United States Copyright Office
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July 30, 2004

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Re: Control Number: 60-902-9297(L)
2000 WESTMINSTER MOTS WIND CHIME
2000 BASS MOTS WIND CHIME
2000 TENOR MOTS WIND CHIME
2000 ALTO MOTS WIND CHIME
2000 MEZZO-SOPRANO MOTS WIND CHIME
2000 SOPRANO MOTS WIND CHIME
1994 WESTMINSTER MOTS WIND CHIME
1996 TENOR MOTS WIND CHIME
1999 MEZZO-SOPRANO MOTS WIND CHIME

Dear Mr. Lundeen:

I am writing on behalf of the Copyright Office Board of Appeals in response to your letter dated February 21, 2002, appealing a refusal to register nine wind chime designs on behalf of your client, Sara Neal Eskew.[1] The Board has carefully examined the submissions for all nine of these works, including all deposit materials submitted, the applications for the works, and all other material submitted by your firm concerning the copyrightability of the nine wind chimes. The Board has concluded that it must deny registration because the works do not contain sufficient sculptural authorship to support a claim to copyright.

ADMINISTRATIVE RECORD

Initial Submission

On March 16, 2001, the Copyright Office received applications on behalf of copyright claimant Sara Neal Eskew covering twelve wind chime designs. The nature of

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[1] There was some confusion in your second request for reconsideration regarding the number of works covered. In a number of references you refer to eight works being appealed. However, you also indicate that there are nine works in question: "For the purposes of the present appeal, the copyright claim to the three other (earlier) related works identified in the First Appeal is withdrawn." Letter of Lundeen to Board of 2/21/2002, at 1. Moreover, you list nine works at the beginning of your second request for reconsideration. Consequently, we have treated your appeal as covering nine works rather than eight despite the fact that you paid for only eight.

authorship for each work was described as three-dimensional sculpture. The deposit material consisted of photographs of each wind chime. By letter dated July 17, 2001, Visual Arts Examiner James Shapleigh, noting that copyright does not protect familiar symbols and designs and minor variations of basic geometric shapes, refused registration of these works because he found that they did not contain the requisite amount of original artistic or sculptural authorship.

First Request for Reconsideration

In a letter dated September 6, 2001, you requested reconsideration [first appeal] of the refusal to register the twelve wind chime designs. You argued that the wind chimes works consist of many different elements, and that the copyright claim consists of the overall selection, combination, and arrangement of those elements in a way which constituted original authorship. [Cases cited in support of registration included Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904 (3d Cir. 1975); Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951); L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486 (2d Cir. 1976); Drop Dead Co. v. S.C. Johnson & Son, Inc., 326 F2d 87 (2d Cir. 1963); and Feist Publications, Inc. v. Rural Tel. Service Co., 499 U.S. 340 (1991).] As evidence that the wind chime designs of the copyright claimant were distinctive, you submitted pictorial representations of other wind chime designs available in the market place. Finally, you cited the extensive sales of the claimant's wind chimes, and urged that the fact they had been copied was further evidence of the copyrightability of the designs.

The Examining Division again refused to register the twelve wind chime designs. On October 25, 2001, Virginia Giroux, Attorney Adviser for the Examining Division, upheld the original decision that all of the designs lacked a sufficient amount of original sculptural authorship to support a copyright registration. Ms. Giroux noted that selection of materials comprising a work, such as type of cord, wood, metal, or finish, did not contribute to the copyrightability of the work. Additionally, she stated that the ideas underlying the wind chime designs were excluded from consideration of copyrightability. She characterized the works as mobile-like wind chimes, each consisting of either four or six cylindrical tubes unequal in length and weight suspended by a cord and wire assembly, a disk-shaped clapper, and a diamond-shaped wind catcher. She further noted that cylinders, circles, disk-like shapes, spheres, diamond shapes, cone shapes and the stair-step pattern, or minor variations thereof, are common and familiar shapes which are in the public domain and, therefore, not copyrightable. Letter from Giroux to Lundeen of 10/25/01, at 2 - 3.

Second Request for Reconsideration

In a letter dated February 21, 2002, you filed a second request for reconsideration [second appeal] of certain of these works. You argued that the works at issue were copyrightable because of the selection, coordination, and/or arrangement of their features,

that they were distinguishable from other similar works, and that the designs enjoyed commercial success. Among the 54 variables that you list as being part of your client's choices are: the selection of the cord; selection of the thickness of the cord, selection of the color of black in the cord and tubes; selection of the knot, and arrangement of the cylindrical tubes in a circular pattern. You asserted that the wind chime designs met the creativity standards established by a series of cases, including Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904 (3d Cir. 1975); Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951); L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486 (2d Cir. 1976); Feist Publications, Inc. v. Rural Tel. Service Co., 499 U.S. 340 (1991); and Drop Dead Co. v. S.C. Johnson & Son, Inc., 326 F.2d 87 (2d Cir. 1963).

DECISION

Earlier Wind Chimes Embody Similar Design Elements

As noted, you did not include in the second request for reconsideration three of the designs, 1989 Soprano MOTS Wind Chime, 1990 Bass MOTS Wind Chime, and 1990 Alto MOTS Wind Chime, which were part of the first level of review. Despite the confusion in numbering, the Board considered the nine designs listed at the beginning of your February 12, 2002, request letter for reconsideration.[2]

At the outset, we must note that the three wind chimes not appealed contain design elements very similar to those found in the other nine wind chimes. We note that, if these three earlier-published wind chimes were copyrightable–which they are not– the nine later published wind chimes, as derivative works, would lack the necessary copyrightable new matter to support a copyright registration. Each of the application forms for the nine works before the Board of Appeals lists new matter in the works, *i.e.*, new authorship on which copyright is being claimed. The new matter for each of the works is described variously as the same tubing, or clapper, or wind catcher elements or, in a few of the works, as fewer than all of the constitutive elements of the wind chimes as that of the earlier published works. All of these wind chimes follow the same basic design, varying only in the dimensions or number of the relatively few elements or in slight changes in the shapes of the elements. For such derivative works, neither case law nor copyright practices support registration of such "minuscule variations." *See, e.g.* L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 492 (2d Cir. 1976).

We set out below our reasoning concerning the uncopyrightable composition of all the wind chimes submitted for registration. Our reasoning applies to both the original works and the derivative, later-published works.

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[2] *See* explanation at footnote 1, above.

The Requirement of Creativity

Your second request for reconsideration restates the principle that only a modicum of creativity is required to support a copyright. You have cited a number of cases repeating this principle to support registration of these wind chime designs.

One of these cases is the hallmark opinion, Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991). In determining whether a work has a sufficient amount of original artistic authorship to sustain a copyright claim, the Copyright Office adheres to Feist's "modicum of creativity" standard. But in Feist, the Court also ruled that some works (such as the work at issue in Feist) fail to meet the admittedly low standard. The Court observed that "as a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity," *Id.* at 363, and that there can be no copyright in work in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359.

As discussed in the Office's earlier responses to your requests for reconsideration, familiar symbols or designs are not subject to copyright and applications for registration of such works cannot be entertained. *See* 37 CFR 202.1(a).[3] Copyright Office registration practices, even prior to Feist, recognized that some works of authorship have a *de minimis* amount of authorship and, thus, are not copyrightable. *See* Compendium of Copyright Office Practices, Compendium II, 202.02(a) (1984). With respect to pictorial, graphic and sculptural works, which are Class VA works, the class to which these wind chime designs belong, section 503.02(a) of Compendium II states that a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." The principle that there is no protection for familiar symbols, designs or shapes such as standard geometric shapes falls within the overarching teaching of Feist that there is no copyright in works that do not reflect more than a *de minimis* quantum of creativity. Feist at 363. In addition to stating that prohibition, Compendium II, which provides detailed instructions for Copyright Office procedures, also cites the principle that creative expression is the basis for determining whether a work is copyrightable, not an assessment of aesthetic merit. Section 503.02(a) of Compendium II states that:

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[3] In response to the first request for reconsideration, Ms. Giroux noted: "These works, mobile-like wind chimes, each consist of either four or six cylindrical tubes unequal in length and weight suspended by a cord and wire assembly, a disk-shaped clapper, and a diamond-shaped wind catcher. In all except one, the tubes are arranged in a stair step pattern within a circular shape with the length of the tubes arranged in order of increasing length. Cylinders, circles, disk-like shapes, spheres, diamond shapes, cone shapes, and the stair step pattern, or minor variations thereof, are common and familiar shapes or designs, in the public domain, and are, therefore, not copyrightable as explained in Sec. 202.1 of the Copyright Office Regulations, 37 C.F.R. 202.1." Letter from Giroux to Lundeen of 10/25/01, at 2.

> Copyrightability depends upon the presence of creative expression in a work, and not upon aesthetic merit, commercial appeal or symbolic value. Thus, registration cannot be based upon the simplicity of standard ornamentation such as chevron stripes, the attractiveness of a conventional fleur-de-lys design, or the religious significance of a plain, ordinary cross. Similarly, it is not possible to copyright common geometric figures or shapes such as the hexagon or the ellipse, a standard symbol such as an arrow or a five-pointed star. Likewise, mere coloration cannot support a copyright even though it may enhance the aesthetic appeal or commercial value of a work. The same is true of a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations.

Further, the Office does not evaluate the aesthetic qualities of works. A work may be highly valued for its aesthetic appeal and, yet, not be copyrightable. Rather, copyright law requires evidence of more than a *de minimis* level of authorship in selection, coordination and arrangement. Works based on public domain elements may be copyrightable if there is some distinguishable element in their selection or arrangement of the public domain elements or in a modification of a constitutive element itself that reflects choice or authorial discretion that is not so obvious or so minor that the "creative spark is utterly lacking or so trivial as to be nonexistent."

The works at issue here, nine wind chimes, consist of vertical hollow cylinders, of varying length. The works contain either four or six such vertical cyclinders. Present in the works is also a cone-shaped top of the chimes from which the cylinders hang with cords and knots. The cylinders also hang in a stair-step pattern. A circular disk exists at approximately the mid-point of the length of the cylinders and a clapper is attached which is square or diamond-shaped, depending on the way in which you look at the clapper. Coloration is black and silver, the colors' coming from the particular materials or metals used in the various chimes. Under the Feist principle, none of the individual elements in the composition of the wind chimes is protectible in itself– simple elongated cylinders, wire shaped into a cone from which the cylinders hang, elementary squares and circular disks. Nor is the simple combination of very few elements which combination constitutes the entire wind chime copyrightable.

This principle finds support in numerous judicial decisions which Ms. Giroux cited in her October 25, 2001 letter. *See, e.g.*, Jon Woods Fashions, Inc. v. Curran, 8 U.S.P.Q. 2d 1870 (S.D.N.Y. 1988) (upholding Copyright Office's refusal to register design consisting of striped cloth over which was superimposed a grid of 3/16" squares); John Muller & Co., Inc., v. N.Y. Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986) (logo consisting of four

angled lines forming an arrow, with the word "arrows" in cursive script below, found not copyrightable); Magic Market, Inc. v. Mailing Services of Pittsburgh, Inc, 634 F. Supp. 769 (W.D.Pa. 1986) (envelopes printed with solid black stripes and a few words such as 'priority message' or 'gift check' did not exhibit minimal level of creativity necessary for copyright registration); Forstmann Woolen Co. v. J. W. Mays, Inc., 89 F. Supp. 964 (E.D.N.Y. 1950) (reproduction of standard *fleur-de-lis* could not support a copyright claim without original authorship). You have argued that these cases are not applicable to the wind chimes works at issue here, claiming that the cases cited by Ms. Giroux involve two-dimensional works but that the wind chimes in question are complex, three-dimensional works which evidence more choice and selection of artistic features than did the choice of telephone listings data involved in Feist or in the works in the cases cited by Ms. Girous. Letter from Lundeen of 2/21/02 at 10 - 11.

The Board has, indeed, considered whether these works are copyrightable in light of the creativity requirement for three-dimensional sculptures. The Board must, as both the original examiner and Ms. Giroux did, look at these claims from the perspective of what the copyright law and Copyright Office regulations and practices say about copyrightable or creative authorship in sculptural works. *See* 37 C.F.R. § 202.10(a) ("In order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form"). Again, Compendium II states that a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." Compendium II, § 503.02(a)(1984). Further,

> [I]t is not possible to copyright common geometric figures or shapes in three-dimensional form, such as the cone, cube or sphere. The mere fact that a work of sculpture embodies uncopyrightable elements, such as standard forms of ornamentation or embellishment, will not prevent registration. However, the creative expression capable of supporting copyright must consist of something more than the mere bringing together of two or three standard forms or shapes with minor linear or spatial variations. (emphasis added)

Compendium II, § 503.02(b)(1984).

Further, the sound or tone which these wind chimes may produce and the mobile-like quality of the works which may involve a motion of the tubes are not aspects of the works which are amenable to copyright protection. *See generally* 17 U.S.C. 102[a] for a list of the subject matter of copyright. The statute mentions sounds as protectible but refers to sound as it exists within fixed sound recording authorship or as part of motion pictures or other audiovisual works. Movement or motion may be included within the category of choreographic works or pantomimes. The fact that the wind chimes in question here may move and / or produce tones does not in itself lend weight to their possible protection under

copyright law. The main legislative history underlying the current copyright Act discusses "original works of authorship" as referred to in section 102 of the statute and points out the two fundamental criteria for such works: originality and fixation in tangible form. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 51 (1976). The House Report goes on to point out that the standard of originality for works protected by copyright "does not include requirements of novelty, ingenuity, or esthetic merit." *Id.* Feist made it clear that only a modicum of creativity is needed for protection and that some works fail to make the grade in that they possess only an obvious arrangement which does not meet even the low standard of copyrightability. Feist at 362 - 363. These wind chimes are such works.[4]

Selection, Arrangement, and Coordination of Familiar Shapes and Materials

In characterizing the creativity present in your client's designs, you urge that "there are a large number of variables, the selection, coordination and/or arrangement of which represent artistic craftsmanship constituting an original work of authorship in each of claimant's wind chimes. Letter from Lundeen of 2/21/02 at 4. You have identified 54 "variables" in the claimant's wind chimes, including such features as the silvery metallic finish of the ring; the selection of the color black for the cordage and tubes; the selection as to the type of knot that secures the cords to the ring; the selection of a metallic finish for the tube-ends; the selection of a matte or rough finish for the large surfaces of the wind catcher; the selection of a round ring (as opposed to a hexagon, triangle, solid disk or other shape, for the suspension platform; the selection of a diamond-shaped wind catcher. You also list a number of other selections including the selection of tubes of a uniform diameter and varying length carefully coordinated to yield precise musical tuning. Your list of variables also points to choices concerning the arrangement or coordination of the materials used to create the wind chimes, *e.g.* the arrangement of the tubes in a circular pattern; the arrangement of the tubes to align their vertical midpoints; and the coordination of the "movements of the tubes by arranging the length of the tubes and the length of the cordage from the ring to the tubes, which might be suggestive of youth or agility in the higher notes (shorter tubes, longer cordage, more movement) and resoluteness or maturity in the lower notes." *Id.* at 4-6.

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[4] The other cases cited in your request for reconsideration concerned works distinguishable from the wind chimes designs involved here. Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir 1951) involved reproductions of paintings of old masters. The court not only found that mezzotints represented copyrightable versions of works in the public domain, but it also found that the works in question were substantial departures from the original works in the public domain. Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904 (3d Cir 1975) concerned a wall chart with instructional material for use with weight lifting equipment. Salkeld does not appear to be directly on point since, as the court noted, it really goes to the standard for a copyright infringement case rather than the standard for copyrightability [and they are not necessarily the same]. The court concluded that defendant's work did not infringe plaintiff's. Drop Dead Co. v. S.C. Johnson & Son, Inc., 326 F.2d 87 (2d Cir. 1963), dealt with a label on an aerosol can of furniture wax which included textual instructions on how to use the product. L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486 (2d Cir. 1976) involved a plastic reproduction of a Nineteenth Century bank which was found by the Second Circuit *not* to be copyrightable due to the lack of originality.

Without responding to each of these 54 variables individually, the Board notes that, as a whole, this list includes choices such as color, finish, and choice of material that are not in themselves subject to copyright protection. A number of other choices appear to be made in order to cause the chimes to function as moving wind chimes rather than as a sculpture, *i.e.*, the ranging lengths of the tubes (necessary to produce different tones), the differences in diameter, and a number of choices such as the arrangement of tubes suspended in a circular pattern which arrangement is fairly commonplace for wind chimes or other mobiles.

In assessing the copyrightability of a work which is a compilation of individually uncopyrightable elements, the Office holds as it guideline Feist but also looks to other cases, both pre- and post-Feist, which give guidance on the issue. *See, e.g.*, Atari Games Corp. v. Oman, 888 F.2d 878 (D.C. Cir. 1989), a case in which, although the Office had initially refused to register the video game at issue, registration, upon Office reconsideration, was made in recognition of the overall audiovisual authorship composed of several individual elements which, taken together, were sufficient. In the case before us, the Board does not dispute the fact that the creator of the chimes made a number of choices in creating these chimes. However, the Board finds that these choices [some of which may represent largely utilitarian decisions while others may represent aesthetic choices] do not result in fixed expression which supports a copyright. The Board notes that in theory an author creating any work has an unlimited choice of alternatives, especially as to color and material, including the finish or surface quality of such materials. It is not the possibility of choices that determines copyrightability, but, again, whether the resulting expression contains copyrightable authorship. *See, e.g.*, Florabelle Flowers, Inc. v. Joseph Markovits, Inc., 296 F.Supp. 304, 307 (S.D.N.Y. 1968) (An "aggregation of well known components [that] comprise an unoriginal whole" cannot support a claim to copyright).

You have argued that the claimant in the works at question here is claiming copyright "for the overall selection, coordination, and arrangement of the features, which clearly embodies originality attributable to the author." Letter from Lundeen of 2/21/02 at 7. You have also urged that the selection, arrangement and coordination made in your client's works involves more authorship than that of the compilers of the telephone directories reviewed in the Feist decision: the wind chimes "are actually quite complex." They "employ various geometric shapes... various colors, textures and finishes... claimant is asserting copyright protection for the overall selection." Letter from Lundeen of 2/21/02 at 7. The Board does not find this argument to be persuasive. In reaching its conclusion, the Feist Court did not analyze the various "selections" which were necessary in order to manufacture a white page telephone directory. Rather, the Court, regarding the authorship in the white pages at issue, described the white pages as containing a listing of names, arranged alphabetically, along with addresses and telephone company-assigned phone numbers. Feist at 343- 344. In stating that the "most fundamental axiom of copyright law is that 'no author may copyright his ideas or the facts he narrates," Feist at 344 - 345, citing Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 556 (1985), the Court proceeded to determine that a work that is

entirely a collection of unoriginal materials, nevertheless, may be copyrighted if the material is selected, coordinated or arranged in an original fashion.

Arguably the works involved in the cases discussed earlier may not represent the *quantity* of choices which you have listed as those made by your client. However, we point out two things: [1] many of the 54 choices by the author of these wind chimes which you have listed either represent inherent qualities of the materials of which the wind chimes are made and, thus, are not the direct authorship of the creator of the overall wind chimes works, or, the choices are duplicative, *e.g.*, selection of the relative thickness of the cordage and selection of the textural finish of the cordage– both aspects of one element, the cordage; and, [2] the cases which Ms. Giroux cited in her October 25, 2001 letter illustrate the principle that public domain elements, brought together in an overall combination or selection, may not be sufficient even if several elements are present. Again, it is not the number of choices an author makes but whether the resulting work possesses a sufficient quantum of authorship which determines copyrightability. *See* definition of compilation, 17 U.S.C. § 101. While use of public domain elements and/or commonly known shapes can result in a copyrightable work, it can do so only as long as such public domain elements and common shapes are combined into, or form, a design which itself exhibits the necessary quantum of creative expression. Such a design may be either two- or three-dimensional in character. Based upon our review of the works at issue here, the correspondence you have supplied, the Office's regulations and the Compendium, the statute and the case law, we cannot find the requisite quantum of creativity to justify registration of the wind chime designs involved here.

We cite a more recent case concerning the composition of a three-dimensional sculpture. In Satava v. Lowry, the Ninth Circuit held unprotectible an artist's lifelike glass-in-glass sculptures of jellyfish. 323 F.3d 805 (9th Cir. 2003). In reversing the judgment of the district court, the appellate court acknowledged that a combination of unprotectible elements may quality for copyright protection, 323 F.3d at 811, and, citing among other cases Feist, 499 U.S. at 358, for the teaching that the "principal focus should be on whether the selection, coordination and arrangement are sufficiently original to merit protection," opined that "a combination of unprotectible elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship." *Id.* In the Board's analysis, following the teaching of Feist, the combination of relatively few elements– hollow tubing, wires in a cone-shape, cord and its knots, square clapper and circular disk– brought together in a design which utilizes a stair-step pattern of the tubes hanging vertically from wires and cord, possessing knots in the cords at certain places along the vertical length, having a circular disk at mid-point along the vertical length as well as an attached square-shaped clapper, does not rise to the level of copyrightable authorship required by Feist. Such a combination essentially brings together a few elements in an overall three-dimensional shape which is, if not categorically commonplace, trivial and scant in its overall configuration.

Comparison with Other Wind Chimes

Another argument you have raised is that the claimant's wind chimes are distinguishable from other wind chimes on the market, several examples of which were included in submissions to this Office. While as a preliminary matter the extent to which the submitted wind chime designs differ from one another appears debatable, in any event, such a consideration is not relevant to a copyright inquiry. Many designs found too simple to support a copyright claim are nevertheless distinguishable from one another or from other copyrightable designs. Again, in order to support a copyright claim, a work must contain "some creative authorship in its delineation or form." 37 C.F.R. § 202.10(a). And, if the Board in its review were to compare works refused registration with previously registered works, which it does not do, the result might well be to cancel the registrations of some previously registered works rather than register the works subject to appeal. The Compendium makes it clear that "the Office does not generally make comparisons of copyright deposits to determine whether or not particular material has already been registered." Compendium II, section 108.03. We cite Compendium II again for the registration principle that "the Office does not ordinarily make findings of fact with respect to publication or any other thing done outside the Copyright Office." Compendium II, section 108.05. Thus, your assertions that aesthetic appeal and commercial acceptance of the claimant's wind chime designs in the marketplace provide evidence of the copyrightability of the designs has no relevance to an Office determination of copyrightability. We do not dispute your assertions; we merely cannot take such assertions into account in our analysis of the actual expression of authorship found in the wind chimes at issue here. Again, many works found by courts to lack copyrightable authorship are nevertheless commercially successful. *See, e.g.*, Homer Laughlin China v. Oman, 22 U.S.P.Q.2d, 1074, 1075 (D.D.C. 1991). Custom Chrome Inc. v. Ringer, 35 U.S.P.Q.2d, 1714, 1716 (D.D.C. 1995) *citing* H. Rep. No. 94-1476 at 55 (1976) (although the shape of an industrial product may be aesthetically satisfying and valuable, the Committee's intention is not to offer it copyright protection under the bill). In Homer Laughlin, the court affirmed the Copyright Office's refusal to register a commercially successful chinaware design based on the Office's conclusion that the work was not copyrightable because "familiar shapes and symbols are not copyrightable nor are simple variations or combinations of basic geometric designs capable of supporting a copyright registration." Homer Laughlin, at 1075 (brackets omitted). As the court observed, "[w]hether a particular work reflects a sufficient quantum of creativity to satisfy the copyright laws is not susceptible to bright line rules or broad principles," but "in determining creativity, such a decision necessarily requires the exercise of informed discretion, and the Register, in part due to having to make such determinations on a daily basis, is generally recognized to possess considerable expertise over such matters." *Id.*

Regardless of whether a given design is embraced by the public as aesthetically pleasing, it is the analysis of the underlying authorship which must dictate the copyrightability of the design.

CONCLUSION

The Board agrees with the Examining Division Attorney that none of the works here, upon examination of the designs elementally and as entireties, contains a sufficient amount of original and creative authorship to sustain a copyright. Contrary to your assertion that the Examining Attorney was making her own impermissible aesthetic evaluation, Letter from Lundeen of 2/21/02, at 11, the Attorney was guided by published Office standards in determining that the works as a whole do not exhibit sufficient copyrightable authorship.

The Board finds that none of these wind chimes, each regarded in its entirety as a unified combination of elements, possesses the required minimal degree of creativity necessary to support a copyright registration and, therefore, affirms the Examining Division's decision to refuse registration. The Board's decision constitutes final agency action.

Sincerely,

/S/

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