.* She concluded that "the components, as well as their configuration, simply do not contain a sufficient amount of original and creative sculptural authorship upon which to support a copyright registration." *Id.* Therefore, copyright registration for the Works at issue was again refused. *Id.*

D. Second Request for Reconsideration

On April 29, 2011, you filed your second request for consideration. *Letter from Hyra to Register of Copyrights* (April 29, 2011) ("*Second Reconsideration letter*"). You argued that the Examining Division did not apply case law in support of its conclusion that the Works lack sufficient original and creative authorship but instead cited to the Copyright Office practices. *Id.* at 2 (citing *Compendium II*, Copyright Office Practices, §§ 503.02(a), (b)).

You stated that the Examining Division improperly rejected the Works because they constitute "'the mere bringing together of two or three standard forms or shapes with minor linear or spatial variations.'" *Id.* You asserted that although the Copyright Office practices do not have the force of law, the Works are still registrable under the practices because they are more than a combination of two or three standard forms or shapes with minor variations. *Id.* You cited *Atari I* to state that "'simple shapes, when selected or combined in a

distinctive manner indicating some ingenuity, have been accorded copyright protection both by the Register and in court." *Id.* at 3 (citing *Atari I*, 888 F.2d at 883).

You noted that the Examining Division acknowledged that the *Horus Powercap* is a combination of at least four components but oversimplified and trivialized the *Horus Powercap* design. *Id.* You described the *Horus Powercap* design as starting at the top with an inverted extended egg-shape, not an oval, which never reaches its end but rather flows smoothly into the gently curved top of a first round terrace. This terrace slopes from a first wide circumference at its top surface to a narrower bottom circumference, a highly unusual shape that, like the inverted egg, has its widest point on the upper part of the shape instead of the bottom. The first terrace flows smoothly into a second, larger terrace that again is circular, with a gently curved top that slopes into a bottom with a narrower circumference. This second terrace then flows smoothly into a hollow cylindrical grooved base. The three grooves result in four peaks alternating with three valleys. *Id.*

You then stated that although the Examining Division noted that a work should be viewed in its entirety, the Examining Division improperly "appear[ed] to have gone in the opposite direction by reducing the overall *Horus Powercap* design to a combination of a few distinct elements." *Id.*

You emphasized that the Supreme Court in *Feist* "held that a work may be denied registration if it embodies only an 'age-old practice . . . so commonplace that it has come to be expected as a matter of course.'" *Id.* at 4 (citing *Feist Publ'ns v. Rural Tel. Co.*, 499 U.S. 340, 341 (1991)). You then asserted that *Feist* stands for the proposition that if a "work embodies something more than that, it is entitled to registration, 'no matter how crude, humble or obvious.'" *Id.* (citing *Feist*, 499 U.S. at 345). You argued that because the Examining Division did not introduce evidence that the powercap design is old or commonplace, and because the powercap is a new and different design, it is registrable. *Id.*

You then discussed the design of the *Horus Small Crystal Rod Type A* and *Horus Large Crystal Rod Type B*. *Id.* You asserted that the Examining Division simplified the descriptions of the designs and found that they were *de minimis*. *Id.* You argued that the caps on the ends of the rods differ between the two designs and incorporate several components. *Id.* You then asserted that the Examining Division did not suggest that the "particular shapes of the applied-for designs are commonplace or old." *Id.*

You described the design of the *Horus Small Crystal Rod Type A* as a short, thick, clear hollow cylinder capped at either end by a very gently sloped hollow conical top with an inner, hollow, concentric cylindrical ring extending downwards from the conical portion, each of which is visible in its entirety through the clear cylinder. *Id.* You described the *Horus Large Crystal Rod Type B* as a long, thick, clear hollow cylinder that terminates at each end with a structure having three distinct segments. The first segment is a cylindrical portion extending into the clear hollow cylinder. The second segment is the middle rim

portion, which is cylindrical and matches the circumference of the clear hollow cylinder. The third and final segment is a cylinder of smaller circumference extending out and away from the cylinder and first and second segments. *Id.* at 4-5. You concluded that the designs are "neither commonplace, nor 'de minimis composed of one or two components arranged in a . . . common configuration'" and are therefore "entitled to registration." *Id.* at 5.

On May 3, 2011, you filed a supplement to your second request for reconsideration. *Letter from Hyra to Register of Copyrights* (May 3, 2011) ("*Supplement to Second Reconsideration letter*"). You further described the shape of the *Horus Powercap* design and commented that the "inverted egg at the top of the *Horus Powercap*, in combination with the first and second terraces, create mathematically designed sinusoidal curves on the edges of the powercap having two peaks and three valleys." *Id.* at 1. You added that after the third valley, "the cylindrical grooved base begins with its rippling concentric rings." *Id.*

You described the inverted egg-shape as "the shape of a water drop rising out of a body of water after an object has been dropped into it, the sinusoidal terraces of the resulting waves in the body of water spreading out from the central impact until they reach the earth." *Id.* You then asserted that the *Horus Powercap* design consisting of elements suggestive of an egg and water is a symbol of life. *Id.* at 2. You described the cylindrical grooved base's four concentric rings as representing alchemical levels of earth and the gilded brass material of the design as made of elements representing the five natural alchemical elements. *Id.*

You argued that the design is intricate and complex, fashioned to exacting and deliberate specifications. *Id.* In support of this argument, you commented that the manufacturer was initially unable to produce the design because of its complexity. *Id.* You concluded that "[a]s the design is far from 'merely a combination of two or three standard forms or shapes with minor variations,' there is no basis in the law to refuse registration of this sculptural design." *Id.*

III. DECISION

After reviewing the application and arguments in favor of registering the Horus collection of one cap design and two crystal rod designs, the Review Board upholds the Examining Division's decision to refuse registration of the Works at issue. The Board concludes that the sculptural items themselves and the combination and arrangement of the items do not contain a sufficient amount of original and creative authorship to warrant copyright registration.

A. Legal Framework

1. *Feist* Standard of Originality

All copyrightable works, be they sculptures, engravings or otherwise, must qualify as "original works of authorship." 17 U.S.C. § 102(a). The term "original" was interpreted by the Supreme Court in *Feist* to consist of two components: (1) independent creation by an author and (2) minimal degree of creativity. *Feist* 499 U.S. at 345. The Board does not dispute that the Works were independently created by Alke GmbH / Detlev Harald Alke. As for the second component, the Board adheres to the standard set forth in *Feist*, which notes that the "requisite level of creativity is extremely low; even a slight amount will suffice." *Id.* However, the Supreme Court held that "[t]here remains a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359; *see also* David Nimmer, *Nimmer on Copyright* § 2.01(b) ("There remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support copyright."). The Court further 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. *Feist*, 499 U.S. at 363.

The Copyright Office, through the *Compendium II* and its regulations, has provided guidance as to which works are within this narrow area of uncopyrightable works. The

Compendium II states that "works that lack even a certain minimum amount of original authorship are not copyrightable." *Compendium II*, § 202.02(a). In regards to sculptural material, the *Compendium II* notes that:

> [t]he requisite minimal amount of original sculptural authorship necessary for registration in Class VA does not depend upon the aesthetic merit, commercial appeal, or symbolic value of a work. Copyrightability is based upon the creative expression of the author, that is, the manner or way in which the material is formed or fashioned. Thus, registration cannot be based upon standard designs which lack originality, such as common architecture moldings, or the volute used to decorate the capitals of Ionic and Corinthian columns. Similarly, it is not possible to copyright common geometric figures or shapes in three dimensional forms, such as the cone, cube, or sphere. The mere fact that a work of sculpture embodies uncopyrightable elements, such as standard forms of ornamentation or embellishment, will not prevent registration. However, the 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. In no event can registration rest solely upon the fact that an idea, method of operation, plan, or system has been successfully communicated in three-dimensional form. In every case, it is the creative expression of the author which must be able to stand alone as an independent work apart from the general idea which informs it.

Compendium II, § 503.02(b).

In implementing this threshold, the Office, as well as the courts, has consistently found that standard designs and geometric shapes are not sufficiently creative in themselves to support a copyright claim. *Id.* The Office's regulations further provide guidance on what is considered a sufficient amount of originality by stating that "familiar symbols or designs" are "not subject to copyright and applications for registration of such works cannot be entertained." 37 C.F.R. § 202.1(a); *see also Compendium II*, § 503.02(a) (stating that "registration cannot be based upon the simplicity of standard ornamentation such as chevron stripes ... [or] common geometric figures or shapes ... [or] a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations"). No registration is possible where the work consists solely of elements which, individually or collectively, are incapable of supporting a copyright claim. Uncopyrightable elements include common geometric figures or symbols such as a hexagon, an arrow, or a five-point star. *Compendium II*, § 503.02(a); *see also Bailie v. Fisher*, 258 F.2d 425, 426 (D.C. Cir. 1958) ("Register [of Copyrights] may properly refuse to accept for deposit and registration 'objects not entitled to protection under the law'"); *DBC of N.Y., Inc. v. Merit Diamond Corp.*, 768 F. Supp. 414, 416 (S.D.N.Y. 1991) (upholding a refusal to register a jewelry design of graduated marquise and trillion cut diamonds on a knife-edged shank on the basis of the commonplace symbols and familiar designs).

The Office's regulations and the *Compendium II* have been upheld by the courts in many instances and have served as guides in their jurisprudence. *See, e.g., Atari II,* 979 F.2d at 247 ("We do not in any way question the Register's position that simple geometric shapes and coloring alone are *per se* not copyrightable.") (internal quotation marks omitted); *Kitchens of Sara Lee, Inc. v. Nifty Foods, Corp.*, 266 F.2d 541, 544 (2d Cir. 1959) (concluding that the Office's regulatory bars to registering familiar symbols or designs was a "fair summary of the law"). *Cf. John Muller & Co. v. N.Y. Arrows Soccer Team, Inc.*, 802 F.2d 989 (S.D.N.Y. 1988) (upholding the Copyright Office's refusal to register a logo consisting of four angled lines forming an arrow, with the word "arrows" in cursive script below, because it "lacked the minimal creativity necessary to support a copyright"); *Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q. 2d 1074 (D.D.C. 1991) (upholding the Copyright Office's denial of registration for a chinaware design pattern because it was made up of familiar shapes and symbols and did not possess the requisite level of creativity).

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 (explaining that the Copyright Act "implies that some 'ways' [of compiling or arranging uncopyrightable material] will trigger copyright, but that others will not;" determination of copyright rests on creativity of coordination or arrangement); *Atari II*, 979 F.2d at 245-56 (finding that a work viewed as a whole may be subject to copyright duet o its selection and arrangement of otherwise unprotectible elements); *Diamond Direct LLC. v. Star Diamond Group, Inc.*, 116 F. Supp. 2d 525, 528 (S.D.N.Y. 2000) ("[W]hile component parts are not entitled to copyright protection simply by virtue of their combination into a larger whole, copyright may protect the particular *way* in which the underlying elements are combined – if the particular method of combination is itself original.") (emphasis in original).

However, merely combining unprotectible elements does not automatically establish creativity where the combination or arrangement itself is simplistic or trivial. A work that reflects a simple arrangement fails to meet the low standard of minimum creativity required for copyrightability. *Feist*, 499 U.S. at 362-63. For example, in *Jon Woods Fashions*, the district court upheld the Register of Copyrights' decision that a fabric design consisting of striped cloth over which a grid of 3/16" squares was superimposed, even though distinctly arranged and printed, did not contain the minimal amount of original artistic material to merit copyright protection. 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988); *see also Satava*, 323 F.3d at 811 ("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. Case law suggests, and we hold today, that a combination of unprotectible elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.") (emphasis in original) (citations omitted).

B. Analysis of the Works

1. The Works do not meet the *Feist* Standard

The subject works are a collection of one cap design and two crystal rod designs. The work entitled *Horus Powercap* consists of a top with an inverted extended egg-shape which never reaches its end but flows smoothly into the gently curved top of a first round terrace. This terrace slopes from a first wide circumference at its top surface to a narrower bottom circumference which has its widest point on the upper part of the shape instead of the bottom. The first terrace flows smoothly into a second, larger circular terrace with a gently curved top that slopes into a bottom with a narrower circumference. This second terrace flows smoothly into a hollow cylindrical grooved base. The three circular grooves result in four peaks alternating with three valleys.

The work entitled *Horus Small Crystal Rod Type A* consists of a short, thick, clear hollow cylinder capped at either end by a gently sloped hollow conical top with an inner, hollow, concentric cylindrical ring extending downwards from the conical portion, each of which is visible in its entirety through the clear cylinder.

The work entitled *Horus Large Crystal Rod Type B* consists of a long, thick, clear hollow cylinder capped at one end by a half-oval shape and at the other end by a cylindrical top. The cylindrical body terminates at each end with a structure having three distinct segments. The first segment is a cylindrical portion extending into the clear hollow cylinder. The second segment is the middle rim portion, which is cylindrical and matches the circumference of the clear hollow cylinder. The third segment is a cylinder of smaller circumference extending out and away from the cylinder and first and second segments.

When determining whether a work possesses sufficient creativity, the Board does not look at the possibility of choices an author had to work with but rather whether the particular resulting product or expression contains copyrightable authorship. You cite *Feist* and *Key* to support the principal that works containing even a small amount of creative expression can sustain a copyright registration. *First Reconsideration letter* at 2 (citing *Feist*, 499 U.S. at 345; *Key,* 945 F.2d at 513 ("In practice, the requirement of originality has become little more than a prohibition of actual copying.") (citation omitted)). The Board agrees with this general legal principal. However, the Supreme Court held that "[t]here remains a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Feist*, 499 U.S. at 359. The works at issue here fall within this narrow category of unprotectible works because they consist of a simple combination of unprotectible elements: the *Horus Powercap* consists of circles, inverted egg-shapes, cylinders, grooves, and indentations; the *Horus Small Crystal Rod Type A* consists of cylinders and cones; and the *Horus Large Crystal Rod Type B* consists of cylinders and ovals.

You argue that the *Horus Powercap* design is entirely new and different based on your description of the design as comprised of an inverted extended egg-shape which flows into a series of round terraces, resulting in peaks alternating with valleys. You support this assertion by pointing out in your supplement to your second request for reconsideration that the design of the *Horus Powercap* creates mathematically designed sinusoidal curves. You also argue that the designs of the cap and the cylinders for the crystal rods are humble but not commonplace. Both the *Horus Small Crystal Rod Type A* and the *Horus Large Crystal Rod Type B* have hollow cylinders capped on both ends with internal cylindrical structures extending through the hollow cylinder. However, it is the Board's view that each of these items are common and familiar shapes, individually and in their combination, that are not protectable under the Copyright Office's rules or under the *Compendium II*. *See Compendium II*, § 503.02(b) ("[I]t is not possible to copyright common geometric figures or shapes in three dimensional forms, such as the cone, cube, or sphere...."); *see also* 37 C.F.R.

§ 202.1(a) (stating that "familiar symbols or designs" are "not subject to copyright and applications for registration of such works cannot be entertained").

You further argue that the *Horus Powercap* design is more than merely a combination of standard shapes and that the *Horus Small Crystal Rod Type A* and *Horus Large Crystal Rod Type B* designs are not *de minimis* composed of one or two components arranged in a common configuration. You cite *Feist*, *Roth Greeting Cards v. United Card Co.*, and *Atari Games Corp.* to support the proposition that the focus should be on the work as a whole, not the individual elements. *First Reconsideration letter* at 4 (citing *Feist*, 499 U.S. at 358; *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1109 (9th Cir. 1970); *Atari Games Corp.*, 888 F.2d at 883). The Board agrees with this general legal principal. Upon viewing the Works as a whole, the Board finds that the combination and arrangement of the unprotectible items comprising the *Horus Powercap* and the crystal rods is simple and common and lacks the originality and creativity necessary to support a copyright registration. *See Compendium II*, § 503.02(a) (stating that "registration cannot be based upon ... a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations"). The combination of the egg-shape with the series of round terraces of the powercap and the combination of the cap shape with the interior designs of the cylinders of the crystal rods are *de minimis* and fail the originality test under existing precedent. *See Satava v. Lowry*, 323 F.3d at 811 ("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.").

You argue that the *Horus Powercap* design is intricate and complex, fashioned to exacting and deliberate specifications. In support of your argument, you describe the *Horus Powercap* inverted egg-shape as suggestive of a water drop rising out of a body of water, with the terraces as the waves of the body of water. You further assert that the egg and water are symbols of life. In addition, you discuss the terraces as representative of the alchemical levels of earth plus the ether from which life comes. You also discuss the composition of the design, which is comprised of elements which represent the five natural alchemical elements of the earth. First, if the "theme" behind a symbol automatically makes that symbol copyrightable, any symbol or combination of symbols could be copyrightable. The circle of a wedding ring may be copyrighted for "illustrating the theme of infinity by having no beginning and no end" and the black cylinder of a tall hat as "symbolizing stature." Thus, the fact that the egg-shape and terraces are representative of life and the terraces are representative of the alchemical levels of the earth plus the ether does not contribute to the copyrightability of the works. Second, it is not the material of which a work is made or adorned with that determines copyrightability. Thus, the fact that the design is composed of elements representing the five natural alchemical elements of the earth is irrelevant to the Board's copyrightability analysis.

The designs at issue here are not comparable to the work in *Atari II,* 979 F.2d 242. In *Atari II*, the Court of Appeals for the District of Columbia held that in refusing to register the video game *Breakout*, the Copyright Office failed to consider the "flow of the game as a whole" and did not pay sufficient "attention to whether any creativity is displayed in the movement of the game pieces." *Id.* at 245-46. Each image displayed by the video game consisted of "rows of rectangles arranged in four monochromatic stripes" and a circle against a black backdrop. The court did find that this "work utilizing simple geometric shapes" was copyrightable, but "the interrelationship of the successive *Breakout* screens [was a] crucial" aspect of the court's rationale. *Id.* at 244. The court specifically pointed to the "placement and design of the scores, the changes in speed, the use of sounds, and the synchronized graphics and sounds which accompany the ball's bounces behind the wall." *Id.* at 247. Here, the designs at issue are not audiovisual works, and any movement of the shapes is related to the function of screwing the *Horus Powercap*and the *Horus Small Crystal Rod Type A* and *Horus Large Crystal Rod Type B* caps. The very basic arrangement of general shapes used in these designs does not compare to the combination of the various creative aspects of the video game.

In *Soptra Fabrics*, the only question regarding the validity of the copyright in a complicated textile design containing at least a "strip of crescents, scalloping or ribbons between that strip and then rows of semicircles" involved whether the design was sufficiently dissimilar from another uncopyrighted work to merit copyright protection. *Soptra Fabric*, 490 F.2d at 1094. This is not the case with the Works at issue here. Likewise, the defendants in *In Design* did not question the copyrightability of the pattern on a sweater that differs significantly from these door designs. *See* 689 F. Supp. 176. The only question of the validity of the copyright of the pattern involved whether the work was an independent creation or simply copied from a standard argyle pattern. *See id.* at 178-79 (dismissing this contention for lack of supporting evidence). Regardless, the court describes the abstract pattern on the sweater in great detail in the background section of the opinion, noting the "heavy black outlines of a...set of diamond-like rhomboids" with a "blended gray interior" superimposed on "horizontal rows of large rhomboids" of two colors connected by "small black diamonds." *Id.* Thus, this pattern is significantly more abstract and creative than the arrangement of general shapes shown in the *Horus Powercap*, *Horus Small Crystal Rod Type A*, and *Horus Large Crystal Rod Type B* designs.

The designs at issue here are also not comparable to the work in *Tennessee Fabricating.,* 421 F.2d 279. The disputed design in *Tennessee Fabricating* was a filigree pattern "formed entirely of intercepting straight lines and arc lines" on a "metal casting unit intended for use in combination or singly for a decorative screen or room divider to 'finish up' a space." *Id.* at 280-81. A work consisting of straight and arced lines that form a creative, distinctive pattern significantly differs from a simple arrangement of generic, commonplace shapes like the *Horus Powercap*'s circles, inverted egg-shapes, cylinders, grooves, and indentations; the *Horus Small Crystal Rod Type A*'s cylinders and cones; and

the *Horus Large Crystal Rod Type B*'s cylinders and ovals. *See Tennessee Fabricating*, 421 F.2d at 281-82.

The design of the handkerchief in *Concord Fabric.,* 409 F.2d 1315, (also significantly differs from the powercap and crystal rod designs. First, the defendant in this case did not even raise an argument against this design's copyrightability; the "[p]laintiff's handkerchief type pattern was duly copyrighted in 1968 and defendant raises no objection for the purposes of this motion to its validity." *Concord Fabric*, 296 F. Supp. at 737, (reversing the holding of the district court regarding the issue of substantial similarity between the designs of the defendant and plaintiff). Second, the district court clarified that the copyright extended only to the plaintiff's "designs within the large squares which compose the handkerchief and not in the squares themselves" nor "the basic handkerchief design." Moreover, while the primary artistic work on the fabric consisted of not only a circle within a square within a square, it also included "designs within the circles, between the squares, and around the outer square," "frames around the border," and colors. *Concord Fabric,* 409 F.2d at 1316. Thus, while the court declined to answer the question of whether a particular design with only a circle within a square within a square is copyrightable, in the present context, the design in *Concord Fabric* was more intricate than this description and did not consist solely of arrangements of general shapes, as do the designs at issue here.

The Board takes issue with your characterization of *Satava*, 323 F.3d 805. You cite *Satava* for the assertion that that "the author's copyrightable contribution in selecting and arranging certain hues and giving distinctive embellishments to the shape" met the "'extremely low' requirement for a modicum of creativity," despite the design being "primarily a combination of elements 'so commonplace in glass-in-glass sculpture and so typical of jellyfish physiology.'" *First Reconsideration Letter* at 4-5 (citing *Satava*, 323 F.3d at 812). Satava's copyrightable contribution was separate and distinct from the unprotectible elements, which the Ninth Circuit found were unprotectible because they were "so commonplace in glass-in-glass sculpture and so typical of jellyfish physiology that to recognize copyright protection in their combination effectively would give Satava a monopoly on lifelike glass-in-glass sculptures of single jellyfish with vertical tentacles." *Id.* at 812. In addition, the Ninth Circuit found that the unprotectible elements in Satava's sculpture fell short of the creativity standard because the "selection of the clear glass, oblong shroud, bright colors, proportion, vertical orientation, and stereotyped jellyfish form, considered together, lack[ed] the quantum of originality needed to merit copyright protection." *Id.* at 811. The Ninth Circuit acknowledged that a "combination of unprotectible elements may qualify for copyright protection," but explained that "it is not true that any combination of unprotectible elements qualifies for copyright protection." *Id.* at 811. The court held 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." *Id.* The *Horus Powercap*, *Horus Small Crystal Rod Type A* and *Horus Large Crystal Rod Type B* designs likewise do not contain a sufficient amount of original and

creative authorship to support a copyright registration, either in terms of the number of their unprotectible sculptural elements or the configuration of the unprotectible sculptural elements.

IV. CONCLUSION

For the reasons stated above, the Review Board of the United States Copyright Office affirms the refusal to register the Works discussed herein. This decision constitutes final agency action in this matter. 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

By: _____
Stephen Ruwe
Member of the Review Board