



**United States Copyright Office**

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September 08, 2016

Parna A. Mehrbani  
Lane Powell PC  
601 SW Second Avenue, Suite 2100  
Portland, OR 97204-3158

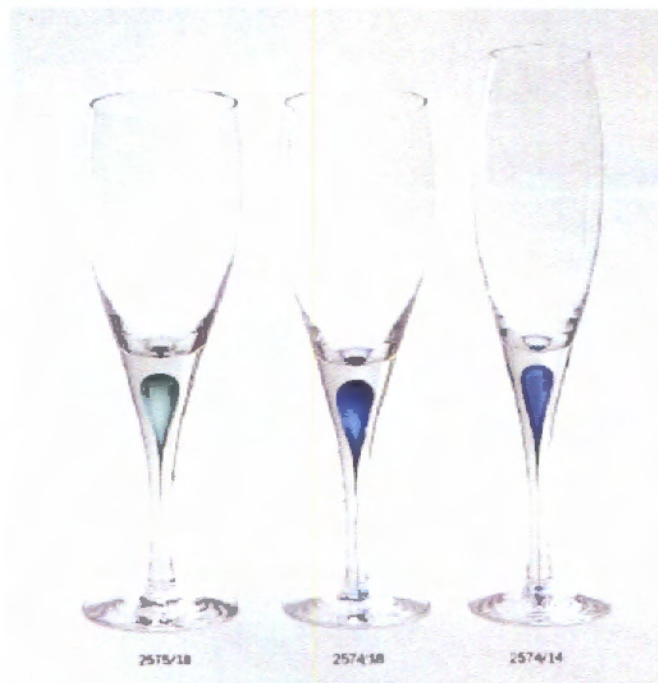
**Re: Second Request for Reconsideration for Refusal to Register Intermezzo;  
Correspondence ID: 1-1E0BTII**

Dear Ms. Mehrbani:

The Review Board of the United States Copyright Office (“Board”) has considered Orrefors Kosta Boda AB’s (“Orrefors”) second request for reconsideration of the Registration Program’s refusal to register a sculpture claim in the work titled Intermezzo (“Work”). After reviewing the application, deposit copy, and relevant correspondence, along with the arguments in the second request for reconsideration, the Board affirms the Registration Program’s denial of registration.

**I. DESCRIPTION OF THE WORK**

The Work is a collection of glasses that includes stemware, old fashioned glasses, highball glasses, martini glasses, an iced beverage glass, a claret, a goblet, and a flute. A blue upside-down teardrop is embedded in the stem or foot of each glass. The stemware are depicted below, and additional reproductions of the work are included as Appendix A.



## II. ADMINISTRATIVE RECORD

On August 4, 2015, Orrefors filed an application to register a copyright claim in the Work. In an August 6, 2015, letter, a Copyright Office registration specialist refused to register the claim, finding that it “is a ‘useful article’ which does not contain any separable authorship needed to sustain a claim to copyright.” Letter from Shawn Thompson, Registration Specialist, to Suzanne Lukas, Lane Powell PC (Aug. 6, 2015).

In a letter dated October 15, 2015, Orrefors requested that the Office reconsider its initial refusal to register the Work. Letter from Parna A. Mehrbani, Lane Powell PC, to U.S. Copyright Office (Oct. 15, 2015) (“First Request”). After reviewing the Work in light of the points raised in the First Request, the Office re-evaluated the claims and concluded that while the teardrop element was conceptually separable, it was “a standard teardrop shape in one solid color that fail[ed] to meet the *de minimis* quantum of creativity required for copyright protection.” Letter from Stephanie Mason, Attorney-Advisor, to Parna A. Mehrbani (Jan. 8, 2016).

In a letter dated April 5, 2016, Orrefors requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Work. Letter from Parna A. Mehrbani, Lane Powell PC, to U.S. Copyright Office (Apr. 5, 2016) (“Second Request”). In that letter, Orrefors asserted, *inter alia*, that the teardrop is copyrightable based on the “aesthetic design choices and trial-and-error creative process deployed by the artist to mold the glass sculptural element into its elegant and elongate form.” Second Request at 2. The Second Request included an affidavit by the Work’s author describing the concept, ideas, and technical processes that led to the creation of the Work. *Id.*, Ex. A.

## III. DISCUSSION

### A. The Legal Framework

#### 1) Useful Articles and Separability

The copyright law does not protect useful articles, which are defined as “article[s] having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.” 17 U.S.C. § 101. Works of artistic craftsmanship that have been incorporated into a useful article may be eligible for copyright protection if they constitute pictorial, graphic, or sculptural works pursuant to 17 U.S.C. § 102(a)(5). The protection for such works is limited, however, in that it extends only “insofar as [the works’] form but not their mechanical or utilitarian aspects are concerned.” *Id.* at 101. In other words, a design incorporated into a useful article is only eligible for copyright protection to the extent that the design includes artistic “features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.” *Id.*; see also *Esquire, Inc. v. Ringer*, 591 F.2d 796, 800 (D.C. Cir. 1978) (holding 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”).

The Office employs two tests to assess separability: (1) a test for physical separability; and (2) a test for conceptual separability. See COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 924.2 (3d ed. 2014) (“COMPENDIUM (THIRD)”); see also *Inhale, Inc. v. Starbuzz Tobacco, Inc.*, 755 F.3d 1038, 1041 n.2 (9th Cir. 2014) (finding that the Office’s interpretation of conceptual

separability is entitled to deference); *Custom Chrome, Inc. v. Ringer*, 35 U.S.P.Q.2d 1714 (D.D.C. 1995) (finding that the Office's tests for physical and conceptual separability are "a reasonable construction of the copyright statute[]" consistent with the words of the statute," existing law, and the legislature's declared intent in enacting the statute).

To satisfy the test for physical separability, a useful article must contain pictorial, graphic, or sculptural features that can be physically separated from the article by ordinary means. *See* COMPENDIUM (THIRD) § 924.2(A). To satisfy the test for conceptual separability, a useful article must contain pictorial, graphic, or sculptural features that can be visualized—either on paper or as a freestanding sculpture—as a work of authorship that is separate and independent from the utilitarian aspects of the article and the overall shape of the article. In other words,

... the feature must be [able to be] imagined separately and independently from the useful article without destroying the basic shape of that article. A pictorial, graphic, or sculptural feature satisfies this requirement only if the artistic feature 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 (THIRD) § 924.2(B). If the feature is an integral part of the overall shape or contour of the useful article, that feature cannot be considered conceptually separable because removing it would destroy the basic shape of the article. *See id.; cf.* H.R. REP. NO. 94-1476, at 55 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5668 (citing a carving on the back of a chair or a floral relief design on silver flatware as examples of conceptually separable design features).

If the useful article does not contain any features that can be physically or conceptually separated from its utilitarian function, the Office will refuse to register the claim because Congress has made it clear that copyright protection does not extend to any aspect of a useful article that cannot be separated from its utilitarian elements. If the Office determines that the work contains one or more features that can be separated from its functional elements, the Office will examine those features to determine if they contain a sufficient amount of original authorship to warrant registration.

## 2) Originality

A work may be registered if it qualifies as an "original work[] of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a). In this context, the term "original" consists of two components: independent creation and sufficient creativity. *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). First, the work must have been independently created by the author, *i.e.*, not copied from another work. *Id.* Second, the work must possess sufficient creativity. *Id.* Only a modicum of creativity is necessary, but the Supreme Court has ruled that some works (such as the alphabetized telephone directory at issue in *Feist*) fail to meet even this low threshold. *Id.* The Court observed that "[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity." *Id.* at 363. It further found that there can be no copyright in a work in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359.

The Office's regulations implement the longstanding requirement of originality set forth in the Copyright Act and described in the *Feist* decision. *See, e.g.*, 37 C.F.R. § 202.1(a) (prohibiting registration of "[w]ords and short phrases such as names, titles, slogans; familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering, or coloring"); *id.* § 202.10(a) (stating

“to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form”). Some combinations of common or standard design elements may contain sufficient creativity with respect to how they are juxtaposed or arranged to support a copyright. Nevertheless, not every combination or arrangement will be sufficient to meet this test. *See Feist*, 499 U.S. at 358 (finding the Copyright Act “implies that some ‘ways’ [of selecting, coordinating, or arranging uncopyrightable material] will trigger copyright, but that others will not”). A determination of copyrightability in the combination of standard design elements depends on whether the selection, coordination, or arrangement is done in such a way as to result in copyrightable authorship. *Id.*; *see also Atari Games Corp. v. Oman*, 888 F.2d 878 (D.C. Cir. 1989).

A mere simplistic arrangement of non-protectable elements does not demonstrate the level of creativity necessary to warrant protection. For example, the United States District Court for the Southern District of New York upheld the Copyright Office’s refusal to register simple designs consisting of two linked letter “C” shapes “facing each other in a mirrored relationship” and two unlinked letter “C” shapes “in a mirrored relationship and positioned perpendicular to the linked elements.” *Coach Inc. v. Peters*, 386 F. Supp. 2d 495, 496 (S.D.N.Y. 2005). Likewise, the Ninth Circuit has held that a glass sculpture of a jellyfish consisting of clear glass, an oblong shroud, bright colors, vertical orientation, and the stereotypical jellyfish form did not merit copyright protection. *See Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003). The language in *Satava* is particularly instructive:

It is true, of course, that a combination of unprotectable elements may qualify for copyright protection. But it is not true that *any* combination of unprotectable elements automatically qualifies for copyright protection. Our case law suggests, and we hold today, that a combination of unprotectable 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.* (internal citations omitted).

Similarly, while the Office may register a work that consists merely of geometric shapes, for such a work to be registrable, the “author’s use of those shapes [must] result[] in a work that, as a whole, is sufficiently creative.” COMPENDIUM (THIRD) § 906.1; *see also Atari Games Corp.*, 888 F.2d at 883 (“[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.”). Thus, the Office would register, for example, a wrapping paper design that consists of circles, triangles, and stars arranged in an unusual pattern with each element portrayed in a different color, but would not register a picture consisting merely of a purple background and evenly-spaced white circles. COMPENDIUM (THIRD) § 906.1.]

Finally, Copyright Office registration specialists (and the Board) do not make aesthetic judgments in evaluating the copyrightability of particular works. *See* COMPENDIUM (THIRD) § 310.2. The attractiveness of a design, the espoused intentions of the author, the design’s visual effect or appearance, its symbolism, the time and effort it took to create, or the design’s commercial success in the marketplace are not factors in determining whether a design is copyrightable. *See, e.g., Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

### ***B. Analysis of the Work***

After carefully examining the Work and applying the legal standards discussed above, the Board finds that the Work is a useful article that does not contain the requisite separable authorship necessary to sustain a claim to copyright.

It is undisputed that the Work is a collection of useful articles, *i.e.*, stemware and glasses meant to hold wine, champagne or other liquids. 17 U.S.C. § 101. Thus, for there to be any consideration of the Work's design features, these features must be either physically or conceptually separable from the Work's utilitarian function as glassware. *See Esquire, Inc.*, 591 F.2d at 800. While the individual glasses clearly lack physically separable design elements, the Office and Orrefors agree that the blue teardrop embedded in the stem or foot of each glass is conceptually separable. *See* Second Request at 2 (agreeing with the Office's identification of the teardrop as the sole conceptually separable element in each glass). The teardrop elements are able to be visualized separately and independently from each of the glasses without destroying the basic shape of the glass or impairing its utilitarian features. *See* COMPENDIUM (THIRD) § 924.2(B).

Still, for a work to be eligible for copyright protection, it must "possess more than a *de minimis* quantum of creativity." *Feist*, 499 U.S. 340, 363. The Work does not meet this low threshold. A teardrop is a familiar symbol, unprotected by copyright. *See* 37 C.F.R. § 202.1(A) ("works not subject to copyright [include] familiar symbols."); COMPENDIUM (THIRD) § 313.4(J) ("Familiar symbols [include c]ommon representational symbols, such as a spade, club, heart. . . or the like."); *see also id.* § 906.1 (common geometric shapes are not copyrightable). Nor does copyright protection extend to "mere coloration." *Id.* § 906.3 (citing 37 C.F.R. § 202.1(a)). While "[a] work that includes familiar symbols . . . may be registered if the registration specialist determines that the author used these elements in a creative manner," here, the decision to make the teardrop a deep cobalt blue is insufficient to demonstrate sufficient creative authorship. COMPENDIUM (THIRD) § 906.2; *see* Second Request at 2 (describing precise shade of blue); *Satava*, 323 F.3d at 810-11 (finding that a glass-in-glass jellyfish sculpture was not copyrightable and finding that the decision to make the jellyfish with "tendrill-like tentacles" or in "bright colors" naturally followed from the idea of the sculpture).

In contrast to the Work's relatively predictable combination of two uncopyrightable elements—a teardrop and the color blue—the cases Orrefors relies upon involved the combination of more numerous elements in more original ways. *See* Second Request at 3 (citing *Home Legend, LLC v. Mannington Mills, Inc.*, 784 F.3d 1404, 1412 (11th Cir. 2015) and *Boisson v. Baninan, Ltd.*, 273 F.3d 262 (2d Cir. 2001)). *Home Legend* concerned the image of a maple floor created from a compilation of fifteen photographic images of hand-stained wood planks that were further digitally manipulated. *Home Legend, LLC*, 784 F.3d at 1412. Similarly, *Boisson* concerned a quilt that combined several individually uncopyrightable elements, including the alphabet, layout, the shapes of letters, icons such as a cat, house, or basket, and color choices to result in a work that was copyrightable as a whole. *Boisson*, 273 F.3d at 271-73.

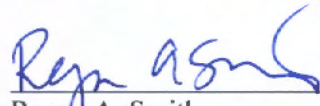
Finally, the Board's evaluation cannot consider Orrefors' appeals based on the ideas, concepts, process, or effort by which the Work was created. *See* Second Request Ex. A (affidavit by the Work's author outlining the ideas, concept, and innovative process behind the Work and describing the effort involved in producing the Work); *id.* at 3 (explaining that the Work is "a glass sculpture that resulted from a sophisticated artistic process."). The Copyright Act makes clear that determinations of copyrightability cannot credit the process by which a work was created, or the

ideas or concepts motivating the creation of a work. 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, [or] concept.”); *see Home Legend, LLC*, 784 F.3d at 1409 (stating that the author’s copyright “covers the two-dimensional . . . design, not [the author’s] procedure or process for creating it.”). Similarly, it is well-settled that copyright protection does not concern itself with the time, effort, or expense required to create a work. *See Feist*, 499 U.S. at 352-354 (holding copyright protection cannot be based upon “sweat of the brow”); COMPENDIUM (THIRD) § 310.7 (“When examining a work for original authorship, the U.S. Copyright Office will focus on the appearance or sound of the work that the author created but will not consider the amount of time, effort, or expense required to create the work.”).

#### IV. CONCLUSION

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

BY:

  
\_\_\_\_\_  
Regan A. Smith  
Copyright Office Review Board

# **APPENDIX A**

# INTERMEZZO

Designer: Erika Lagerbielke



2575/18



2574/18

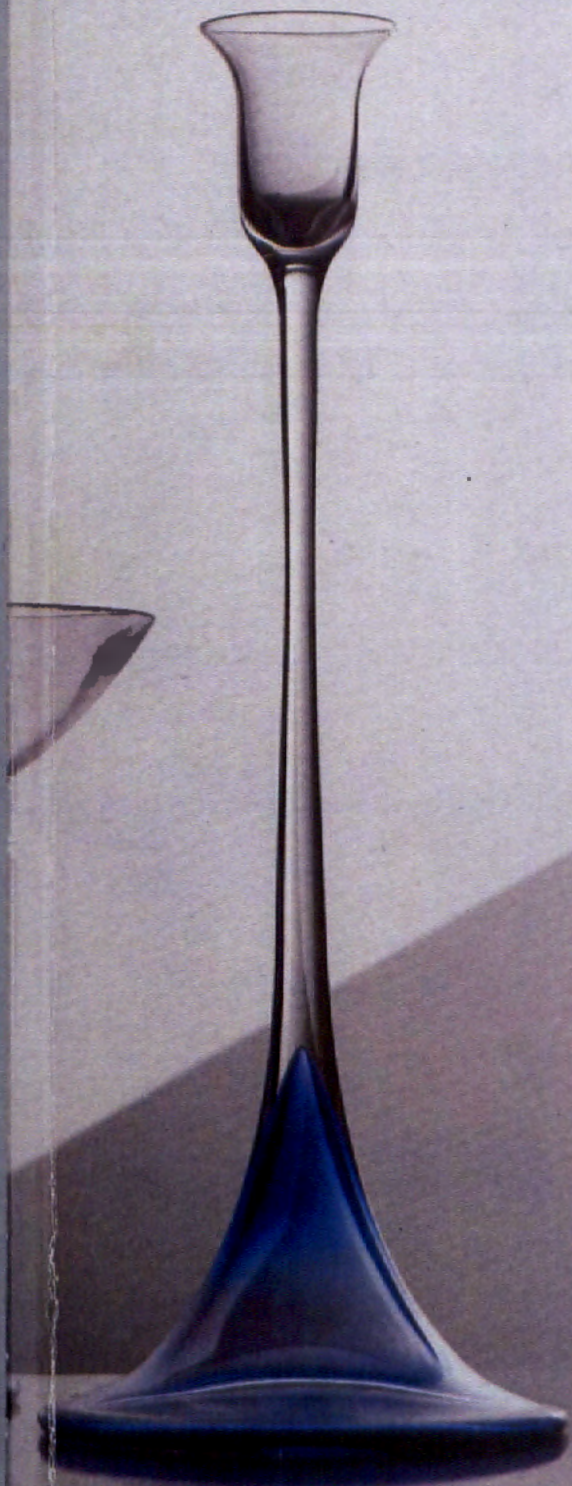


2574/14

Artikel Article	Höjd Height mm	Bredd Width mm	Rymd Capacity cl	A-artist A-item	Pris Price
Θ 2574/14 CHAMPAGNE blå/blue	250	65	18	x	
2574/18 VIN/WINE blå/blue	230	70	25	x	
2575/14 CHAMPAGNE grön/green	250	65	18	x	
2575/18 VIN/WINE grön/green	230	70	25	x	



# Orrefors 1985



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### Orrefors "Intermezzo" Blue Stemware

CHOOSE YOUR ITEMS

Orrefors "Intermezzo Blue" Collection designed by Erika Lagerbielke. From the name synonymous with unique and luxurious art glass, Orrefors' Intermezzo Blue has a distinct teardrop of blue in the stem.

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FULLSCREEN

[Orrefors Intermezzo Blue Set of 2 Double Old Fashioned Glasses](#)

PRICE: \$130.00

QUANTITY:

more details

COLOR: Clear/Blue

SHIP: **Direct from vendor**

Usually leaves the facility within 4 business days.

IN-STORE AVAILABILITY:

[Check local stores](#) if you want it sooner.

ADD TO BROWN BAG

ADD TO BROWSTRIE

ADD TO WISH LIST



FULLSCREEN

[Orrefors Intermezzo Blue Set of 2 Highball Glasses](#)

PRICE: \$130.00

QUANTITY:

more details

COLOR: No Color

SHIP: **In Stock**

Usually leaves our facility within 3 business days.

IN-STORE AVAILABILITY:

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ADD TO BROWN BAG

ADD TO BROWSTRIE

ADD TO WISH LIST



⌕ FULLSCREEN

Orrefors "Intermezzo" Blue Set of 2 Martini Glasses PRICE: \$130.00

[more details](#)

COLOR: No Color

**AVAILABILITY ALERT**

This item is **ON ORDER**.

It is expected to leave our facility within **30** business days.



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⌕ FULLSCREEN

Orrefors Intermezzo Blue Iced Beverage PRICE: \$70.00

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COLOR: Clear/Blue

**SHIP: In Stock**

Usually leaves our facility within **2** business days.

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⌕ FULLSCREEN

Orrefors "Intermezzo" Blue Claret PRICE: \$65.00

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**SHIP: In Stock**

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⌕ FULLSCREEN

Orrefors "Intermezzo" Blue Wine PRICE: \$65.00

[more details](#)

COLOR: Clear/Blue

**SHIP: In Stock**

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⌕ FULLSCREEN

Orrefors "Intermezzo" Blue Goblet PRICE: \$65.00

[more details](#)

COLOR: Clear/Blue

**SHIP: In Stock**

Usually leaves our facility within **2** business days.

**IN-STORE AVAILABILITY:**

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QUANTITY:

**ADD TO BROWN BAG**

[ADD TO CART](#)

[ADD TO WISH LIST](#)

Orrefors "Intermezzo" Blue Martini Glass PRICE: \$65.00  
[more details](#)

QUANTITY:



✕ FULLSCREEN



COLOR: Clear/Blue

SHIP: **Direct from vendor**

Usually leaves the facility within **4** business days.

IN-STORE AVAILABILITY:

[Check local stores](#) if you want it sooner.

ADD TO BROWN BAG

ADD TO ~~SOB~~ REGISTRY

ADD TO WISH LIST



✕ FULLSCREEN

Orrefors "Intermezzo" Blue Flute

PRICE: \$65.00



COLOR: Clear/Blue

SHIP: **In Stock**

Usually leaves our facility within **2** business days.

IN-STORE AVAILABILITY:

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QUANTITY:

ADD TO BROWN BAG

ADD TO ~~SOB~~ REGISTRY

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