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February 25, 2003

Clifford Chance Rogers & Wells LLP
200 Park Avenue
New York, New York 10166-0153
attn: Mr. Joel N. Bock, Esq.

RE: ACROPOLE; DOUBLE BAR; GOTHIC 6; and GOTHIC 6+3
Copyright Office Control No. 60-606-7926

Dear Mr. Bock:

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On behalf of the Copyright Office Board of Appeals, I am responding to your request to reconsider the cancellation of registrations for four lamp designs. Before proceeding, I take this opportunity to apologize for the long delay in responding to your appeal. The lamp designs in question, ACROPOLE, DOUBLE BAR, GOTHIC 6 and GOTHIC 6+3, owned by your client O'Lampia Studio, Inc., are the subject of a second request for reconsideration [appeal] of the Examining Division's decision to cancel the copyright registrations for these works. The Board of Appeals has examined the originally submitted applications, the deposit materials submitted for the works, and your appeal letters concerning the works. The Board now affirms the Examining Division's decision to cancel the registrations for these four lamp designs because of the lack of copyrightable authorship in the four designs.

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I. Administrative Record

On June 2, 1997, the Copyright Office received, on behalf of your client O'Lampia Studio, Inc., the fees, applications and deposits for registration of 48 lamp designs entitled O'Lampia 1 through O'Lampia 48. Examiner John Ashley rejected all 48 of the applications by letter dated October 21, 1997. Mr. Ashley identified the lamps as useful articles, and stated that the law requires a determination of separable authorship in the design of the lamps in order to sustain copyrightability in a useful article. He stated that "[i]n determining separability, we consider the work in light of the two examples Congress gave of separable authorship. These are the carving on the back of a chair and a floral relief design on silver flatware, as opposed to the design of the chair or the shape of the flatware." Mr. Ashley concluded that the lamp designs "do not have any features that can be identified as separable and that also constitute copyrightable works of art." [Ashley 10/21/97 letter].

You appealed the decision of the examiner in a letter dated December 23, 1997, on the following grounds: (1) that the examiner used an incorrect standard for separability when he compared the lamp designs to the legislative history examples of separable carving on the back of a chair and a floral relief design on silver flatware [Bock 12/23/97 letter at 2-5]; (2) that the examiner failed to recognize that the lamp designs do have separable features that are copyrightable works of art [Bock 12/23/97 letter at 6-8]; (3) that the examiner's denial of registration was inconsistent with prior O'Lampia lamp design registrations on record

[Bock 12/23/97 letter at 8-9]; and (4) that the possibility of utility or design protection for the lamp designs should not play a part in the Office's determination of registrability [Bock 12/23/97 letter at 9].

By letter dated July 27, 1998, Virginia Giroux, Examining Division attorney-advisor, notified you that registration for the 48 works was again being refused, although she noted that the registration for the O'LAMPIA 23 design was covered by a previous registration.[1] Ms. Giroux further responded to your contention that the Office applied an incorrect standard to determine separability. She cited the Copyright Office's conceptual separability test which is stated in the Compendium of Copyright Office Practices, ("Compendium II") (1984) and noted that the Office does not follow the test described in Brandir International Inc. v. Cascade Pacific Lumber Co., 834 F.2d 1142 (1987). [Giroux 7/27/98 letter at 1,2]. Ms. Giroux also responded to the contention that the Office misapplied the legislative history of the Copyright Act and stated that the examples of separability in the House Report are not exhaustive and were offered only as evidence of general legislative intent. [Id. at 2]. Finally, she stated that, while the Office on reconsideration agreed that the lamp designs in question incorporated certain elements that are conceptually separable, those elements are not copyrightable. [Id.]

In addition to again denying registration to O'LAMPIA 1 through 48, Ms. Giroux stated that in order for the Office to be "consistent with respect to all works which are submitted for registration," the Office intended to cancel four of the six prior registrations of O'Lampia lamp designs which you cited as evidence of the registrability of O'LAMPIA 1 through 48. [Giroux 7/27/98 letter at 3, 4].

On September 24, 1998, you objected to the proposed cancellation of the registrations for the four works cited above and, in the same letter, also asked for a reconsideration of the denial of registration of O'LAMPIA 1 through 48. You pointed out that the Examining Division Attorney on first reconsideration had agreed that there are separable elements in the lamp designs and that her further judgment that the separable elements were not copyrightable was incorrect under the appropriate legal standard of creativity needed for copyright protection. Particularly, you cited Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340 (1991) for the principle that the required level of creativity is "extremely low" [Bock 9/24/98 letter at 2,3]; you also cited Mazer v. Stein, 347 U.S. 201 (1954) in support of your position that the lamp designs are works of art and, thus, under the Mazer principle, entitled to copyright protection. [Bock 9/24/98 letter at 6,7]. You also cited

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[1] Ms. Giroux requested that a new application be submitted for the previously registered work, BIRDCAGE 8, in order to describe the registrable authorship in that work as "sculpture on lamp post."

further case law for both the Feist and Mazer principles indicating the possibility of copyright protection for useful articles which exhibit any physically or conceptually separable artistic features. [Bock 9/24/98 letter at 3-7].

On October 29, 1998, the Examining Division advised you in a second letter from Ms. Giroux that the first request for reconsideration concerning the canceled registrations was denied. In her explanation, Ms. Giroux stated that the Examining Division agreed that the works may contain some physically or conceptually separable elements but still concluded that these particular lighting fixture designs did not contain any separable elements that were also copyrightable. [Giroux 10/29/98 letter at 1, 3]. Ms. Giroux also informed you that the Office would entertain a second request for reconsideration where cancellation was being considered; and, she informed you that she had forwarded your second appeal of the 48 claims to the Office's Board of Appeals for further review. [Id. at 3].

In a letter dated December 3, 1998, Marilyn Kretsinger, Copyright Office Assistant General Counsel, informed you of the then-new Copyright Office procedure that instituted a service fee for appeals, effective July 1, 1998. The required fee applies to both the second request for reconsideration covering the 48 claims as well as to any second request covering the proposed cancellations. Ms. Kretsinger acknowledged our prior mailing to an incorrect address, and extended the 120 day filing period to begin from the date her letter was sent to you by telefax. Finally, Ms. Kretsinger informed you that the Board of Appeals would consider your client's case as one request for reconsideration with related claims. [Kretsinger 12/3/98 letter]

On May 7, 1999, you presented a second request for reconsideration to the Board of Appeals, authorizing a deposit account debit to cover the regulatory cost of reconsideration of the Office's decision on the four claims to be cancelled. We point out, therefore, that the Board's decision here properly concerns only those four claims. We also wish to point out the following information. Each work of authorship must be judged on its own merits for the sake of registration and, thus, two similar works are not necessarily either both registrable or both not registrable based solely on their similarity. The remaining 48 works for which no second reconsideration fees were submitted would be governed by the same examining and registration considerations with respect to their individual copyrightability as the Office applies herein to the four claims for which cancellation is pending. This point, however, is moot because we are now beyond the timeframe in which the appropriate fees covering a second reconsideration could have been submitted for the other 48 claims.

II. Copyrightability of Useful Articles

You assert that the Register has acknowledged that there are separable elements in these lamps which exist apart from their utilitarian function, and, therefore, that the principal question is whether those elements meet the minimal standard for creativity. [Bock 5/7/99 letter at 2]. In its decision on first reconsideration, the Examining Division agreed that these lamps may possess some physically or conceptually separable elements. [Giroux 10/29/98 letter at 1]. However, the Examining Division did not specify the particular features which it regarded as separable; it merely listed a group of features -- "balls, knobs, hang chains, cup-like structures, slender columns, and different shaped metal rods"-- which it stated represented a variety of common shapes or their minor variations and, thus, were not copyrightable. [Giroux 10/29/98 letter at 1-2]. We will address both the separability and the copyrightability of these features in our discussion below. We address first the issue of the extent of copyright protection for useful articles.

A. The statute

The copyright law sets forth the guiding principle regarding the extent of copyright protection for a useful article. The statute defines this protection in the following terms: "the design of a useful article... shall be considered a pictorial, graphic or sculptural work 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." 17. U.S.C. 101. The legislative history accompanying the 1976 Copyright Act clarified Congress's intent with respect to copyright protection for useful articles: "... to draw as clear a line as possible between copyrightable works of applied art and uncopyrighted works of industrial design. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 55 (1976). The House Report further explains Congress's intention that "although the shape of an industrial product may be aesthetically satisfying and valuable, [Congress's] intention is not to offer it copyright protection..." Id. Specifically addressing the issue of the "shape" of an industrial product, the House Report goes on to state that:

> Unless the shape of an automobile, airplane, ladies' dress, food processor, television set, or any other industrial product contains some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of 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.

Id.

B. Copyright Office Compendium

Compendium II, the Copyright Office's manual of practices with respect to examination of claims to copyright registration, addresses registration of the works of the visual arts [chapter 500] which include the "pictorial, graphic and sculptural works" to which the statute refers. Chapter 500's treatment of separability provides guidelines which explain how the Copyright Office approaches the examination of useful articles in order to determine whether such articles incorporate the statutorily-required "pictorial, graphic or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the articles." In the case of conceptual separability, Compendium II, 505.03, states:

> Conceptual separability means that the pictorial, graphic and sculptural features, while physically inseparable by ordinary means from the utilitarian item, are nevertheless clearly recognizable as pictorial, graphic or sculptural work which can be visualized on paper, for example, or as free-standing sculpture, an 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.

In the case of physical separability, Compendium II, 505.04, states:

> The physical separability test derives from the principle that a copyrightable work of sculpture which is later incorporated into a useful article retains its copyright protection. 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.

The Office's position and its Compendium articulation of that position is consistent with the statutory grounds for protectibility of pictorial, graphic and sculptural works which are incorporated within useful articles. The statute's definitional guideline for determining whether protectible features exist apart from the **utilitarian aspects** of the useful article does not explicitly delineate the meaning, i.e., the scope and range, of utilitarian aspects which must be taken into account in performing such separability judgment. Although "utilitarian aspects" might appear, on first consideration, to be language which is plain on its face,

Congress saw fit to include the explanatory discussion of the subject within the legislative history of the 1976 Copyright Act which has been cited above.

The House Report also specifically refers to Copyright Office regulations, promulgated in the 1940's, on this subject of separability as the regulations applied to useful articles and industrial design. The House Report [at 54] notes that the 1976 statutory language is "drawn from" those Office regulations and that part of the language is "an adaptation" of subsequent Office regulatory language which implemented Mazer v. Stein, 347 U.S. 201 (1954) [works of art incorporated into useful articles, such as mass-produced articles of commerce, may retain their copyright protection]. Courts, under both the 1909 and the 1976 Acts, have considered the appropriate extent of protection for works of art incorporated into useful articles and have consistently recognized the expertise of the Copyright Office in its administration of the registration activity, including confirming Office registration decisions concerning works of art incorporated into useful articles. *See* Norris Industries, Inc. v. International Telephone and Telegraph Corp., 696 F.2d 918 (11th Cir. 1983); Esquire, Inc. v. Ringer, 591 F.2d 796 (D.C. Cir. 1978); Vacheron and Constantin - Le Coultre Watches, Inc. v. Benrus Watch Company, Inc. 260 F.2d 637 (2d Cir. 1958); SCOA Industries, Inc. v. Famolare, Inc., 192 U.S.P.Q. 216 (S.D.N.Y. 1976); Ted Arnold, Ltd. v. Silvercraft Co., 259 F. Supp. 733 (S.D.N.Y 1966).

Concerning the Office's Compendium tests for separability, the relevant Compendium sections essentially confirm the case law which supports the long history of the Office's interpretation. In Esquire v. Ringer, referring to the useful article passage from the 1976 House Report, *supra,* the United States Court of Appeals for the District of Columbia Circuit stated that the passage "indicate[s] unequivocally that the overall design or configuration of a utilitarian object, even if it is determined by aesthetic as well as functional considerations, is not eligible for copyright." Esquire, Inc. v. Ringer, 591 F.2d 796, 804 (D.C. Cir. 1978). Although Esquire was decided under the 1909 Act, the Court made clear that its references to the provisions of the 1976 Act were appropriate because "the new Act was designed in part to codify and clarify many of the [Copyright Office] regulations promulgated under the 1909 Act, including those governing 'works of art.' " Id. at 803. The Office's position with respect to the interpretation of the separability issue was also confirmed by the 11th Circuit in Norris Industries, Inc. v. International Telephone and Telegraph Corporation in which the Court noted Congress' intention concerning the statutory language on separability and additionally noted that other federal circuit courts have relied upon the Office for "expertise in the interpretation of the law and its application to the facts presented by the copyright application," based upon the Office's having "been concerned with the distinction between copyrightable and noncopyrightable works of art since the Copyright Act of 1870..." Norris, 696 F.2d at 922. And, although it was a case brought under the Administrative Procedure Act [5 U.S.C. 701 - 706], Custom Chrome, Inc. v. Ringer nevertheless once again confirmed that the Office's refusal– premised on the Compendium tests– to register motorcycle parts

was not arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law. 35 U.S.P.Q.2d 1714 (D.D.C. 1995).

C. Composition of the four works

The four works whose registrations are the subject of the Copyright Office's intention to cancel are lamp designs. Such works are designs for what are clearly useful articles under relevant statutory and case law. The great portion of your request for reconsideration concerning these works centers on your assertion that, given that the Register has conceded that the works contain separable authorship, the separable elements within the lamp designs should sustain copyright registration. We have, however, just set out a detailed statement of the Office's registration position with respect to useful articles in order to clarify that the overall shape, configuration or outline of a useful article is not subject to copyright. We have also noted that the Office's previous correspondence to you in your requests for reconsideration did not specifically identify particular elements as separable within each lamp design. The Office now addresses the need for an analysis of each lamp design in order to determine which, if any, specific design elements are either physically or conceptually separable under the Compendium tests.

1. ACROPOLE

This lamp design consists of a vertical column set upon a circular disk base. The vertical column rises and incorporates a small ball which sits directly under a small saucer-shaped holder. A circular shade is topped by a half-dome cup which itself is topped by a small ball. Hanging from the shade are two pull-chains, each ending in a small ball.

This lamp design exhibits a structure in which the vertical column itself, the base, shade and pull chains all form part of the overall shape, or configuration, of the useful article and, as such, cannot be said to be separable under the legislative history of the 1976 Act or under the Compendium. The only elements which may be considered to be conceptually separable are the balls at the end of the pull-chains as well as the half-dome topping over the shade and the ball on the top of the half-dome; these elements serve no functional purpose.

2. DOUBLE-BAR

This hanging lamp design consists of a vertical column descending from a holder exhibiting a small cone shape . The column is attached to two parallel horizontal bars, one of which is curved at both ends and holds two hanging half-globe lamp shades. At the end of the descending vertical column is attached a small round ball. The vertical column, the horizontal bar with the attached globes and the cross-bar above the globes constitute the overall shape of the useful article which shape is not protectible under the 1976 Act as it is explained in the legislative history cited above. The only feature in this lamp design which

could be said to be conceptually separable is the small round ball attached to the bottom of the vertical column.

3. GOTHIC 6

This hanging chandelier lamp is comprised of a vertical column which fans out at the bottom into u-shapes, each ending in a small cone-and-cup which holds a candle. The vertical column is topped by a rectangular-shaped holder, or connector, [slightly wider than the width of the vertical column] which is attached to a hanging wire. The middle of the vertical column contains a small, flat, circular disk protruding from the column.

All of the elements just mentioned as composing the hanging chandelier are part of overall shape of the useful article and, as such, cannot be considered physically or conceptually separable under relevant case law and under the Office's Compendium. The small, flat, circular disk protruding from the middle of the vertical column is the only part of the lamp design which may be said to be conceptually separable, having no functional use.

4. GOTHIC 6 + 3

This hanging chandelier reflects the same lamp design as **GOTHIC 6** with the one difference of having an additional set of U-shapes holding additional candles. As such, its elements, again, are part of the overall shape of the lamp itself and cannot be considered physically or conceptually separable. Again, the only separable component in this lamp design is the small, flat, circular disk protruding from the middle of the vertical column.

III. Copyrightability of separable features

The conceptually separable elements in these lamp designs– a flat, circular disk, round balls, a half-dome sphere, and a rectangular connecting piece are manifestations of common shapes and, as such, in themselves cannot sustain copyright registration. You argue that the lamp designs should be judged as copyrightable when they are viewed "as a whole," or, in the case of compilation authorship, when elements are "select[ed], combine[d] and organize[d]" so that the individual elements are combined "into creative, artistic and original designs." [Bock 5/7/99 letter at 7]. As you have also stated [Bock 5/7/99 letter at 3], the Feist decision articulated the principle governing copyrightability : "[T]he requisite level of creativity is extremely low; even a slight amount will suffice." Feist, 499 U.S. at 345. This principle is, indeed, the measure which the Copyright Office seeks to implement in its examination process. The complementary principle of copyrightability coming out of Feist, however, is that, even given the low standard required for protection, there are some works which fail to meet that standard. 499 U.S. at 358, 362-363. Each of the lamp designs in question incorporate only a few of the particular separable elements described above. Because each design consists of components which are integrally part of the overall shape of the lamp design with only a few elements capable of being identified as separable, those

few separable elements do not, *in themselves or in concert*, form an overall design which is copyrightable. Each overall design is unprotectible because it is the design of a useful article in which article a round ball, a flat, circular disk, a connector in the shape of a rectangle with rounded edges, a cone shape have been added as non-functional elements.

A. The work as a whole

Our analysis is consistent with the Atari opinion which you cite. Atari Games Corp. v. Oman, 979 F.2d 242 (D.C. Cir. 1992). (Atari II) The District of Columbia Court of Appeals in Atari, having remanded the work in question to the Copyright Office for reconsideration as to its registrability, reiterated in its opinion the need to analyze a work in its entirety without limiting copyrightability analysis to a dissection of individual components which constitute a work. Atari II stressed the importance in a copyrightability determination of an emphasis on the combination and arrangement of commonplace elements. 979 F.2d at 245, 247. Atari II also cited Reader's Digest Ass'n v. Conservative Digest, Inc., 821 F.2d 800 (D.C. Cir. 1987), referring to Reader's Digest as the "circuit's leading decision on authorship based on the arrangement of uncopyrightable elements." 979 F.2d at 245. These two opinions are part of the decisional law which guide the Office in its examining approach to a work which incorporates commonplace or standard design elements: the Office's examining approach is to define and consider the authorship as a whole in order to determine whether there exists a "distinctive arrangement and layout of those elements" which may sustain a registration. 821 F.2d at 806.

Although the case law which you have cited deals with works of authorship [audiovisual works, two-dimensional graphic designs] differing from the useful article works– lamp designs– at issue here, the same principle of copyrightability applies. Approaching the lamp designs in their entireties, we must initially disregard the greater portion of the designs because the designs are designs for useful articles which are statutorily subject to the separability test. Having applied that test and having found that the designs in question *are* the shapes of useful articles, we find that the remaining portions of the lamp designs which can be identified as separate from the overall shape and as non-functional include only a few common shapes. Further, these few common shapes do not create, or form, an overall "design" which can fairly be said to constitute the lamp design-- e.g., the design of the Double Bar work does not consist of the isolated small ball and the cone-shaped element. Thus, case law [including those opinions which you have cited in your second request for reconsideration (Bock 5/7/99 letter at 4)-- Knitwaves, Inc. v. Lollytogs, Ltd., 71 F.3d 996 (2d Cir. 1996); Runstadtler Studios, Inc. v. MCM Limited Partnership, 768 F. Supp. 1292 (N.D. Ill. 1991)] which indicates that copyrightability depends on an assessment of a work as a whole does not aid these four works in which the separable elements which are allowable in the "copyright, post-separability" stage of consideration of

the lamp designs are so few and so commonplace in their sculptural shapes that, taken together in each lamp design, they do not rise to the level of copyrightable authorship.

You have also cited to us Carl Falkenstein, Inc. v. Lustrelon, Inc., 1989 WL 69692 (E.D. Pa.) for that Court's analysis and recognition of lamp design components which have separable features that are "not determined or significantly influenced by their utilitarian function of holding a light bulb in place." [Bock 5/7/99 letter at 2, citing 1989 WL 69692, *8]. The court in Falkenstein found that the works in that litigation incorporated separable sculptural features and that these features were not determined by utility. The sculptural elements found to be separable were also found to be copyrightable. The Falkenstein Court cited Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989 (2d Cir. 1980) for the principle that separable, sculptural elements are subject to copyright protection. The Office's examining practices are consistent with Falkenstein's holding. We do not, however, find in that opinion support for your position concerning the four lamp designs in which we have, indeed, identified separable, non-functional elements [as did the Falkenstein court] but where we have concluded that these separable elements, not having utility in themselves, do not nevertheless represent copyrightable authorship, either individually or in their combination within each overall lamp design.

B. Creativity and Feist

Your request for reconsideration further argues that the applicant chose from "an infinite pool of possible choices" to make its "creative selection and arrangement of elements" used in these lamp designs [Bock 5/7/99 letter at 8]. This fact does not, in itself, render the designs protectible. We note the case law cited in your second request for reconsideration [Bock 5/7/99 letter at 4, 8]-- CCC Information Serv., Inc. v. Maclean Hunter Market Reports, Inc., 44 F.3d 61 (2d Cir. 1994); Folio Impressions, Inc. v. Byer California, 937 F.2d 759 (2d Cir. 1991); Key Publications, Inc. v. Chinatown Today Publ. Enterpr., Inc., 945 F.2d 509 (2d Cir. 1991). This case law stands for the principle that a minimum presence of editorial judgment, selectivity or choice may provide the foundation for copyrightability in a given work. These decisions do not, again, assist your argument for copyrightability for these lamp designs. The mere fact that a few elements were chosen by the applicant to be incorporated into useful article designs, the overall essence of which designs is statutorily not protectible because the designs are precisely the shape of the useful articles, does not result in an overall work of authorship which is comparable to the compilation or graphic art works at issue in the cited cases. The authorship in those cases was authorship which, taken as a whole, reflected a choice as to particular elements– chosen from many– and organized and arranged into a resulting whole. The works at issue in the cases cited did not consist of a central core, or basic structure, which, of necessity, must be discounted because it falls within a particular statutory category of authorship, i.e., the overall shape of the lamp itself which is the shape of the unprotected useful article.

We concede that not much is needed to sustain copyrightability but the separable elements we have identified, even taken together, in any one of the individual lamp designs do not form sufficient compilation authorship-- in these cases, a compilation authorship which would result in recognizable sculptural design, after the basic shape, or configuration, of the lamp is discounted because that configuration is not separable under the statute's legislative history as well as under the Office's Compendium test. The remaining separable elements, taken *in toto*, in each lamp design represent *de minimis* authorship not subject to copyright. Again, Feist, the definitive pronouncement on the required level of creativity, does recognize a narrow category of works in which the necessary quantum of creativity is missing. 499 U.S. at 359. These lamp designs with respect to their separable authorship elements fall into such category.

You have also brought to the attention of the Copyright Office two recent cases decided by the Southern District of New York which you cite as support for registration of the lamp designs. [Bock 11/7/00 letter]. You cite Weindling International Corp. v. Kobi Katz, Inc., 2000 U.S. Dist. LEXIS 14255 (S.D.N.Y.) for the proposition that the modest requisite amount of creativity of Feist can be met by a combination or arrangement of elements which, in themselves, are not copyrightable but which, when taken as a whole, form a copyrightable design. You also cite Yurman Design, Inc. v. PAJ, Inc., 93 F. Supp. 2d 449 (S.D.N.Y. 2000) which held jewelry design protectible which was "comprised , compiled or derived of elements, commonly used throughout the jewelry industry." Id. at 457, 458.

As we have stated above, the Office recognizes the validity of authorship which is comprised of elements which may, in themselves, not enjoy copyright protection but which, when combined or arranged, and which, when regarded in the resulting entirety, nevertheless exhibit the modest quantum of creativity required under Feist. Each of the four lamp designs for which cancellation is pending does not reflect such authorship in its entirety. The overall design of the separable features of each lamp is not tantamount to the overall design of a piece of jewelry. Although some jewelry pieces may incorporate functional elements, a jewelry design which is copyrightable may consist entirely of non-protectible or standard or commonplace components which, taken together, form a design or pattern that meets the Feist standard. The lamp designs in question are designs for useful articles and the required analysis to identify separable elements within each design brings us to identify very few elements within each design which, even considered as grouped in their entirety, do not form a protectible design separate and apart from the non-protectible overall shape of the useful article. We refer you to the statement in the Yurman opinion which pointed out that the "degree to which a particular jewelry item will contain protected arrangements of elements will certainly vary, and it goes without saying that not all jewelry pieces will contain the spark of originality that is required by our copyright law." 93 F. Supp. 2d at 457-458.

C. Aesthetic considerations

You have also argued that the Copyright Office applied too rigid a concept of art to the examination of these lamp designs and that the Office failed to recognize the Art Nouveau style of these works. We point out that Compendium II, Section 503.01, states that the "registrability of a work... is not affected by the style of the work or the form utilized by the artist." Although this Compendium principle is stated in terms of works of the "traditional fine arts," the lamp designs in question, to the extent that they exhibit separable sculptural authorship, are judged under this same standard. The question before the Board is not the quality of the art but whether the work demonstrates a sufficient quantum of expression. Towle v. Godinger Silver Art Co., Ltd., 612 F. Supp. 986 (S.D.N.Y. 1986). We also, of course, recognize the teaching in Mazer v. Stein, 347 U.S. 201 (1954), which held that the "use in industry of an article eligible for copyright" does not prevent the copyright registration of that article. 347 U.S. at 218. The Mazer principle does not, however, negate the need under the 1976 Act to identify separable elements within the design of useful articles in order to consider such elements for registration. Nor does Mazer alter the need for the modest required quantum of authorship to be present in such separable elements. Nor does Mazer vitiate the Office's analysis that the separable portions of sculptural authorship in the lamp designs in question are too minimal in their configuration, both independently and in their combination within each lamp design, to sustain registration.

The Office applies the same quantum standard of authorship to all types of artistic works without judging the aesthetic merit of the works. Although you cite the "creativity and artistic merit" of the four lamp designs in question here and also refer to the articles and publications which have commented on the artistic merit of the designs [Bock 5/7/99 letter at 7], the Office's analysis of any work is premised upon statutory and regulatory requirements and not on a subjective interpretation of the artistic value of the work. *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903): courts should not undertake to judge the artistic worth of a work of authorship. *Accord*, H.R. Rep. No. 1476, 94th Cong., 2d Sess. 51: the standard for copyright protection "does not include requirements of novelty, ingenuity, or esthetic merit." The Copyright Office does not look for, nor does it reject, any particular "style" of art in its registration examination; it rather looks for the presence of the necessary quantum of authorship required under Feist-- the modest standard of copyrightability. Again, the few common shapes which are reflected in the few separable elements incorporated into the four lamp designs do not meet the modest level of authorship required under Feist.

Applying statutory guidelines, relevant case law and Office registration practices in an analysis of the authorship in these lamp designs, the Board concludes that the registrations for these four lighting fixtures were made in error and will be cancelled. This decision constitutes final agency action.

C:bodf(II)

Sincerely,

Nanette Petruzzelli

Nanette Petruzzelli
Chief, Examining Division
for the Board of Appeals
U.S. Copyright Office

C:bodf(II)