The Register of Copyrights of the United States of America
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000 · (202) 707-8350

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Karol A. Kepchar
Akin Gump Strauss Hauer & Feld LLP
Robert Strauss Building
133 New Hampshire Ave. N.W.
Washington, D.C. 20036-1564

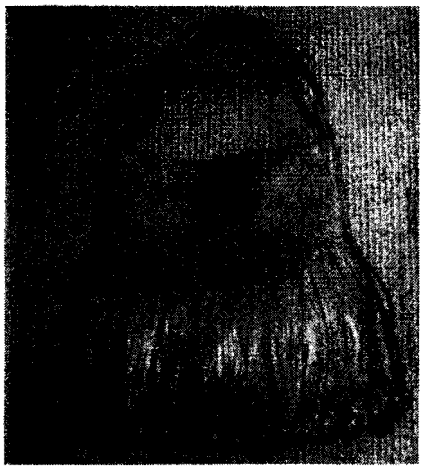
Re: ZARA
Copyright Office Control Number: 61-501-7419(A)

Dear Ms. Kepchar:

I write on behalf of the Copyright Office Review Board in response to your letter dated March 19, 2008, in which you requested the Copyright Office (the "Office") to reconsider for a second time its refusal to register the work entitled "ZARA" (the "Work"). We apologize for the long delay in resolving this case and providing you with the determination of the Review Board. However, the Copyright Office Review Board has carefully examined the application, the deposit, and all correspondence concerning this application, and must affirm denial of registration because the Work, as submitted for consideration, is a useful article with insufficient separable and original authorship.

I. DESCRIPTION OF WORK

The Work, entitled "ZARA," is a handbag involving a three dimensional sculptural design comprising two layers of uniform strands of fringe leather tassels which extend from just below the top width of the bag down to bottom of the bag where the eight strands of fringe are collected in a total of sixteen separate groupings each of which is looped around another set of strands of fringe that extends along the bottom length of the bag. This looping of the strands of fringe gives the appearance of multiple loops, or knots, extending across the bottom of the bag. A photographic image of "ZARA" appears below:



II. ADMINISTRATIVE RECORD

A. Initial Application and the Office's Refusal to Register

On June 3, 2007, the Copyright Office received the application for registration of the Work, submitted by you on behalf of your client, 2K6, L.L.C. In a letter dated July 11, 2007, Examiner Shawn Thompson pointed out the standards by which any features of a useful article may be either physically or conceptually separable, and therefore considered for copyright registration. In doing so, he cited the Office's test for conceptual separability as expressed in chapter 5 of the *Compendium of Copyright Office Practices II (1984), Compendium II* (hereinafter "*Compendium II*"). He indicated that the Work does contain features that can be identified as separable. Nevertheless, he concluded these elements are not copyrightable because they do not contain sufficient original authorship, as required under *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903) and *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 358 (1991). He then referenced 37 CFR § 202.1 for the principle that a familiar symbol or design, typographic ornamentation, lettering, coloring and mere variations thereof are not copyrightable. Letter from Thompson to Kepchar (July 11, 2007).

B. First Request for Reconsideration

In a letter dated July 27, 2007, you requested reconsideration of the Office's refusal to issue a copyright registration. The appeal cited *Feist* pointing out that the required level of originality to obtain registration is extremely low. *Feist*, 499 U.S. 340 at 345. You then argued that the Work does not fall within the scope of the categories of works not subject to copyright identified in 37 CFR § 202.1. Specifically, you cited a number of cases including, *OddzOn Products v. Oman* 16 U.S.P.Q. 2d 1225 (D.D.C. 1989), *aff'd* 924 F.2d 346 (8th Cir. 1991) ("Koosh" ball comprising common sphere shape not registrable as sculptural work); *John Muller & Co., Inc. v. N.Y. Arrows Soccer Team*, 802 F.2d 989, 990 (8th Cir. 1986) (upholding Register's decision not to register a copyright claim in a chevron-shaped logo); and *Ballie v. Fisher*, 258 F.2d 425, 426 (D.C. Cir. 1958) (upholding Register's refusal to register a cardboard star with folded flaps), to draw a distinction between the Work, which you maintain is copyrightable, and the types of familiar symbol or design found by courts to lack the requisite creativity. Further, you asserted that to the extent the examiner refused the work as a "familiar symbol or design, he did so without offering any legal or factual support. Letter from Kepchar to Examining Division (July 11, 2007) at 2-3.

You also argued that even if one of the individual collections of eight strands with its knotted appearance were deemed to be an uncopyrightable common design, the combination, integration, and placement of the sixteen collections of strands on the handbag are eligible for copyright registration. *Id.* at 4-5, citing *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 109-110 (2d Cir. 2001) (finding sufficient originality to support a copyright claim "in the ways Yurman [] recast and arranged" the constituent elements, even though the individual elements, when considered separately, were not); *Covington Indus. Inc. v. Nichols*, 2004 U.S. Dist. LEXIS 6210, *6-13 (S.D.N.Y. 2004) (finding colored vertical and horizontal stripes comprising a plaid upholstery design sufficiently creative); *Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc.* 338 F.3d 127, 132 (2d Cir. 2003) (noting that all creative works incorporate elements from the public domain, including, color, letters, descriptive facts, and standard

geometric forms); and *The Prince Grp., Inc. v. MTS Prods.*, 967 F. Supp. 121, 124-125 (S.D.N.Y. 1997) (finding geometric polka dot design sufficiently creative due to changes in the standard shape together with the added shading and color).

You then argued that the Work met the standard for copyrightability, which you again pointed out is extremely low. *Id.* at 5, citing *Kay Berry, Inc. v. Taylor Gifts, Inc.*, 421 F.3d 199, 207 (3d Cir. 2005); *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F.2d 541, 545 (2d Cir. 1959); *Prestige Floral S.A. v. Cal. Artificial Flower Co.*, 201 F. Supp 287, 289-291 (S.D.N.Y. 1962). You also maintained that the examiner need not and indeed should not make a determination as to how much creativity is expressed in the Work in order to determine copyrightability. *Id.*, citing *Bleistein*, 188 U.S. 239. Finally, while acknowledging that neither novelty nor distinctiveness is required for copyright protection, you asserted that the fact that the Work has been heralded by the press only underscores its copyrightable originality. *Id.* at 6.

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

Upon receiving your letter from July 27, 2007, Attorney Advisor, Virginia Giroux-Rollow, of the Examining Division reexamined the application and the deposit. In a letter dated December 19, 2007, Ms. Virginia Giroux-Rollow upheld the refusal to register the Works because she determined the Work, a handbag, to be a useful article without any separable features. She also concluded that even to the extent any features of the work were separable, they did not contain sufficient authorship to support a registration as a copyrightable "work of art." Letter Giroux-Rollow to Kepchar (Dec. 19, 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 Works are made of leather does not contribute to the Works eligibility for registration. She pointed out that section 101 of title 17 establishes the definition of a useful article as an "article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a 'useful article.'" She noted that the Office uses the separability test enunciated in *Compendium II, § 505.03,* which also contains the separability principles generally stated in *Esquire, Inc. v. Ringer*, 591 F.2d 796, 800 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 908 (1979). Ms. Giroux-Rollow added that under the *Compendium II* test, conceptual separability occurs when the pictorial, graphic, or sculptural features, while physically inseparable by ordinary means from the utilitarian item, are 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, without destroying its basic shape. *Id.* at 1-2.

Applying this test, Ms. Giroux-Rollow concluded that there are no separable elements on the handbag that are copyrightable. She stated that the Office views the leather fringe knotted at the bottom as part of the overall shape, styling, contour, and configuration of the handbag itself, and as such, not copyrightable. She added that the fact that a design is unique, distinctive, aesthetically pleasing or could have been designed differently are not relevant considerations in determining copyrightability. *Id.* at 2-3.

Ms. Giroux-Rollow further stated that the works that were the subject of the cases cited in your letter are distinguishable from the present design, noting that in each one the author

"created a design that was more than a trivial variation of a theme, either by selecting a variety of shapes and colors or arranging them in a creative manner or both." *Id.* at 3. She then cited to the Congress' House Report on the current copyright law, H.R. Rep. 94-1476 (1976) at 55, stating Congress' intent not to offer copyright protection for the shape of an industrial product while, at the same time, allowing for protection of a work of art incorporated into the useful article provided that it has separable authorship and can stand on its own. *Id.* at 3-4.

D. Second Request for Reconsideration

In a letter dated March 19, 2008, you submitted a second request for reconsideration. Letter from Kepchar to Copyright Office (Mar. 19, 2008). You began by reiterating a description of the work and recounting the background of the application. *Id* at 1-2. You went on to cite to 17 U.S.C. § 101; H.R. Rep. 94-1476 (1976) at 55; and *Nimmer on Copyright* § 2.08[B][3] (2007) for the principle that useful objects may have copyrightable aspects that are physically or conceptually separable. You then argued that the Work, the series of knots, is physically separable from the pouch it surrounds. *Id.* at 2-3.

You asserted that even if the work was not physically separable from the utilitarian handbag it is conceptually separable. You indicated that for the design to be considered conceptually separable, the design should evoke in the observer two different ideas. You asserted that the Work evokes not only the utilitarian notions of a handbag but also evokes notions of repetitive cycles of life, infinity and Asian spirituality. Then, citing to attached press materials, you added that the conceptual impact of the Work is well documented. *Id.* at 3-4.

You cited a number of cases in which sculptural works featured on or incorporated in a utilitarian object have been found to be separable from such utilitarian objects for the purposes of a copyrightability analysis where the sculptural aspects are physically *inseparable* from the object at issue, including, *Lucky Break Wishbone,* 528 F. Supp. 2d 1106; *Collezione Europa U.S.A,* 243 F. Supp. 2d at 452-458; *Celebration Int'l.,* 234 F. Supp. 2d at 912-916; *Kieselstein-Cord,* 632 F.2d at 990-995; *Trans-World Mfg.*, 95 F.R.D. at 96-99. You argued that these cases regarding conceptual separability demonstrate that the Work is separable from the utilitarian pouch. You stated that it is not difficult to imagine the sculptural design as an independent ornament on objects other than the pouch. You also asserted that removal of the copyrightable features leaves the utilitarian aspects of the handbag intact. Specifically, you stated that the strands that comprise the copyrightable design are non-functional, they cannot hold or enclose any contents, and that the utilitarian pouch is the only functional element that can hold or enclose any contents. *Id.* at 4-5.

You also asserted that the reasons cited for refusal are wrong. You contended that the Examiner responded to the originality arguments in the first request for reconsideration as if they were intended to address the issue of separabilty. Furthermore, you noted that the Office at first conceded separability and then asserted the work is not separable. *Id.* at 5-6. You then argued that the Office's reliance upon *Esquire* is misplaced and that the applicable test for conceptual separablity is found in *Brandir International, Inc. v. Cascade Pacific Lumber Co.,* 834 F.2d 1142 (2d Cir. 1987) and *Carol Barnhart, Inc. v. Economy Cover Corp.*, 773 F.2d 411, 418 (2d Cir. 1985). You then asserted that the Work satisfies the test for separability, as expressed in those cases. *Id.* at 6-7.

Finally, you fault the Office for failing to address the issue of whether the Work contained sufficient creativity, because the Office instead relied on its conclusion that the Work is not separable. You then asserted that the work does meet the threshold for creativity required for copyright registration, citing *Kay Berry,* 421 F.3d at 207 (3d Cir. 2005); *Kitchens of Sara Lee,* 266 F.2d at 545; *Prestige Floral,* 201 F. Supp at 289-291, for the proposition that the level of creativity required is extremely low. *Id.* at 7-8. Finally, you accepted that neither novelty nor distinctiveness is required for copyright protection. However, you again maintained that the fact that the Work has been heralded by the press underscores the originality of the design. *Id.* at 9.

III. DECISION

After reviewing the application and deposit submitted for registration as well as the arguments that you have presented, the Copyright Office Review Board (the "Board") affirms the Examining Division's refusal to register the handbag design entitled "ZARA." The Board reviewed the Work *de novo* to determine whether the Work could be registered for copyright protection. Under its analysis, the Board finds that the repetitive knotted design is not separable from the utilitarian handbag. Furthermore, even if the design were viewed as separable from the utilitarian handbag, it does not contain sufficient original authorship.

A. Analysis of the Work

The analysis to determine whether a work is copyrightable consists of several steps. First, a threshold determination is made as to whether a work is a useful article or not. If it is not a useful article, the analysis proceeds immediately to the question of whether the work is sufficiently original to be copyrightable. However, if it is a useful article, the first step is to determine whether it has any elements that are separable from its utilitarian function, because Congress has decreed that there is no copyright protection for any element that is not separable from the useful article.

In all such instances, the separability analysis is independent of and precedes the creativity analysis. If there are no separable elements that ends the examination; there is no further question of copyright protection. If there are separable elements, the Office examines them to determine whether they have sufficient originality (which requires both independent creation and sufficient creativity) to be copyrightable.

1. Useful Articles and Separability

After examining the subject handbag and its component parts, the Board has determined that the Work, as submitted, is an intrinsically useful article. The handbag at issue is used to hold and protect its contents from damage, and it therefore "ha[s] an intrinsic utilitarian function that is not merely to portray the appearance of an article or to convey information," and consequently is a useful article according to 17 U.S.C. § 101. We stress the word "an" intrinsic function. Even if a handbag also has a decorative function, its intrinsic function is still enough to make it a useful article.

The Board acknowledges that works of artistic craftsmanship, which may be useful articles themselves or incorporated into a useful article, can receive protection as pictorial,

graphic, or sculptural works pursuant to 17 U.S.C. § 102(a)(5). However, copyright protection for this category of works is limited, in that protection extends only "insofar as their form but not their mechanical or utilitarian aspects are concerned." *Id.* at § 101. The design of a useful article will be protected "only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." *Id.* This separability can be physical or conceptual. Congress has explained that:

> [A]lthough the shape of an industrial product may be aesthetically satisfying and valuable, the Committee's intention is not to offer it copyright protection under the bill. Unless the shape of . . . [an] industrial product contains some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted under the bill. The test of separability and independence from 'the utilitarian aspects of the article' does not depend upon the nature of the design — that is, even if the appearance of an article is determined by 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 over-all configuration of the utilitarian article as such.

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

a. Physical Separability

Section 505.04 of *Compendium II* articulates the standard applied by the Office for designs that are physically separable. The test is based upon the principle that a copyrightable work of sculpture which is later incorporated into a useful article retains its copyright protection. If the useful article has physically separable parts or elements, then these parts or elements must themselves possess the necessary creativity to warrant registration. "Examples of works meeting the physical separability test include a sculptured lamp base of a Balinese dancer, or a pencil sharpener shaped like an antique car. However, since the overall shape of a useful article is not copyrightable, the test of physical separability is not met by the mere fact that the housing of a useful article is detachable from the working parts of the article." *Compendium II* § 505.04.

The Board finds that the repetitive knotted leather design is not physically removable from the overall handbag by ordinary means. In arriving upon this conclusion, the Board points out that the repetitive knotted leather design and the inner pouch are both physically affixed, in a manner not removable by ordinary means, to the metal clasp running along the length of the upper portion of the handbag. Additionally this clasp serves to establish and maintain the overall shape of both the inner and outer portion of the handbag. Furthermore, even if the repetitive knotted leather design were physically removal by ordinary means while still maintaining the overall shape, any such removal would diminish the handbag's ability to function to protect its contents from damage. In considering this basis for determining

separability, it is worth noting that the Board bases its determination on what the useful article is (in this case, a handbag with a durable leather shell), not upon what other useful article or articles the item could become if it were physically pulled apart. Consequently, as the work fails the test for physical separability, it must be considered under the conceptual separability test described *Compendium II*, § 505.03.

b. Conceptual Separability

Section 505.03 of *Compendium II* articulates the standard applied by the Office for designs that are conceptually separable. Conceptual separability means that the subject features are "clearly recognizable as a pictorial, graphic, or sculptural work which can be visualized on paper, for example, or as a free-standing sculpture, as another example, independent of the shape of the useful article, *i.e.*, the artistic features can be imagined separately and independently from the useful article without destroying the basic shape of the useful article. The artistic features and the useful article could both exist side by side and be perceived as fully realized, separate works – one an artistic work and the other a useful article." *Compendium II*, § 505.03. For example, while a carving on the back of a chair cannot readily be physically separated from the chair, it can easily be conceptually separated because one could imagine the carving existing as a drawing. The chair, meanwhile, would still remain a useful article having retained its basic shape, even absent the carving. The carving would therefore qualify as conceptually separable.

The Board points out that just because a feature is not necessary to, or dictated by, the utilitarian concerns of an article, it does not mean that the feature is automatically conceptually separable. If removing such features would destroy the useful article's basic shape, namely because the features are an integral part of the overall shape or contour of the useful article, then the features would not qualify as conceptually separable. Further, regardless of any symbolic meaning or conceptual impact certain features might evoke, if they serve a function or are a useful component of the article in question they are not considered separable under the statutory definition.

You, however, maintain that there is no basis in law for the Office's interpretation that an element is not conceptually separable if separation of the design element destroys the basic shape of the useful article. See Letter from Kepchar to Copyright Office (Mar. 19,2008) n.2. We disagree. Section 505 of *Compendium II* is a direct successor to the Copyright Office regulation that was affirmed in *Esquire, Inc. v. Ringer*, 591 F.2d. 796 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 908 (1979). *Esquire* enunciated the rule that is the basis for the Office's analysis of whether a pictorial, graphic or sculptural work may be considered separable from the utilitarian object in which it is incorporated. Relying on explicit statements in legislative history, the *Esquire* court found that the Office's regulation was an authoritative construction of the copyright law. *Id.* at 802-803. *Esquire* held that copyright protection is not available for the "overall shape or configuration of a utilitarian article, no matter how aesthetically pleasing that shape may be." *Id.* at 800. In that case, the Office had refused to register an outdoor lighting fixture which arguably contained non-functional, purely aesthetic features. The court upheld the Office's refusal, noting that "Congress has repeatedly rejected proposed legislation that would make copyright protection available for consumer or industrial products." *Id.*[1] Similarly in

[1] Although *Esquire* was decided under the 1909 version of the Copyright Act, its reasoning is still applicable to cases arising under the 1976 Act. "[T]he 1976 Act and its legislative history can be taken as an

Norris Industries, Inc. v. International Telephone and Telegraph Corp., 696 F.2d 918, 924 (11th Cir. 1983), the court held that a wire-spoked wheel cover, although aesthetically designed, was not entitled to copyright protection because it was a useful article used to protect lugnuts, brakes, wheels, and axles from damage and corrosion.

Although the courts' findings in the cases of *Lucky Break Wishbone.*, 528 F. Supp. 2d 1106; *Collezione*, 243 F. Supp. 2d at 452-458; *Celebration Int'l.*, 234 F. Supp. 2d at 912-916; *Kieselstein-Cord*, 632 F.2d at 990-995; *Trans-World Mfg.*, 95 F.R.D. at 96-99, found conceptually separable elements, these cases are distinguishable by the fact that the separable elements did not themselves contribute to the utilitarian function of the object in question. Whereas in the present case, the Board determines that the repetitive knotted leather design contributes to the handbag's utilitarian function. Regardless of where else one might imagine such a design, removal of that feature from the handbag would diminish the handbag's ability to perform its basic function, to carry and protect contents in the handbag. As with the wire-spoked wheel cover in *Norris Industries,* 696 F.2d at 924, the repetitive knotted leather design is not entitled to copyright protection because it is in and of itself a useful article used to protect and cover the inner more delicate portions of the handbag from damage.

Having analyzed the Work under the provisions of *Compendium II's* test for separability and having found the repetitive knotted leather design is not a separable feature, we now turn to the alternative separability test under which you argued the Work would be registerable because separability would be apparent. You cited to Professor Denicola's test as adopted by the *Brandir* court: *Brandir,* 834 F.2d 1142. The *Brandir* case relies on what is widely known as the Denicola test for conceptual separability because it was first advocated by Professor Denicola. Unfortunately, the Denicola test offers no objective standard that can be applied with consistency by the Office in its statutorily-required examination of claims to registration. The Denicola separability test essentially relies on the exercise of subjective judgment and such judgment would likely lead to arbitrary decision-making. Judging a creator's intent, given the factual circumstances of creation, and determining whether design elements in a particular work reflect "the designer's artistic judgment exercised independently of functional influences," *Brandir*, 834 F.2d at 1145, is not the type of judgment the Office normally undertakes in its examining process. Such judgments would necessarily rely on interpreting the specific actions surrounding the creation of a work; these actions occur outside the registration process. Any investigation and questioning of the method and circumstances of creation generally lie beyond the administrative capability of the Office. *See, e.g., Compendium II*, § 108.05. Thus, the Office uses as its tests for separability those 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. However, judicial acceptance of separability tests other than those found in *Compendium II* leads us to provide additional analysis of the work to determine, under the alternative test you raised in your request for consideration, whether the Work does possess any separable features which might be subject to copyright registration, if considered.

You have indicated that the handbag's design elements can be identified as reflecting the designer's aesthetic judgment exercised independently of functional considerations. We

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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 later Act.

recognize that the handbag contains features that are arranged so that they may not only be useful but also be attractive to those who may wish to purchase it. However, in order to be a handbag it must function as one and the creator has achieved this goal. It is immaterial that the configuration of the handbag could have been aligned or set differently or that the configuration or makeup could have reflected a different style or approach.

Although your client has created a handbag with a stylized outer shell, the handbag's features are nevertheless aspects of something that has 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. 741 (1983) (emphasis added). Under this guideline, the Work is, in its entirety, a handbag to hold and protect its contents from damage, where the design of the outer protective leather layer is dependent upon the dimensions of the functional rim closure and the need to enclose the inner pouch. In *Brandir's* words, "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." 834 F.2d at 1145. Such is the case with the Work. The Work in question is sought by users because it is responsive to their utilitarian demands. While it may be novel and aesthetically pleasing, it is nevertheless created in a way that allows the device to work. The Work meets the utilitarian and functional demand of a handbag. For this reason, and for those stated above, its form does not "reflect purely aesthetic visions." *Id.* at 743.

2. The Originality Threshold

As stated above, the Board finds that the repetitive knotted leather design is neither physically nor conceptually removable from the overall handbag. However, even if the repetitive knotted leather design was separable it does not contain sufficient original authorship.

The statute mandates that copyright protection is only available for original works of authorship. 17 U.S.C. § 102(a). The Supreme Court has ruled that originality consists of two elements, independent creation plus a modicum of creativity. *Feist*, 499 U.S. at 346. With respect to the first prong, the Board does not dispute that the Work's repetitive knotted leather design was independently created by the author. Nor does it dispute that *Kay Berry.*, 421 F.3d at 207; *Kitchens of Sara Lee*, 266 F.2d at 545; or *Prestige Floral*, 201 F. Supp at 289-291, cases cited in your second request for reconsideration, stand for the proposition that a slight amount of creativity may be sufficient to warrant copyright protection. However, none of the cited cases have contradicted the *Feist* standard, followed by the Office, which also acknowledges that there are works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent. The Court observed that "as a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity," *Feist*, 499 U.S. at 363, and that there can be no copyright in works in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359; *see also*, 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.01(B) (2002) ("[T]here remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright.).

The Board has considered your arguments on this point and finds that your attempts to analogize the Work to cases in which the court found original authorship is misplaced. In

Yurman Design, the jewelry designs consisted of "silver, gold, cable twist, and cabochon cut colored stones," which the court found copyrightable because of the "way Yurman has recast and arranged those constituent elements." *Yurman Design,* 262 F.3d at 109-110. The Board does not find similar original recasting and arrangement in the Work. Similarly, and as previously explained by Ms. Giroux-Rollow, the simple arrangement of uniform groupings of plain leather strands exhibited in the Work do not approach the authorship found in the plaid design found in *Covington Industries Inc. v. Nichols*, 2004 U.S. Dist. LEXIS 6210, (S.D.N.Y. 2004). Nor does the Work approach the variety of selection and arrangement of otherwise unprotectable elements found in the graphic designs in either *Tufenkian,* 338 F.3d 127 or *The Prince Group,* 967 F. Supp. 121. See Letter Giroux-Rollow to Kepchar (Dec. 19, 2007) at 3.

Unlike the works in those cases, the repetitive knotted leather design, which you incorrectly argued was separable, merely constitutes trivial variations of its elemental parts and does not sustain the *Feist* standard for original authorship. It is beyond dispute that individual strands of fringe are uncopyrightable material within the public domain. In addition, the simple concept of grouping layered strands in bunches of eight is uncopyrightable. Similarly, the looping of these bunches of fringe strands around another into a loop or simple knot is not copyrightable. Finally, the arrangement of these unprotectable design elements in a slight arc of sixteen identical loops or knots is remarkable and represents at best *de minimis* authorship, as it consists of public domain elements arranged in a rather simple configuration. Accordingly under the Feist standard, the Work cannot be registered because the knots individually lack sufficient creativity and because "a work that reflects an obvious arrangement fails to meet the low standard of minimum creativity required for copyrightability. *Feist,* 499 U.S. at 362-363.

This conclusion is consistent with several other judicial decisions, including *John Muller*, 802 F.2d 989 (a logo consisting of four angled lines forming an arrow, with the word "arrows" in cursive script below lacked the minimal required creativity to support registration); *Forstmann Woolen Co. v J. W. Mays, Inc.*, 89 F. Supp. 964 (E.D.N.Y. 1950) (label with words "Forstmann 100% Virgin Wool" interwoven with three fleur-de-lis held not copyrightable); *Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q.2d 1074 (D.D.C. 1991) (upholding refusal to register "gothic" pattern composed of simple variations and 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 a design consisting of two inch stripes, with small grid squares superimposed upon the stripes). Likewise it is consistent with the standard set forth in chapter 5 of the *Compendium II. Compendium II*, § 503.02(a). *See also Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) ("It is true, of course, that a *combination* of unprotectible elements may qualify for copyright protection. (citations omitted). But it is not true that any combination of unprotectible elements automatically qualifies for copyright protection. Our case law suggests, and we hold today, that a combination of unprotectible elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an *original* work of authorship.") (emphasis added).

Furthermore, your assertion that press accounts have heralded the Work as "distinctive" is of no value in determining copyrightability. The commercial success of a work or its symbolic value cannot be taken into account in determining the copyrightability of this work. In evaluating whether a work meets the creativity threshold required by copyright law, it is necessary to examine the actual elements of the work, individually and in combination.

However, in the case of a work of visual art, that review is limited to the actual appearance of the work, and does not extend to whatever symbolic significance the work might have in the mind of someone looking at it.

Section 503.02(b) of the *Compendium II* states that: "the 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." Courts have cited this provision with approval. In *Paul Morelli Design, Inc. v. Tiffany and Co.*, 200 F. Supp.2d 482, 488 (E.D. Pa 2002), the Court observed as follows:

> Works may experience commercial success even without originality and works with originality may enjoy none whatsoever. Nothing has been presented to us showing any correlation between the two. Moreover, under Morelli's theory a work may not be copyrightable at one point when it enjoys no sales but may later become copyrightable if it experiences an upswing in economic fortune. This cannot be. A work is either original when created or it is not. Evidence of commercial success simply does not have "any tendency to make the existence of any fact that is of consequence to the determination of [copyrightability] more probable or less probable than it would be without the evidence."

Id. at 488.

IV. CONCLUSION

For the reasons stated above, the Copyright Office Review Board concludes that, as submitted, "ZARA" cannot be registered for copyright protection. This decision constitutes final agency action.

Sincerely,

Tanya M. Sandros
Deputy General Counsel
for the Review Board
United States Copyright Office