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September 29, 2000

Coudert Brothers
Attn: Donald L. Bartels
4 Embarcdero Center, Suite 3300
San Francisco, CA 94111

Control Number: 60-616-0718(D)
Re: TWIST AND SHOUT MULTIPLICATION
TWIST AND SHOUT ADDITION
Control Number: 606190718
FLASH MAGIC FLASHCARD DECODER ADDITION
FLASH MAGIC FLASHCARD DECODER MULTIPLICATION
Control Number: 606186594

Dear Mr. Bartels:

I am writing on behalf of the Copyright Office Board of Appeals in response to your October 27, 1999 appeal of the Office's refusal to register the two sets of works *Twist and Shout, Addition / Twist and Shout, Multiplication* and *Flash Magic Flashcard Decoder Addition / Flash Magic Flashcard Decoder Multiplication.* The Appeals Board has met concerning these works and affirms the Examining Division's refusal to register. The Board's decision follows.

Administrative record

First submission and Office refusal to register:

On September 14, 1998, a submission for copyright registration for two separate works *Flash Magic Flashcard Decoder Addition / Flash Magic Flashcard Decoder Multiplication* was received in the Copyright Office. On September 16 and 17, 1998, a submission for two separate works *Twist and Shout Addition* [9/16] / *Twist and Shout Multiplication* [9/17] was also received. In separate letters from Examiner William Briganti, Ms. Jennifer K. Daehler of Coudert Brothers was informed that registration was not possible because none of these works, being considered useful articles by the Copyright Office, exhibit separable features which could support a claim to copyright consistent with the statute and the Office's ***Compendium of Copyright Office Practices, Compendium II*** [1984]. Mr. Briganti also pointed out that registrations could be made for the text and artwork [photographs] which appear on the packaging materials for the works.

First appeal and Office reply:

The Office subsequently received First Appeals for the two sets of works dated January 27, 1999 [*Flash Magic*] and February 10, 1999 [*Twist and Shout*]. Both First Appeal briefs put forth the same arguments: that various parts of each of the works, including the color combination in each, are conceptually separable under the relevant case law treating useful articles and application to such articles of the conceptual separability test. You described in detail the parts of the articles which you considered conceptually separable and argued that these parts were essentially the result and expression of aesthetic or artistic considerations and that the design of the parts, including the choice and combination of colors, was not determined by functional considerations. As such, you concluded that the works were subject to registration.

In a letter dated June 30, 1999, Examining Attorney-Advisor Virginia Giroux responded to both First Appeals. Ms. Giroux explained the Office's separability test as that is articulated in ***Compendium of Copyright Office Practices***. She also cited Esquire v. Ringer, 591 F.2d 796 (D.C. Cir. 1978); which upheld the Office's separability tests and she pointed out that overall shape or contour of a useful article could not be considered separable under Esquire. Ms. Giroux went on to cite other case law concerning separability in useful articles, briefly distinguishing those cases in which separable authorship was found from the works in question in these appeals. Finally, she pointed out that registration was possible for text and photographs on the packaging materials.

Second appeal and Copyright Office decision:

1. Categorization of works in question

Your Second Appeal briefs for both sets of works categorize the works as *toys*. *Flash Magic* Appeal at 3; *Twist and Shout* Appeal at 3. Although you have referred to the works in question as toys, you have also indicated that they provide a useful function, i.e., teaching children, and you refer to the works as "devices." *Flash Magic* Appeal at 3; *Twist and Shout* Appeal at 7. It is the question of the manner and degree to which a useful article or device may enjoy copyright protection and your disagreement with the practices of the Copyright Office with respect to the registration of works of art incorporated into useful articles that are the focus of both appeals.

Although you did not raise the distinction between toys and useful articles, we take this opportunity *sua sponte* to comment generally on the registrability of toys. The Copyright Office follows the principle set forth in Gay Toys, Inc. v. Buddy L. Corp., 703 F.2d 970 (6th Cir. 1983), which held that toys which do not have "an intrinsic utilitarian function" are not useful articles under the statute and, therefore, are not amenable to the separability tests. *Accord,* Masquerade Novelty, Inc. v. Unique Industries, Inc., 912 F.2d 663 (3d Cir. 1990). Although we do not disagree with your assertion that the works in questions are toys, we do take the position that these "toys" are also useful articles

because they are intended for, and are capable of, the useful function of performing arithmetic calculations and, through the performance of such calculations, of teaching children how to add and multiply correctly. As such, we consider the works to be useful articles which are subject to an analysis of separability in order to determine whether any particular feature of the works is registrable as a pictorial, graphic or sculptural work which can be separately identified from the utilitarian aspects of the articles. Both of your Appeals are framed in terms of argument supporting your position that the works, as useful articles, do exhibit such separable and copyrightable features. We turn first to a consideration of the Copyright Office's examination of useful articles and the tests applied by the Office to determine conceptual and physical separability

2. Copyright Office separability tests

Both Second Appeals disagree with the Office's tests for separability as those tests are articulated in ***Compendium of Copyright Office Practices, Compendium II*** [1984]. You argue that the Office's tests mistakenly frame the requirement for separability of "sculptural and aesthetic features" in terms of their separate existence from the **overall shape** of the useful article rather than requiring "sculptural and aesthetic features" which are separable, as set out in 17 U.S.C. 101, from the **utilitarian aspects** of a useful article. *Flash Magic* Appeal at 4, 5; *Twist and Shout* Appeal at 4, 5. Thus, your position is that the Office's ***Compendium*** test for separability "promulgates a standard that contradicts the plain language and clear meaning of the statute." Id. You argue that the Office is incorrect in premising separability on the necessity for the existence of pictorial, graphic or sculptural features which exist apart from and independently of the **shape of the article** rather than apart from and independently of the **utilitarian aspects of the article**

The copyright law, 17 U.S.C. §101, contains the following definition:

> *Pictorial, graphic and sculptural works* include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, 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.

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 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 a separability judgment. Although "utilitarian aspects" might appear, on first consideration, to be language which is plain on its face, Congress saw fit to include an explanatory discussion of the subject within the legislative history of the 1976 Copyright Act. The House Report to the 1976 Act explains Congress's goal of distinguishing between copyrightable works of applied art and uncopyrightable industrial design. The House Report specifically states that "... although the **shape** [emphasis added] of an industrial product may be aesthetically satisfying and valuable, the Committee's intention is not to offer it copyright protection 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** [emphasis added] are copyrightable.' " H.R. Rep. No. 1476, 94th Cong., 2d Sess. 54, 55 (1976).

The House Report also specifically refers to the Copyright Office regulations, promulgated in the 1940's, on this subject of separability as the regulations apply to useful articles and industrial design. The House Report 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, courts 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. 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." 591 F.2d at 804. 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..." 696 F.2d at 922. And, although it was a case brought under the Administrative Procedure Act [5 U.S.C. 701 - 706], the recent 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** [emphasis added]." 35 U.S.P.Q.2d 1714 (D.D.C. 1995).

3. Alternative separability tests

You have also cited Brandir in support of your argument that the features of a useful article which reflect the "designer's artistic judgment, exercised independently of functional influences," should be taken into account in assessing separability. [*Twist and Shout* Appeal at 8; *FMFD* Appeal at 9] Brandir International, Inc. v. Cascade Pacific Lumber Co., 834 F. 2d 1142 (2d Cir. 1987). The Brandir Court adopted Professor Denicola's test for determining conceptual separability. That test considers whether or not a given feature or aspect of a useful article "reflects a merger of aesthetic and functional considerations;" if so, the artistic features of the useful article cannot be said to be conceptually separable; if not, conceptual separability may exist. 834 F.2d at 1145. Professor Denicola's test encompasses a consideration of the design process involved in the useful article in question as well as the artistic choices of the creator of the article and whether the artistic aspects of the article were significantly influenced by the functionality requirements. 67 Minn. L. Rev. 707 (1983).

We further note your references to Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989 (2d Cir. 1980) and Carol Barnhart, Inc. v. Economy Cover Corp., 773 F.2d 411 (2d Cir. 1985). The two belt buckles in question in Kieselstein-Cord had been registered by the Copyright Office because the ornamental surfaces of the buckles were conceptually separable from any useful function which the buckles might fulfill and were also not co-extensive with the shape of the belt-buckles. Such an example of a sculptural work incorporated into the useful article of a belt buckle may be compared to, and distinguished from, the mannequins in question in Carol Barnhart. There the Second Circuit analyzed the mannequins as works where the "...configuration" [*read : overall shape*] is "inextricably intertwined with the utilitarian feature..." and, thus, not separable. 773 F.2d. at 419. We also point out that the Office does not follow the alternative separability test proffered by Judge Newman in his dissent in Carol Barnhart. Judge Newman's test, sometimes referred to as a "temporal displacement" test, would take into consideration whether the observer of the article in question would be able to arrive at a "separate non-utilitarian concept that can displace, at least temporarily, the utilitarian concept." Id. at 423. Because of the possible problems which both the Denicola and the Newman tests might engender, premised as they are, at least partly, on subjective perception and because such tests might result in registration of works in conflict with the expressed Congressional intent to deny copyright protection to the design of useful articles which happen to be aesthetically pleasing, *supra* at 4, the Copyright Office has also not adopted these particular alternative separability tests.

Copyright Office examining staff are not experts in the subject matter in which a given useful article may fall; rather, the examining staff, trained in the statute, its legislative history and settled case law, applies the Office's test with respect to possible protection for works of art embodied in useful articles. Again, the Copyright Office has

not adopted the Denicola test or Judge Newman's test; nor has the Office adopted any other separability test advanced by any particular copyright scholar or commentator. The test applied by the Office must be one consistent with the expressed intention of Congress as it was set forth in the substantial legislative history that accompanied the 1976 major revision of the copyright law . Although one of the various separability theories advanced in this area may ultimately be endorsed by a majority of courts which come to view the test as consistent with expressed Congressional intent ["courts have twisted themselves into knots trying to create a test to effectively ascertain whether the artistic aspects of a useful article can be identified separately from and exist independently of the article's utilitarian function," Masquerade Novelty, 912 F.2d at 670], no such consistent or universally accepted test alternative to the current position of the Copyright Office has yet emerged.

4. Analysis of works

Twist and Shout:

You argue in the case of the *Twist and Shout* works that the housing of these works is physically separable from the "underlying functional components (i.e., microprocessor, synthesizer, etc.)" and that "accordingly, copyright protection should extend to the TS housing." *Twist and Shout* Appeal at 6.

Although the housing, or outer telescope-like device, is physically separable from the microprocessor which performs the arithmetic functions and from the synthesizer chip and accompanying speaker which produce the musical and spoken sounds which are heard when the *Twist and Shout* is operated, all of the individual semiconductor chip and associated elements which provide the interactive functioning of *Twist and Shout* must be contained, or housed, within some covering or object which a child can manipulate and handle in order to use this teaching device. The fact that the particular telescope-like configuration was chosen by the authors of the work does not change the fact that the entire physical housing constitutes the shape of the useful article; thus, the housing is still not copyrightable in itself merely because it exists physically separate from the individual semiconductor chips in the sense that the housing is not identical with the chips but is rather the separately identifiable container in which the chips are located. A child could not easily or normally interact with the semiconductor chips in isolation; the chip elements, along with any sound magnification, must be encased within some covering or container in order to be useful. The housing, therefore, is part of the utilitarian aspect of the article in question and, thus, is not physically separable in the sense that the statute and the House Report indicate that requirement in order for copyright protection to be the case.

You further argue that the housing contains "sculptural and aesthetic features" which are "also conceptually separable from the underlying function of the device."

You specifically point out the conceptual separability of the grooved rings, with raised lettering or numbering, the end pieces and the use of color in the *Twist and Shout.* Concerning the grooved rings, although there may have been other means by which to present a location on the device for the representation of the operands, the grooved rings are part of the overall shape of the device and further serve the function of allowing the child to manipulate the device in order to set up a particular mathematical problem which the device will assist the child in solving. The grooved rings are, therefore, part of the functionality of *Twist and Shout* and, as such, cannot be said to be conceptually separable from the device itself. The grooved rings cannot be considered conceptually separable either under the Congressional language of "independent of the utilitarian aspects of the article" or under the Copyright Office language of "independent of the shape of the article itself."

The end pieces of *Twist and Shout* are just that– end pieces which close the device and which aid in containing the inner workings of the device. As such, they are part of the functional aspect of *Twist and Shout* and cannot be considered separable. In fact, one of the two end pieces is perforated with small holes in order to allow the sound magnification to be heard-- again, a functional consideration and thus not amenable to either a physical or conceptual separability conclusion.

The use of, i.e., the combination of colors, in *Twist and Shout*, although concededly conceptually separable from the overall shape of the useful article and determined by aesthetic rather than functional considerations, nevertheless does not rise to the level of copyrightability needed to sustain registration. One *Twist and Shout* contains a combination of three solid colors, the other a combination of four solid colors. This combination as a whole of three or four colors [discounting the white leap-frog trademarked logo which appears on one of the two end pieces] represents de minimis authorship even under the low requisite level of creativity dictated by Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340 (1991). Feist clarified the principle that, although a slight amount of creativity will suffice, there does remain a narrow category of works in which creativity is lacking and the creative spark is insufficient to support a copyright. Feist.499 U.S. at 359. And, pre-Feist case law indicated that not all works of the visual arts meet the low threshold for copyrightability. *See, e.g.,* John Muller & Co. v. N.Y. Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986); Jon Woods Fashions, Inc. v. Curran, 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988); Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc., 634 F. Supp. 769 (W.D. Pa. 1986).

With the exception of the colors decorating the *Twist and Shout* works, all of the features which you have detailed are functional in their essence and thus cannot be said to exist apart from and independently of the useful article itself. These features also constitute parts of the overall shape of the useful article and, under a judicially confirmed Copyright Office analysis of the meaning of the statute's definition of separability and test for such separability, cannot be said to separable– either physically or conceptually– from the utilitarian aspects of the article itself. Further, the Office cannot agree that the

combination of the sculptural features– which cannot be considered physically or conceptually separable– with the color scheme incorporated into the works in question produces a copyrightable work. Although the Office agrees in principle with your reference to the broad assertion in West Publishing Co. v. Mead Data Central, Inc., 799 F.2d 1219, 1223 (8th Cir. 1986) [both Appeals at 10] that "almost any ingenuity in selection, combination or expression, no matter how crude, humble or obvious, will be sufficient to make a work copyrightable," and with the reaffirmation of the Feist principle advanced in Atari Games Corp. v. Ralph Oman, 979 F.2d 242 (D.C. Cir. 1992), again we must point out that Feist, the definitive pronouncement on the required level of creativity, does recognize a narrow category of works in which the necessary creativity is missing. In terms of the above analysis, the works in question, considering the legitimate elements within these two useful articles that can be taken into account in their overall combination– and here that is the combination of colors– fall into that narrow category of uncopyrightability.

Flash Magic Flashcard Decoder:

You argue in the case of the *Flash Magic Flashcard Decoder [FMFD]* works that the housing of the FMFD, has "a width which tapers in along the right side, but extending in an outward fashion along the left side of the body; that it has no impact on the operation of the device;" that "the shape of the housing is purely aesthetic;" that "the recess portion provided in the upper right hand corner of the housing has no bearing on the operation of the device;" that the rectangular-shaped bottom portion and generally U-shaped top portion has "little or no impact on the operation of the device." *FMFD* Appeal at 7. You further maintain that if the decoder screen and writing implement were to be removed from the FMFD, the "asymmetric structure of the body of the FMFD, the recess portion in the upper right corner and the uniquely-shaped flashcard holder would remain intact," thus evidencing physical separability. *FMFD* Appeal at 7.

You also point out that conceptual separability exists because the "generally U-shaped top portion of the flashcard holder can be separately identified and exists independently from the operation of the FMFD." *FMFD* Appeal at 8. You argue that the flashcard holder could have been fashioned in any number of design options and that the design chosen, including the generally elliptical-shaped opening present through the FMFD body as well as the upper right recess, was "based on the artistic judgment of the applicant." Finally, the combination of colors is also put forward as a "sufficient basis to maintain a claim for copyright for the FMFD housing." *FMFD* Appeal at 10.

Although you have dissected the FMFD work into parts which you maintain can be physically separated from the actual decoding screen and writing implement, the parts which you have identified as possessing physical separability– the upper right recess portion, the rectangular-shaped bottom portion and generally U-shaped top portion, the uniquely-shaped flashcard holder– all of these "areas" of the FMFD are, indeed, just that: areas or integral parts of the entire article which, although they may be capable of being physically separated by detaching or breaking the parts from each other, the article as

such, i.e., the FMFD, would not exist if these components were taken away. The only "things" left would be the decoder screen and writing implement-- neither of which singly or together constitute the FMFD for which copyright registration is sought. The useful article which is marketed as FMFD consists of the functional decoder screen and writing implement in an integrated combination with all other individual parts which also function in the use of the work- the cards themselves as well as the container in which the cards sit in order to easily maneuver them in conjunction with the decoder screen. In your argument, you have physically dissected away from each other coordinate and inter-functioning utilitarian parts of the overall shape of the work. Taking away one or more of the individual parts in seeking to show physical separability leaves one with less than the article itself, i.e., the utilitarian aspects as well as the shape and configuration of the useful article cease to exist as such- an attempt at showing physical separability inconsistent with expressed Congressional intent as to which separable- **yet intact**- aspects of a useful article might enjoy copyright protection. H.R. Rep. No. 1476, at 55.

You further argue that certain aspects of the FMFD are conceptually separable from the "operation of the FMFD." *FMFD* Appeal at 8. Specifically, you argue that the "generally U-shaped top portion of the flashcard holder exist independently from the operation of the FMFD" and that the shape of the holder "has little or no impact on the operation of the FMFD." Id. You also argue that the "generally elliptical-shaped opening present through the FMFD body gives the FMFD an aesthetic look;" that the "recess along the upper right-hand corner of the FMFD has an aesthetic shape that has little or no impact on the operation of the device;" and, finally, that the combination of three colors renders the FMFD copyrightable. *FMFD* Appeal at 9.

The portions of the work which you argue are conceptually separable from the utilitarian aspects of the article are, again, integral parts of the article and are essentially related to the functioning of the article. The U-shaped top portion of the flashcard holder, the upper right recess and the elliptical-shaped opening of the body of the work are all utilized to hold and to secure the cards in place in order for the cards to work with the decoder screen in bringing about the desired result, i.e., a child learning mathematical skills. Although the constituent portions of the work which you have pointed out could have been designed in different shapes, that fact does not alter the utilitarian character of those particular portions of the work. Because those indicated parts are useful in nature and intimately tied to the decoder screen's functioning and because the design of those parts is part of the overall shape of a useful article, which shape Congress has determined not protectible by copyright, we cannot register any portion of the FMFD as either physically or conceptually separable.

Finally, as with *Twist and Shout*, the use of three solid colors in the *Flash Magic* works does not rise to the level of separable **copyrightable** authorship. Such a combination of three colors lacks the necessary minimum quantity of authorship as that has been determined under Feist, *supra* at 7, 8.

The Appeals Board takes this final opportunity to remind you that registration may be made for these works on the basis of the text and photographs appearing on the packaging of the works if those elements are published for the first time in these works and are owned by your client. If this is desired, new applications should be submitted limiting the authorship description at space 2 of the Forms VA to "text and photographs."

This decision constitutes final agency action with respect to registration of these works on any basis other than "text and photographs" of the packaging materials.

Sincerely,

Nanette Petruzzelli

Nanette Petruzzelli
Chief, Examining Division
For the Appeals Board
United States Copyright Office