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Dear Mr. Moriarty:

I am writing on behalf of the Copyright Office Board of Review in response to your request for a second reconsideration of the Office's decision to refuse registration for four applications submitted by your client, Colin Leslie Hearl Wood. After carefully reviewing the administrative record and your arguments, the Board affirms the Examining Division's refusal to register Applicant's four partitions which are Chenmai Fence, Songling Fence, Shantung Fence and Tangshan Fence.

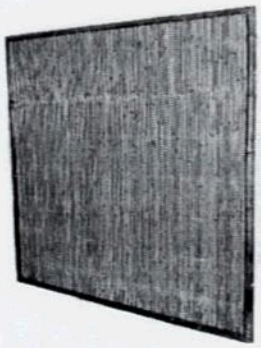
DESCRIPTION OF WORKS

The works being reviewed and which have been called partitions or fences serve as room or space dividers. Each work is made of bamboo. Applicant says that while each work has the term fence as part of the name

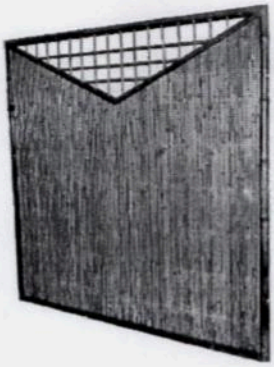
> unlike a real fence, [it]....is not intended for use as a barrier to the motion of people or animals, as demarcation of the edge of a parcel of land, or other such function. It is adapted to be used indoor, as an element of interior design, in order to adapt the *feng shui* of a room.

(Letter from Moriarty to Copyright Office Board of Appeals of 4/15/02, at 4).

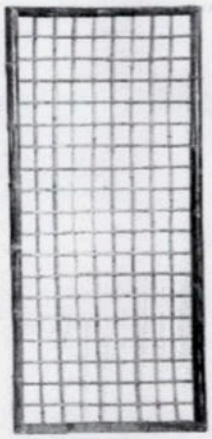
The Tangshan Fence has a bamboo frame with lengths of bamboo attached, curtain - like, within the frame; these lengths are placed in a horizontal direction.



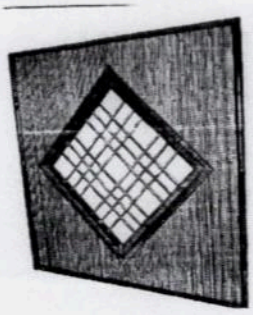
The Chenmai Fence has a bamboo frame with lengths of bamboo attached, curtain-like, within the frame; these lengths are placed in a horizontal direction; and there is a triangle lattice insert made of bamboo strips across the top portion of the fence.



The Shantung Fence has a bamboo frame and a lattice insert that is made by bamboo strips running in horizontal and vertical directions and forming squares.



The Songling Fence has a bamboo frame; lengths of bamboo running in a horizontal direction, curtain-like, are inserted within the frame. At the center of the Fence, there is another frame which has a lattice insert formed by strips of bamboo running in horizontal and vertical directions, criss-crossing each other and forming squares or rectangles.



ADMINISTRATIVE RECORD

Applications and Initial Refusal to Register. Applicant, Colin Leslie Hearl Wood, submitted four separate applications for works described as partitions, which are made out of bamboo. The Office received the applications for Chenmai Fence and Songling Fence on January 2, 2001; the application for Shantung Fence on January 3, 2001, and the application for Tangshan Fence on January 8, 2001.

Applications that are not received in the same package may be directed to different examiners. In this case, three different examiners looked at these works. In a letter dated June 15, 2001, Helen Livanois, Examiner, refused registration for Chenmai Fence. John M. Martin, Examiner, refused registration for Songling Fence and Shantung Fence in a letter dated June 23, 2001. William R. Briganti, Senior Examiner, refused registration for Tangshan Fence in a letter dated September 26, 2001. All three examiners found that the partitions are useful articles and based their refusals on the fact that the partitions do not have any separable authorship that is copyrightable.

First Request for Reconsideration. On October 15, 2001, as Applicant's attorney, you submitted requests for reconsideration for each partition. You argued that the partitions are not useful articles and, in the alternative, that they are conceptually separable. Citing three cases, Carol Barnhart, Inc. v. Economy Cover Corp., 773 F.2d 411 (2d Cir. 1985); Superior Form Builders v. Dan Chase Taxidermy Supply, 86 F.3d 320 (4th Cir. 1996) and Masquerade Novelty v. Unique Industries, 912 F. 2d 663 (3d Cir. 1990); you reasoned that the partitions' utility is to portray their own appearances. You stated that they are not "intended primarily for use as a barrier," but, rather, they are for use "as an element of interior design" to arrange a room according to the principles of *feng shui*. (Letter from Moriarty to Examining Division of 10/15/01, at 2). You attached photographs to demonstrate their use for *feng shui*, *see* Attachment A. Arguing alternatively that the partitions are conceptually separable from a useful purpose, you recommended that the Copyright Office apply standards of review discussed in Carol Barnhart and Professor Goldstein's[1] writings and presented arguments in which you applied four standards to the partitions, concluding that they are conceptually separable or have conceptually separable elements.

Response to First Request for Reconsideration. On December 17, 2001, Attorney Advisor, Virginia Giroux, upheld the refusal to register the four partitions. Applying the statutory definition of useful article, 17 U.S.C. 101, she found that the partitions are useful articles because it is only necessary that a work have "an intrinsic function." Once that standard is satisfied, she explained that a work is submitted to the analysis that the Copyright Office requires for utilitarian works. She rejected the alternative standards of review you offered because the standard applied by the Copyright Office, as required by section 505.03 of

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[1] Paul Goldstein, Copyright § 2.53(b), at 109.

Compendium II, chapter 5 (1984) (hereinafter, Compendium II) of Copyright Office Practices, is based on the statute and its legislative history, which has been upheld in court challenges. After stating the standard of review for useful articles, Ms. Giroux found that the partitions do not have any physically or conceptually separable elements. She said, "we view the vertical bamboo joints, the border portions, as well as the open space lattice designed portions, as part of the contour and configuration of the useful article itself not physically or conceptually separable from its utilitarian function without destroying its basic shape." (Letter from Giroux to Moriarty of 12/17/01, at 3). Citing cases in support of her point, she stated that, even if those elements were separable, they are not copyrightable because they are common and familiar geometric shapes or minor variations thereof " that are not copyrightable. Id. She discussed the cases you cited, finding the results in those cases consistent with the refusal to register the partitions.

Second Request for Reconsideration. On April 15, 2002, you requested that the Copyright Office Appeals Board, now renamed the Review Board, again reconsider the refusal to register the partitions. In addition to restating the arguments in the first request for reconsideration, you disagreed with Ms. Giroux's application of the definition of useful article to the partitions, arguing that a utilitarian function is not their primary purpose. Based on a detailed description of the manner in which bamboo is selected, arranged and assembled to make the partitions, you stated that the collective effect is "an elegant, harmonious appearance from strong bamboo construction." (Letter from Moriarty to Copyright Office Board of Appeals of 4/15/02, at 2-3).

Analogizing the partitions to novelty masks as considered in Masquerade Novelty v. Unique Industries, 912 F.2d 663 (3d Cir. 1990), and toys as considered in Gay Toys, Inc. v. Buddy L. Corp., 703 F.2d 970 (6th Cir. 1983), you stated that the effect of the partitions on the mind of the observer is not a utilitarian function. You argued, therefore, that, because the function of the partitions on the mind of an observer is not utilitarian, they do not fall within the definition of useful article. You again drew attention to photographs, in Attachment A, that illustrate that the partitions primarily serve an aesthetic function, having an effect on the mind of a viewer consistent with the principles of *feng shui*. You concluded that although the partitions did divide one area from another, their primary function is not utilitarian. You compared the bamboo screens to paintings, saying that paintings could be arranged in the same manner as the partitions to divide areas. Id., at 3-4).

You again urged the Copyright Office to consider a different standard of review to determine whether the partitions have conceptually separable elements. Besides the alternative standards you applied in the first request for reconsideration to prove that the partitions are conceptually separable from utilitarian functions, you also included the standard applied in Brandir International, Inc. v. Cascade Pacific Lumber Co., 834 F.2d 1142, (2d Cir. 1987), that has been attributed to Professor Denicola.

DECISION AND ANALYSIS

After reviewing the application and arguments you presented, the Copyright Office Board of Review affirms the Examining Division's refusal to register Chenmai Fence, Songling Fence, Shantung Fence and Tangshan Fence. To briefly state the Board's analysis, if it first determines that a work is a useful article, it then determines whether there is any aspect of the work that is separable from the utilitarian function. Only separable elements may be copyrightable. The Board then examines any separable elements to determine whether they have sufficient originality to be copyrightable. The Board determined that Applicant's partitions are not copyrightable because it did not find any elements separable from the bamboo partitions' function as utilitarian articles. Following is a detailed discussion of the Board's reasoning.

Useful Article Analysis

A useful article is defined as 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 (definition of "useful article"). Also, any article that is "normally a part of a useful article is considered a 'useful article.'" Id. Based on that statutory definition, the Review Board determined that Applicant's works are useful articles. The works are described in the applications as partitions and the word "fence" is part of the works' titles. The material deposited to identify the works is consistent with that characterization. The arguments presented in your requests for reconsideration acknowledge that they are partitions, despite your contention that they are not useful articles as defined in §101. However, typically, partitions and fences are useful articles that perform the function of dividing space, similar to what is done with walls.

Like walls, partitions and fences may be designed to have different appearances or construction, yet, they also serve many utilitarian purposes, such as providing security, protection from the elements, privacy and separating spaces that serve different functions. The photographs you submitted in Attachment A support that conclusion about Applicant's works. For example, they show Applicant's works being used to divide space between areas that serve different functions. A dining area is separated from a living room area and an indoor space is separated from the outdoors. One photograph shows a partition incorporated into a bed frame as the headboard which is another useful article.

You argue that the works are not useful articles because they are intended primarily to portray themselves to provide a physical environment that will affect a viewer in a way that is consistent with the principles of *feng shui*.[2] However, the definition of useful article requires

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[2] This argument is premised on the partitions' creating *feng shui* (a positive mental effect) in a room. We can ascertain no standard by which the Office could judge originality and creativity for copyright purposes and in

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only that "an" intrinsic utilitarian function exist, not that it be the sole or primary purpose of a work. Esquire, Inc. v. Ringer, 591 F.2d 796, 804 (D.C. Cir. 1978). The fact that the works function as fences or partitions, in addition to their purpose in creating a *feng shui* atmosphere or effect, is sufficient to support a finding that they are useful articles even if the utilitarian function is not regarded as their primary purpose by the author.

Therefore, as useful articles, the partitions are subject to the separability analysis that, as explained below, copyright law requires. The purpose of the separability analysis is to ensure that utilitarian aspects of useful articles are not registered since they are not copyrightable. Written guidelines for the separability analysis are found in § 505.02 of Compendium, which 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. Determination of separability may be made on either a conceptual or physical basis. (Emphasis added.)

These guidelines are based on the legislative history of the Copyright Act of 1976, quoted below, in which Congress clarified that utilitarian aspects of useful articles are not copyrightable. Only elements that are physically or conceptually separable from the utilitarian purpose of a useful article may be copyrighted.

> [A]lthough 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. Unless the shape of an automobile, airplane, ladies' dress, food processor, television set, or any other industrial product contains some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted under the bill. The test of separability and independence from "the utilitarian aspects of the article" does not depend upon the nature of the design — that is, even if the appearance of an article is determined by esthetic (as opposed to functional) considerations, only elements, if any, which can be

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terms of the Supreme Court's Feist standard of copyrightability based upon a work's ability to create a feeling of *feng shui*. See 4 M. & D. Nimmer, Nimmer on Copyright §13.03 [A][1[c] (criticizing the use of "feel" as an "amorphous referent" that "merely invites an abdication of judicial analysis"). Invoking a work's "feel" is no substitute for articulating an objective analysis of the work's original and creative elements which may provide the basis for copyright protection.

> identified separately from the useful article as such are copyrightable. And, even if the three-dimensional design contains some such element (for example, a carving on the back of a chair or a floral relief design on silver flatware), copyright protection would extend only to that element, and would not cover the over-all configuration of the utilitarian article as such.

H.R. Rep. No. 94-1476, at 55 (1976). (Emphasis added.)

Having determined that the four partitions are useful articles, the Review Board proceeded to do the separability analysis that is set forth below.

Separability Analysis

Physical Separability. Copyright law authorizes registration only if, and to the extent that, a work contains pictorial, graphic or sculptural features that are separable from the useful article. 17 U.S.C. § 101 (definition of "pictorial, graphic and sculptural works") and § 102(b). Those provisions have been incorporated into Copyright Office procedures for its physical separability test that is contained in § 505.02 of Compendium II, which states:

> 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.

Section 505 is a direct successor to the Copyright Office regulation that was affirmed in Esquire, Inc. v. Ringer, 591 F.2d 796 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 908 (1979). Esquire enunciated the rule that is the basis for the Office's analysis of whether a work is separable from the utilitarian object in which it is incorporated. Relying on explicit statements in legislative history, the Esquire Court found that the Office's regulation was an authoritative construction of the copyright law. *Id.* at 802-803. Esquire and later cases held that, despite an original and creative shape, the overall design or configuration of a utilitarian object may not be copyrighted if it is not "capable of existing as a work of art independent of the utilitarian article into which [it is] incorporated." *Id.* at 803-804. In Esquire, the Court held that the Copyright Office properly refused registration for a useful article, in that case a light fixture, notwithstanding how aesthetically pleasing the useful article's shape or configuration may have been. *Id.* at 800. The legislative history states that:

> The test of separability and independence from "the utilitarian aspects of the article" does not depend upon the nature of the design--that is, even if the appearance of an article is determined by esthetic (as opposed to functional) considerations, only

> elements, if any, which can be identified separately from the useful article as such are copyrightable.

H.R. Rep. No. 94-1476, at 55 (1976). Only elements that are independent of the utilitarian aspects of a useful article are copyrightable.

Consistent with Esquire, the Review Board determined that the partitions do not have aspects that are physically separable from their utilitarian function. The partitions are analogous to the wire-spoked wheels that were the subject of Norris Industries, Inc. v. International Telephone & Telegraph Corp., 696 F.2d 918 (11th Cir. 1983), *cert. denied,* 464 U.S. 818 (1983). The wire-spoke wheel covers were intended to simulate the appearance of wire wheels. Norris contended that the wheel covers were only ornamental and their purpose was to adorn the wheels of automobiles. However, the court found that the design and function of the wheel covers were inseparable. The court did not find any superfluous sculptured design that served no function and that could be identified apart from the wheel covers. Similarly, the partitions do not have any elements that are superfluous. It appears that this point is not in dispute since you argued that the partitions have conceptual separability, not physical separability.

Conceptual Separability. The Board cannot accept your recommendation that it adopt a different standard for conceptual separability than the one the Examining Division applied. While, as you pointed out, courts have shown deference to the experience and expertise of the Copyright Office, the Office's policies and regulations are based on the law contained in Title 17 of the U.S. Code and its legislative history. The Office does not have discretion to adopt a standard of review that is outside of those guidelines. The standard used by the Copyright Office is based on the statute, legislative history and precedent, as explained below. Also, the Copyright Office is bound by considerations of due process and principles of fairness to apply the same standard of review consistently, to all works.

You argue that the Office should adopt one of the alternative separability tests that you identified, the one proffered by Judge Newman in his dissent in Carol Barnhart[3]; or that proffered by Professor Denicola[4]; or that proffered by Professor Goldstein.[5] Because of the

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[3] 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." 773 F.2d at 423.

[4] The Second Circuit in Brandir International, Inc. v. Cascade Pacific Lumber Co., 834 F. 2d 1142 (2d Cir. 1987), 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

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possible problems which these and other 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, the Copyright Office has not adopted these particular alternative separability tests; 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 alternative separability theories you recommend may ultimately be endorsed by a majority of courts as the theory that is most 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, Inc. v. Unique Industries, Inc., 912 F.2d 663, 670 (3d Cir. 1990)], no such consistent or universally accepted test alternative to the current position of the Copyright Office has yet emerged.

The Copyright Office follows the practices described in Compendium II, § 505.03, which states that conceptual separability exists when pictorial, graphic or sculptural features are "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." As an example, § 505.03 also states, "Thus, carving on the back of a chair, or pictorial matter engraved on a glass vase, could be considered for registration."

The Board determined that the partitions do not have conceptually separable elements. The elements identified in your discussion regarding the appearance of the partitions cannot be imagined separately and independently from the partitions without destroying their overall basic shape. *See* (Letter from Moriarty to Copyright Office Board of Appeals of 4/15/02, at 2-3). Those elements are essential to their utilitarian function as space dividers. To conceive of them separately from the partition would alter the overall shape of the utilitarian object. As Ms. Giroux stated, "[We] view the vertical bamboo joints, the border portions, as well as the open space lattice designed portions, as part of the contour and configuration of the useful article itself no physically or conceptually separable from its utilitarian function without destroying its basic shape, and as such, not copyrightable." (Letter from Giroux to Moriarty of 12/17/02, at 3).

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[4](...continued)
whether the artistic aspects of the article were significantly influenced by the functionality requirements. 67 Minn. L. Rev. 707 (1983).

[5] In his treatise on copyright [Goldstein at 2.5.3 (2000)], Professor Goldstein offers an alternative separability test which affords copyright protection to a "pictorial, graphic or sculptural feature incorporated in the design of a useful article if it can stand on it own as a work of art traditionally conceived and if the useful article in which it is embodied would be equally useful without it."

Nor is it relevant that various aspects of the partitions are unique or decorative. To quote the legislative history again, "The test of separability ... does not depend upon the nature of the design -- 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 [utilitarian aspects of the] useful article as such are copyrightable." H.R. Rep. No. 94-1476, at 55 (1976).

Originality Analysis

As explained above, after finding that an element of a useful article is separable, the Board then evaluates whether it has sufficient originality to be copyrightable. The Board has not found that the partitions have any separable elements. However, we take the liberty to consider, for the sake of argument, whether the design elements you identified, as referenced above, would be sufficiently original to be copyrightable, were separability the case.

Copyright protection is only available for "original works of authorship." 17 U.S.C. §102(a). The Supreme Court has stated that originality consists of two elements, "independent creation plus a modicum of creativity." Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340, 346 (1991). *See also* Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99, 102 (2nd Cir. 1951) ("'Original' in reference to a copyrighted work means that the particular work 'owes its origin' to the 'author.' No large measure of novelty is necessary."); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884) (The court defined "author" to mean the originator or original maker and described copyright as being limited to the creative or "intellectual conceptions of the author.")

Even prior to Feist, courts interpreted "original" as requiring a low level of creativity. Any "distinguishable variation" of a work constituted sufficient originality as long as it was the product of an author's independent efforts, and was "more than a 'merely trivial' variation." Catalda, at 102-103. And, Catalda at 103, again: originality for copyright purposes amounts to "little more than a prohibition of actual copying"; Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250 (1903): "... a very modest grade of art has in it something irreducible, which is one man's alone."

However, at the same time that the Supreme Court reaffirmed in Feist the established precedent that only a modicum of originality is required for a work to be copyrightable, it also emphasized that there are works in which the "creative spark is utterly lacking or so trivial as to be virtually nonexistent." Feist at 359. Such works are incapable of sustaining copyright protection. Id., citing Nimmer on Copyright, 2.01[B]. 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," Feist at 363, and that there can be no copyright in works in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." Id. at 359. A work that reflects an obvious arrangement fails to meet the low standard of minimum creativity required for copyrightability. Id. at 362-363. An

example would be alphabetical listings in white pages of telephone directories, the type of work at issue in Feist, which the Supreme Court characterized as "garden variety...devoid of even the slightest trace of creativity." Id. at 362.

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 II, 202.02(a). With respect to pictorial, graphic and sculptural works, which are Class VA [visual arts] works, 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." Further, there is no protection for familiar symbols, designs or shapes such as standard geometric shapes. 37 C.F.R. 202.1. In addition to stating that prohibition, Compendium II, which provides detailed instructions for Copyright Office registration procedures, also reflects 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:

> 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.

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* quantum of authorship and such authorship may consist of a selection, coordination and arrangement of preexisting elements or features. Works based on public domain elements may be copyrightable if there is some distinguishable element in their selection, arrangement or modification that reflects choice and authorial discretion and that is not so obvious or so minor that the "creative spark is utterly lacking or so trivial as to be nonexistent." Feist at 359. *See also* 17 U.S.C. 101- definitions of "compilation" and "derivative work."

Although the individual components of a given work may not be copyrightable, the Copyright Office follows the principle that works should be judged in their entirety and not judged in terms of the protectibility of individual elements within the work. Atari Games

Corp. v. Oman, 979 F.2d 242, 244-245 (D.C. Cir. 1992). After carefully considering your descriptions and discussion of the partitions, the Board, in its assumption *arguendo* that the design features you identified are separable, has determined that the elements are not copyrightable, either individually or taken as a whole. The materials selected for the partitions are not copyrightable. The few shapes and design elements within the partitions are simple, basic geometric shapes that do not have sufficient authorship and contain only a *de minimis* level of creativity.

The analysis followed in the Office's examining procedure for determining whether there is sufficient creativity for copyright protection does not involve comparing works. Compendium II, section 108.03. Rather, registrability is determined on the merits of each work without comparison to prior art or to other registered works. It may be that the partitions vary significantly in their design from other partitions. While those variations may be significant in the analysis required for a design patent, they are not necessarily relevant to the standard of creativity required for copyright protection– a different standard that is based on relevant statutory and settled case law. Again, the partition designs are all merely simple variations on common shapes. Their level of creativity is *de minimis*, considered either as separately or as jointly together as a whole.

There is substantial support in case law for the Board's conclusion that the partitions are not copyrightable [assuming separability]: in Homer Laughlin China Co. v. Oman, 22 USPQ2d 1074 (D. D.C. 1991) (upholding refusal to register chinaware design pattern composed of simple variations or combinations of geometric designs due to insufficient creative authorship to merit copyright protection); in Jon Woods Fashions, Inc. v. Curran, 8 USPQ2d 1870 (S.D. N.Y. 1988) (upholding refusal to register fabric design consisting of striped cloth with small grid squares superimposed on the stripes where Register concluded design did not meet minimal level of creative authorship necessary for copyright); in John Muller & Co., Inc. v. N.Y. Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986) (upholding a refusal to register a logo consisting of four angled lines forming an arrow, with the word "arrows" in cursive script below, noting that the design lacked the minimal creativity necessary to support a copyright and that a "work of art" or a "pictorial, graphic or sculptural work ... must embody some creative authorship in its delineation of form.") *See also* Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc., 634 F.Supp. 769 (W.D. Pa. 1986) (envelopes with black lines and words "gift check" or "priority message" did not contain minimal degree of creativity necessary for copyright protection); Bailie v. Fisher, 103 U.S. App. D.C. 331, 258 F.2d 425 (D.C. Cir. 1958) (cardboard star with two folding flaps allowing star to stand for retail display not copyrightable work of art); and Forstmann Woolen Co. v. J.W. Mays, Inc., 89 F.Supp. 964 (E.D. N.Y. 1950) (label with words "Forstmann 100% Virgin Wool" interwoven with three *fleur-de-lis* held not copyrightable).

Assuming *arguendo* the presence of separable authorship in the partitions, the Board is unable to discern any authorship elements, considered individually or as a whole, that are more than merely trivial. Each element of the partitions that you identified reflects a minor

variation on a familiar shape or design. They do not have the necessary quantum of authorship, required by Feist, either individually or taken as a whole, to sustain registration.

Conclusion

For the reasons stated in this letter, the Review Board affirms the Examining Division's refusal to register the partitions. This decision constitutes final agency action in this matter.

Sincerely,

/S/

Marilyn J. Kretsinger
Associate General Counsel