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April 12, 2000

Matthew R. Jenkins, Esq.
Jacox, Meckstroth & Jenkins
2310 Far Hills Building
Dayton OH 45419-1575

Re: "TELESUITE ROOM"
Copyright Control No. 60-514-2527(J)

Dear Mr. Jenkins:

I am writing on behalf of the Copyright Office Board of Appeals in response to your letter dated June 24, 1998, appealing the Copyright Office's refusal to register the work entitled Telesuite Room. You wrote on behalf of your client, Teleport Corporation. Upon careful reexamination of the application, deposit, and all related correspondence, and consideration of the copyright statute, legislative history and case law, the Board finds that Telesuite Room cannot be registered as an architectural work.

Administrative Record

On August 19, 1996, the Copyright Office received a visual arts application for registration of an architectural work titled "Telesuite Room." You indicated in a fax dated November 25, 1996, that your client's work was intended to be a conference room permanently located within a building.

In a letter dated December 25, 1996, Examiner John H. Ashley denied registration for Telesuite Room either as an architectural work or as a pictorial, graphic or sculptural work. Mr. Ashley wrote that the work did not meet the specifications in regulations at 37 C.F.R. 202.11(b)(2) regarding what constitutes a "building," and did not appear to fit Congress' concept of a "building" as expressed in H.R. Rep. No. 735, 101st Cong., 2d

Sess. (1990), the House Report for the legislation enacted to provide copyright protection for architectural works. First denial letter at 2. Even if the work were deemed to be a "building," it appeared to be designed in a familiar, geometric shape that is not copyrightable, and did not contain a protectable arrangement and composition of spaces. *Id.* at 3.

In a letter dated February 4, 1997, you requested reconsideration of the refusal to register Telesuite Room, asking for registration either as an architectural work or as a sculptural work. You argued that the work met the statutory definition of "architectural work" and was analogous to works noted as protectable in 37 C.F.R. 202.11(b)(2) and in the House Report. Further, you asserted that the work could be protected as one space, as opposed to one room in a building. You also stressed the permanent nature of the work. First request for reconsideration at 1-2.

In addition, you suggested that Telesuite Room could be registered as a "life-size, walk-in" sculptural work. First request for reconsideration at 3. You also highlighted the separable sculptural aspects of the interior decoration and structure that might be registered. *Id.*

The Office responded in a letter dated March 16, 1998, again refusing to register Telesuite Room. Examining Division Attorney-Advisor Virginia Giroux explained that the room was not a "building" under terms of the copyright statute at 17 U.S.C. 101 or the regulations at 37 C.F.R. 202.11(b)(2). She asserted that the room was a fixture to be placed within an existing space in a building, and was not an individual edifice. Second denial letter at 2.

In addition, the work could not be registered as a sculptural work because it embodied the interior design of one room, and contained no separable, original authorship that embodied forms or elements that were not in the public domain. See 37 C.F.R. 202.1(a). Further, the work could not be described as a "building" since it did not possess the overall structure of an edifice. Second denial letter at 2.

You replied in a letter dated June 24, 1998, again requesting registration of Telesuite Room, and reiterating the points you previously made. You asserted that Telesuite Room falls within the coverage of 37 C.F.R. 202.11(b)(2) and the works Congress intended to protect, as expressed in the House Report. Second request for reconsideration at 2. You noted that an architectural work did not have to be built in the open to be registrable. You stressed the permanent nature of Telesuite Room and repeated that when installed it would alter the interior configuration of the overall building in which it was placed. You added that the work presented an original selection and

arrangement of design elements defining sculpture in the form of an interior sculpture that becomes part of a building. *Id.* at 4.

The Appeals Board's Decision

The Appeals Board considered the definition of "architectural work" in section 101 of title 17, United Stated Code (as amended), the House Reports for the 1976 Copyright Act and the Architectural Works Copyright Protection Act of 1990, implementing regulations at 37 C.F.R. 202.11(b)(2), and existing case law to examine de novo the Telesuite Room application, deposit and correspondence related to the work. To this date neither the courts nor Congress (except for the few specific examples of stand-alone structures cited in the House Report for the Architectural Act) have expressly addressed what may constitute a protected architectural work, or whether a single interior room might qualify. However, the Board concludes that registration of a single room or a portion thereof, such as Telesuite Room, would be inconsistent with the definition of "architectural work."

An "architectural work" is defined in section 101 of the current Copyright Act as "the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features."

Telesuite Room is not the "design of a building"; at most it is the design of a small portion of a building. The definition of "architectural work" does not appear to include an individual room, no matter what effect the design of the room might have on the overall design of the building.

Although the Board is aware of no cases in which this issue has been addressed, the discussion of "architectural works" in Leicester v. Warner Bros., 1998 U.S. Dist. LEXIS 8366; 47 U.S.P.Q. 2d 1501 (C.D. Cal. 1998), is instructive. That case involved the defendants' inclusion, in a motion picture, of four towers designed by the plaintiff as part of a building, that allegedly infringed the plaintiff's architectural copyright. The court concluded that "the four relevant towers are a portion of the architectural work which includes the building and those four towers." The court thus saw the towers not as archtectural works in and of themselves, but as part of an architectural work, *viz*, the entire building.

You have observed that the legislative history of the Copyright Amendments Act of 1990 states that "[T]he phrase 'arrangement and composition of spaces and elements'

recognizes that (1) creativity in architecture frequently takes the form of a selection, coordination, or arrangement of unprotectible elements into an original, protectible whole; (2) an architect may incorporate new, protectible design elements into otherwise standard, unprotectible building features; and (3) *interior architecture may be protected.*" (Emphasis added.) H.R. Rep. No. 735, 101st Cong., 2d Sess. 18 (1990). The Board does not interpret this statement to mean that individual elements of interior design may constitute an architectural work, or that the interior design of a single room may constitute an architectural work. Rather, it simply acknowledges that the protection for an architectural work (*e.g.*, a building) can extend not only to its exterior design, but also to its interior design elements.

In light of this conclusion, your assertion that the work is designed to be permanent or stationary, and that it would be constructed for human habitation, as is required in 37 C.F.R. 202.11(b)(2), is irrelevant. A room may be permanent and stationary, and designed for human habitation, but although those features may be elements of the definition of a building, they do not add up to a building.

Turning to your alternative assertion that Telesuite Room should be registered as a sculptural work, the Board cannot agree. Initially, the Board is reluctant to recognize as a "sculptural work" a design of a room which, as is acknowledged in the application for registration and emphasized in your correspondence, is really intended to be recognized as a work of architecture. An alleged architectural work that does not qualify as such is not disqualified from consideration as a sculptural work, but its architecture-like origins cast doubt on its sculptural status. In any event, even in the absence of such concerns, the Board cannot agree that Telesuite Room is a sculpural work of authorship.

Your assertion that the Telesuite Room is a sculptural work appears to be based on "the gypsum work [which] comprises an original selection and arrangement of design elements which define an original sculpture in the form of an interior sculpture which can become a permanent part of a building." Second request for reconsideration, at 4.

The Board's analysis begins with the understanding that Telesuite Room is a useful article, a conclusion that you appear to have accepted. See your first request for reconsideration, at 3. Indeed, when Congress implemented our adherence to the Berne Convention in 1998, it recognized that buildings are useful articles. See S. Rep. No. 100-352 , at 9 (1988).* Although the Board has concluded that Telesuite Room is not an

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* Although Congress decided to treat architectural works as distinct from pictorial, graphic, or sculptural works when it enacted protection for architectural works as such in 1992, and although it decided not to apply to architectural works the separability test that is applied to pictorial, graphic and sculptural works, those decisions have no bearing on how a

architectural work, it has reached that conclusion because Telesuite Room "is not the 'design of a building'; at most it is the design of a small portion of a building." See discussion above. As, in essence, the design of a room – or, more accurately in the context of a claim of sculptural authorship, as the room itself – Telesuite Room is "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information" – *i.e.*, it is a "useful article" as defined in 17 U.S.C. § 101. Moreover, given that a building is a "useful article," Telesuite Room is also a "useful article" because § 101 instructs us that "[a]n article that is normally a part of a useful article is considered a 'useful article'."

As a sculptural work, Telesuite Room would be copyrightable 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 (definition of "pictorial, graphic and sculptural works"). Based on these provisions of law and the legislative history, the Office applies a separability test that is contained in Section 505 of Compendium of Copyright Office Practices, Compendium II ("Compendium II"). Section 505 states that:

> Registration of claims to copyright in three-dimensional useful articles can be considered only on the basis of separately identifiable pictorial, graphic, or sculptural features which are capable of independent existence apart from the shape of the useful article.

In other words, any copyrightable authorship in Telesuite Room must be found in something other than the shape of the room. You have failed to identify such authorship. Even if the gypsum work that you identify could be considered to be something other than part of the shape of the room (*e.g.*, if it could be analogized to "carving on the back of a chair, or pictorial matter engraved on a glass vase" – see § 505.03 of Compendium II), you have identified and the Board can identify no "design elements" (in your words) of that work that do not appear to be commonplace. "Familiar symbols or designs" are not copyrightable, 37 C.F.R. § 202.1 (Copyright Office regulation, "Material not subject to copyright"), nor are "common geometric figures or shapes in three-dimensional form." Compendium II, § 503.02(b). Nor is there any copyrightable authorship in the arrangement or placing of individual standard features included in the Telesuite Room design, such as doors, windows, ceiling or walls.

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building or a room would be treated when its copyrightability as a sculptural work is in question.

The Appeals Board finds no architectural or sculptural authorship in Telesuite Room that can be registered for copyright protection. Therefore, your request must be denied. This decision constitutes final agency action.

Sincerely,

David O. Carson
General Counsel
for the Appeals Board
U.S. Copyright Office