United States Copyright Office
Library of Congress - 101 Independence Avenue SE - Washington, DC 20559-6000 - www.copyright.gov

March 27, 2007

Michael K. Hendershot
Brinks Hofer Gilson & Leone
P.O. Box 10395
Chicago, IL 60610

RE: C-LEG TABLE
Control No. 61-400-2358(B)

Dear Mr. Hendershot:

I am writing on behalf of the Copyright Office Review Board in response to your letter dated May 12, 2006, requesting reconsideration of a refusal to register the work entitled "C-LEG table" as a three dimensional ("3-d") sculpture on behalf of your client, New Classic Creations, Ltd. The Board has carefully examined the application, the deposit, and all correspondence in this case concerning this application and affirms the denial of registration of the work.

I. DESCRIPTION OF THE WORK

The table design at issue is composed of two parts: the tabletop and its legs. The tabletop has an eight-pointed inlaid bronze star comprised of overlapping geometric shapes. It also has a pattern of lines emanating outward from the star to the edge of the table as well as a bronze circle design spanning the circumference of the table. The bottom half of the table is composed of four legs which slope outwards from the center with each creating a C-shaped design. Between the four legs rests a square-shaped setting.



II. ADMINISTRATIVE RECORD

A. Initial Submission

On May 17, 2005, the Copyright Office received a Form VA application and a request for Special Handling from your client, New Classics Creations, LLC, to register the C-LEG table as three-dimensional ("3-d") sculpture. In a letter dated June 8, 2005, Visual Arts Section Examiner Joanna Corwin refused registration of this work because it is a useful article and did not contain any separable authorship needed to sustain a claim to copyright. Ms. Corwin explained that the design of a useful article is considered copyrightable only to the extent that the design incorporates a pictorial, graphic, or sculptural feature that is physically or conceptually separable from the utilitarian aspects of the article. She concluded that because all of the elements of the work are either related to the utilitarian aspects or function, or are subsumed within the overall shape, contour, or configuration of the articles, there is no physical or conceptual separable authorship. However, she did register the "Heart and Diamond Chair" which was submitted simultaneously with the C-LEG table because the design on the chairback was both separable and copyrightable.

B. First Request for Reconsideration

On October 11, 2005, the Copyright Office received your request to reconsider its refusal to register the C-LEG table. You asserted that the C-LEG table contains original, creative, copyrightable elements that are conceptually separable from its utilitarian aspects. Letter from Hendershot to Examining Division of October 11, 2005 at 2, citing *Kieselstein-Cord v. Accessories by Pearl*, 632 F.2d 989 (2d Cir. 1980); *Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co., Inc.*, 74 F.3d 488 (4th Cir. 1996); *Pivot Point International, Inc. v. Charlene Products, Inc.*, 372 F.3d 913 (7th Cir. 2004).

In support of this assertion, you stated that the C-LEG table contains at least two conceptually separate artistic elements: (1) the C-LEG table's original leg configuration (the C-LEG design); and (2) the C-LEG table's tabletop ("tabletop design") which is described as having "an original graphical design spanning the entire top of the table." As to the former, you noted that the applicant made an artistic judgment, independent of utilitarian considerations, to provide the table with a base consisting of four C-shaped legs, spaced at a particular distance apart from each other, and attached at their centers by a connecting piece. As to the latter, you noted that the tabletop exhibits three distinct elements: the eight-pointed inlaid bronze star comprised of overlapping geometric shapes; the pattern of lines emanating outward from the star to the edge of the table; and the bronze circle design spanning the circumference of the table.

In a February 15, 2006, letter addressed to you, Examining Division Attorney-Advisor, Virginia Giroux-Rollow, offered registration of the tabletop design because she found that there is a sufficient amount of original and creative 2-dimensional "artistic" authorship in the treatment of the elements to support a copyright registration based on a "2-d artwork." However, Ms. Giroux-Rollow refused to register a claim in the table as a "3-d sculpture" because the C-shaped legs are part of the shape of the useful article, and, as such, do not contain any authorship that is both separable and copyrightable. She concluded that because the C-shaped legs are related to the utilitarian aspects or function of the table

and are also subsumed within the overall shape, contour, and configuration of the table itself, there is no separable authorship.

Ms. Giroux-Rollow set forth the definition of a useful article under the Copyright Act and the extent to which such a work is copyrightable. She explained that the Copyright Office examines useful articles first to determine whether the work contains any pictorial, graphic, or sculptural authorship that is physically or conceptually separable from the work's utilitarian aspects. She noted that examiners do not make aesthetic judgments and do not consider the design's attractiveness, uniqueness, or its look or feel.

She distinguished the Denicola test for separability (employed by the courts in *Pivot Point* and *Brandir International v. Cascade Pacific Lumber Co*, 834 F.2d 1142 (2d Cir. 1987)) from the test the Copyright Office uses, as set forth in *Esquire v. Ringer*, 591 F.2d 796 (D.C. Cir. 1978), that is, conceptual separability occurs when the pictorial, graphic, or sculptural features, while physically inseparable by ordinary means from the utilitarian item, are nevertheless clearly recognizable as a pictorial, graphic, or sculptural work which can be visualized on paper or as a free-standing sculpture independent of the shape of the article without destroying its basic shape. Letter from Giroux-Rollow of 2/15/2006 at 2, citing *Compendium II, Copyright Office Practices, §505.03*. Ms. Giroux-Rollow added that the test for conceptual separability is not met by merely analogizing the general shape of an article to works of modern sculpture since the alleged artistic or decorative features and the useful article cannot be perceived as having "separate existences." She noted that the fact that a design is aesthetically appealing or that it could have been designed differently is not a relevant consideration in determining copyrightability. For the above stated reasons, registration of the work as a 3-d sculpture was again refused.

C. Second Request for Reconsideration

In a letter dated May 12, 2006, you requested reconsideration of the Copyright Office's second refusal to register the C-LEG table as a 3-d sculpture. In support of your request, you argue that the tabletop design and the leg design both are conceptually separable elements entitling the table design to registration in its entirety. Letter from Hendershot to Copyright Office of 5/12/2006 at 4-5, citing *Pivot Point*, 372 F.3d at 931; *Brandir*, 834 F.2d at 1145. You assert that the tabletop design is conceptually separable pursuant to the guidelines of *Compendium II* because it can be visualized on paper, and as a sculpture, without destroying it basic shape. Letter from Hendershot of 5/12/2006 at 6. You state that the Examining Division implicitly acknowledged that the tabletop design is conceptually separable when it offered to register it as a 2-d work. You further assert that the tabletop design is equivalent to the conceptually separable elements referenced by *Compendium II*, such as the "carving on the back of a chair" or "pictorial matter engraved on a vase." Letter from Hendershot of 5/12/2006 at 7. Finally, you argue that both the tabletop design and the leg design are conceptually separable pursuant to the *Pivot Point* standard because they reflect the independent, artistic judgment of the designer such that they are not "as much the result of utilitarian pressures as aesthetic choices." *Id.* at 8, citing *Pivot Point* at 931.

Additionally, you state that only a faint trace of originality is required for copyright protection. Letter from Hendershot of 5/12/2006 at 2, citing *In Design v. Lynch Knitting Mills, Inc.*, 689 F.Supp.

176, 178-79 (S.D.N.Y. 1998), *aff'd* 863 F.2d 45 (2d Cir. 1988); *Thomas Wilson & Co. v. Irving J. Dorfman* Co., 433 F.2d 409, 411 (2d Cir. 1970). You argue that the tabletop design and the leg design both feature the minimal level of creativity required for registration of the table design in its entirety. Letter from Hendershot of 5/12/2006 at 3-4, citing *Atari Games Corp. v. Oman*, 888 F.2d 878, 883 (D.C. Cir. 1989); *Tennessee Fabricating Co. v. Moultrie Mfg. Co.*, 421 F.2d 279, 282 (5th Cir. 1970); *In Design*, 689 F. Supp. at 178-79.

III. DECISION

After reviewing the applications and the arguments you presented, the Copyright Office Review Board affirms the Examining Division's refusal to register the C-LEG Table (*i.e.*, the structure consisting of both the tabletop and the legs) as a 3-dimensional design because it is a useful article lacking, apart from the already conceded 2-dimensional table top surface design, the necessary conceptual separability.

A. Copyrightability of Useful Articles

The principal question that we must address is whether the work is a useful article not subject to copyright registration. The Board's discussion will begin with a summary of the extent to which copyright protection is provided by law to useful articles.

1. The Statute

The copyright law sets forth the guiding principle regarding the extent of copyright protection for a useful article. It defines this protection with respect to a pictorial, graphic or sculptural work in the following terms: "the design of a useful article . . . 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." 17. U.S.C. § 101. The legislative history accompanying the 1976 Copyright Act clarified Congress's intent with respect to copyright protection for useful articles: ". . . to draw as clear a line as possible between copyrightable works of applied art and uncopyrighted works of industrial design." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 55 (1976). The House Report further explains Congress's intention that "although the shape of an industrial product may be aesthetically satisfying and valuable, [Congress's] intention is not to offer it copyright protection. . ." *Id.* Specifically addressing the issue of the "shape" of an industrial product, the House Report goes on to state that:

> 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 identified separately from the useful article as such are copyrightable.

Id.

2. Conceptual Separability

You argue that the tabletop design and the leg design are conceptually separable elements, entitling the Table design as a whole to registration for the entirety. Letter from Hendershot of 5/12/2006 at 3 - 4. We point to the Copyright Office's manual of practices, including those with respect to examination of claims to copyright registration, which addresses registration of the works of the visual arts. *Compendium of Copyright Practices, Compendium II,* (1984). *Compendium II,* chapter 500, treats separability and provides guidelines which explain how the Copyright Office approaches the examination of useful articles in order to determine whether such articles incorporate the statutorily-required "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 or sculptural features, while physically inseparable by ordinary means from the utilitarian item, are nevertheless clearly recognizable as pictorial, graphic or sculptural works which can be visualized on paper, for example, or as free-standing sculpture, 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:

> 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.
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> *Compendium II,* § 505.04.

The Office's position and its *Compendium* articulation are 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 a 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 separability judgment.

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 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. *See, e.g., Norris Industries, Inc. v. International Tele. and Telegraph Corp.*, 696 F.2d 918 (11th Cir. 1983), *cert. denied*, 464 U.S. 818 (1983); *Esquire, Inc. v. Ringer*, 591 F.2d 796 (D.C. Cir. 1978), *cert. denied*, 340 U.S. 908 (1979); *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).

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, *above at 4*, 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." *Esquire, Inc. v. Ringer*, 591 F.2d 796, 804 (D.C. Cir. 1978). 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 Eleventh Circuit in *Norris Industries* in which the Court noted Congress's 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. . ." *Norris*, 696 F.2d at 922. And, although it was a case brought under the Administrative Procedure Act [5 U.S.C. § 701 - 706], *Custom Chrome, Inc. v. Ringer*, 35 U.S.P.Q.2d 1714 (D.D.C. 1995), nevertheless confirmed that the Office's refusal (premised on *Compendium II* tests) to register motorcycle parts was not arbitrary, capricious, an abuse of discretion nor otherwise not in accordance with law.

B. Application of the Separability Test

You contend that the work in question, C-LEG Table, possesses sculptural authorship which is conceptually separable from the utilitarian function of this work. Letter from Hendershot of 5/12/2006 at 5-8. You have stated that what you view as conceptually separable designs in this work, the tabletop and the table legs, can be said to be separable from the utility of the work. *Id.* at 8. You argue that the Examining Division implicitly acknowledged that the tabletop design is conceptually separable because it offered to register the design on the surface of the tabletop as 2-dimensional artwork. The Copyright Office Review Board believes that your arguments obscure the basic principles that any separable features embodied in a useful article must: (1) be considered separable under the Office's long-standing test for conceptual separability, and (2) be consistent with the basic philosophy set forth in the legislative history concerning Congress's intent to deny copyright protection to industrial designs.

1. Copyright Office Test

In your second request for reconsideration, you urge the Copyright Office to recognize the tabletop and table leg designs as separable design elements of a single table. Letter from Hendershot of 5/12/2006 at 8. The work here, C-LEG Table, may possess overall shapes that you believe are conceptually separable, but that does not change the fact that the table itself is a useful article. We again cite *Compendium II* and its test for conceptual separability: the artistic features must be amenable to being "imagined separately and independently from the useful article without destroying the basic shape of the useful article." *Compendium II*, §505.03. You argue that the tabletop design can be "visualized on paper"and "visualized as a free standing sculpture" without destroying its basic shape. Letter from Hendershot of 5/12/2006 at 5-6. You also state that "it is not difficult to imagine the entire tabletop hanging on a wall as a sculpture, detached from either the Leg Design or the utilitarian aspects of the Table Design itself." *Id.* We do not believe that your characterizations and conclusions meets the test of conceptual separability. *Compendium II's* standard, *above at 5*, is not met here: the separation– either a physical separation or one which occurs only in the imagination– of the table elements, *i.e.*, of the top from the legs, would destroy the table as a whole, *i.e.*, would destroy the basic shape of the useful article. "The artistic features and the useful article cannot "both exist side by side and be perceived as fully realized, separate works – one an artistic work and the other a useful article." *Compendium II*, § 505.03. In essence, the destruction of the table is the result of removing, physically or conceptually, the table top from the legs or removing one or more legs from the table top. The conceptual removal of the tabletop from its table legs results in two distinct elements, neither of which can be used for its intended purpose as a table. In other words, the simple, oval-shaped design of the flat tabletop and the curvature of the legs are subsumed within the overall shape or contour of the 3-dimensional structure in which the tabletop and table leg designs are embodied. We therefore find that the work does not satisfy the conceptual separability test of *Compendium II.*

Based on the above-stated arguments, we uphold the Examining Division's refusal to register the C-LEG table. The work at issue, explicitly described on the registration application form as "a 3-Dimensional sculpture," is a functional table. The arguably artistic design of the work cannot remove the C-LEG table from the "useful article" class of works. We also note that while the Examining Division registered the tabletop design as 2-dimensional artwork, that does not contradict the fact the table, as a 3-dimensional article, is still a *useful* article not subject to registration. The C-LEG table does not meet the statutory requirement of separability as analyzed under the Office's separability test. We now analyze C-LEG Table under the alternative tests you have suggested.

2. Case Law and Alternative Tests

As we have explained above, any separable authorship said to exist within a useful article must meet the *Compendium II* tests put forward by the Office. We turn now, however, to the alternative separability tests you have put before us. In your request for a second reconsideration of registration for this work, you rely on *Kieselstein-Cord v. Accessories by Pearl, Inc.* to support your argument that the tabletop design is conceptually separable. Letter from Hendershot of 5/12/2006 at 3, 7. We find that case to be inapt here. In finding the ornamentation on the belt buckles to be separable from the functional aspects of the buckles, the *Kieselstein* court specifically noted that although a belt buckle is traditionally a useful article used to hold trousers at the wearer's waist, the particular buckles could be

considered jewelry and worn at other parts of the body as well; that is, wearers realized value in the conceptually separable sculptural elements. 632 F.2d at 993. With respect to the C-LEG Table top for which you have cited *Kieselstein*, its only use is a functional one, whether or not it is alleged to perform that function with more of an aesthetic flair because of the presence of the admittedly copyrightable 2-dimensional design on the surface of the top. The *Kieselstein* buckles' curves, on "several surface levels," 632 F. 2d at 990, formed a sculptural configuration which existed apart from their utility and from their overall buckle shape; the C-LEG Table top, on the other hand, does not exhibit any comparable and distinguishable sculptural configurations as did the belt buckles in *Kieselstein*. The Table top is simply an oval-shaped top, or level holding-plane, and its sole separable feature is its separately registered 2-dimensional surface artwork.

You also argue that both the tabletop design and the leg design are conceptually separable pursuant to the *Pivot Point* standard. Letter from Hendershot of 5/12/2006 at 5, 8. In *Pivot Point*, 372 F.3d 913, 931-932, the Seventh Circuit, relying on the separability test adopted in *Brandir International, Inc. v. Cascade Pacific Lumber Co.*, 834 F.2d 1142 (2d Cir. 1987), found that the particular facial expression of the mannequin's face at issue there was separable from the mannequin's functional aspect of displaying wigs and applying make-up. The test which the Seventh Circuit utilized was Professor Denicola's test which states that, where design elements can be identified as reflecting the designer's artistic judgment exercised independently of functional influences, conceptual separability may exist. Denicola, *67 Minn. L. Rev. 707* (1983). In favorably comparing the work at issue here with the human face mannequin in *Pivot Point*, you have taken the position that both the tabletop design and the leg design are conceptually separable artistic elements under the *Pivot Point* standard because they "reflect the independent, artistic judgment of the designer" [*Pivot Point*, 372 F.3d at 931][1] and that the applicant "made the artistic judgment, independent of utilitarian considerations . . ." Letter from Hendershot of 5/12/2006 at 8.

Pivot Point, employing the separability test used in *Brandir*, considers design influences and a designer's aesthetic goals in its overall legal analysis. In the case of C-LEG Table, we take administrative notice of the facts provided by your client in the application form, the deposit materials submitted, and the case law cited in support. Having taken such notice, we determine that a beautifully, or skillfully, or artistically-designed table is still a table and, thus, amenable to the useful article separability requirement. Here, the design elements, *i.e.*, the 3-dimensional top of the table and the 3-dimensional table legs, reflect a merger of aesthetic and functional considerations. No matter the shape and aesthetic qualities of the top of the table and the legs, these specific structures must still serve the

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[1] It is also worth noting that the *Pivot Point* court quotes Judge Newman's dissenting opinion in *Carol Barnhart, Inc. v. Economy Cover Corp.*, 773 F.2d 411 (2d Cir. 1985). The quote concerns Judge Newman's proposed test that an ordinary observer may recognize in a particular object two different concepts in his mind– one utilitarian and the other non-utilitarian– and may displace the utilitarian concept of the object with one which is not. Judge Newman saw such displacement in the observer's mind to be a basis for determining that the necessary statutory separability may exist in a given useful object. Judge Newman uses the example of an "artistically designed chair displayed in a museum." Under his test, if the observer can displace the concept of the utility of the chair by some other [non-utility] concept, conceptual separability may exist. He further opines, as an example, that "[T]hat does not occur, at least for the ordinary observer, when viewing even the most artistically designed chair." *Pivot Point*, 372 F.3d at 926, citing *Carol Barnhart*, 773 F.2d at 422. Or, the Board might add, the most artistically designed table.

utility of holding items placed on the top as well as holding up the flat table top itself, both the normal requirements of the structure of a table. Thus, the artistic aspects of these features cannot be said to be conceptually separable from these utilitarian features– which they really are– under the Denicola test adopted in *Brandir*. *Brandir*, 834 F.2d at 1145: "... if design elements reflect a merger of aesthetic and functional considerations, the artistic aspects of a work cannot be said to be conceptually separable from the utilitarian elements." The Board finds that the simple design of the C-LEG table fails to satisfy the conceptual separability test enunciated in *Brandir*, even if the Office were to have adopted that test.

In stressing the importance of *Pivot Point* which analyzed the mannequin head at issue under *Brandir's* reasoning, you cited the recent *Galiano v. Harrah's Operating Co.*, 416 F.3d 411(5th Cir. 2005) which opinion itself provided a brief history of the judicial analysis of the separability issue. We take this opportunity to point out that Fifth Circuit in *Galiano* did not, however, adopt the *Brandir*/Denicola separability analysis. The Fifth Circuit, rather, chose to apply the Nimmer test for determining the presence of separability: whether a useful article would be marketable to "some significant segment of the community simply because of its aesthetic qualities." *Galiano*, 416 F.3d at 417, 421- 422. The Court further chose to limit this particular separability test to the category of garment designs only and preferred this narrow standard "in the interest of having a determinate rule." *Id.* at 421- 422. Thus, although commenting that *Pivot Point* represents the "most thorough and persuasive analysis" of the separability issue "in any circuit," *Galiano*, 416 F.3d at 418, the Fifth Circuit panel applied the Nimmer test and found the plaintiff's works as not having been shown to be "marketable independently of their utilitarian function as casino uniforms." *Id.* at 422.

We raise this particular decision and its separability test to confirm that the Copyright Office would not consider as relevant to the separability test the marketability or the predictable commercial success of a useful article with respect to its aesthetic aspects. The House Report to the 1976 Act states unequivocally that "... 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." H.R. Rep. No. 1476 at 55, *above at 4*. And, *Compendium II*, §503.01, states that the registrability of a work does not depend on artistic merit or aesthetic value. Section 505.05 further states that in applying the Office's test for separability, *above at 5*, the fact that the shape of the article could be designed differently and the amount of work which went into the making of the design are not relevant factors: "Thus, the mere fact that a famous designer produces a uniquely shaped food processor does not render the design of the food processor copyrightable." The Office does not consider a test which premises the requisite separability on the marketability or the sales potential– factors which may fluctuate and differ from predictive judgment to predictive judgment– of a useful article as a work of art to be a test consistent with explicit congressional intent concerning the statutory meaning of separability.

The Board concludes that the work at issue here, C-LEG Table, meets neither *Compendium II's* separability test nor those alternative separability tests which you have argued to us.

C. De Minimis Authorship

You have also argued that C-LEG Table meets the requirement for creative and original authorship needed for registration. Letter from Hendershot of 5/12/2006 at 2 - 4. While we need not reach the issue of whether C-LEG Table meets the test for sufficient creative authorship, given that we

have found the work to be a useful article showing no conceptually separable features, the Board, nevertheless, chooses to analyze the copyrightability of the Table as if we were conceding separability– which we are not. The Board concludes that, had the work at issue here shown the necessary separable features, the design elements of C-LEG Table still do not constitute more than *de minimis* authorship and, therefore, are not copyrightable.

In determining whether a work has a sufficient amount of original artistic authorship necessary to sustain a copyright claim, the Board adheres to the standard set forth in *Feist Publications, Inc. v. Rural Telephone Service Co.* ("*Feist*"), where the Supreme Court held that only a modicum of creativity is necessary to support a copyright. 499 U.S. 340, 345 (1991). However, the Court there also ruled that some works (such as the work at issue in *Feist*) fail to meet the 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," 499 U.S. 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. While "the standard of originality is low, . . . it does exist." *Id.* at 362.

Compendium II has long recognized this principle: "[w]orks that lack even a certain minimum amount of original authorship are not copyrightable." *Compendium II*, § 202.02(a). With respect to pictorial, graphic, and sculptural works, the class within which the C-LEG Table falls, *see* 17 U.S.C. § 102(a)(5), *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). *Compendium II* recognizes that it is the presence of creative expression that determines the copyrightability of a work, and that:

> registration cannot be based upon the simplicity of standard ornamentation . . . Similarly, it is not possible to copyright common geometric figures or shapes . . . a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations [also cannot support a copyright].

Id. See also 37 C.F.R. § 202.1(a) ("familiar symbols or designs" are "not subject to copyright and applications for registration of such works cannot be entertained.").

Case law confirms these principles. *See 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 standard *fleur-de-lis* could not support a copyright claim without original authorship); *Baile v. Fisher*, 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); *Magic Marketing, Inc. v. Mailing Services of Pittsburgh*, 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 protection); *Tompkins Graphics, Inc. v. Zipatone, Inc.*, 222 U.S.P.Q. 49 (E.D. Pa. 1983) (collection of various geometric shapes not copyrightable).

Given the considerable case law sustaining Copyright Office decisions of refusal to register simple designs, the Office, nevertheless, recognizes that the use of public domain elements and/or commonly known shapes can result in a copyrightable work as long as the overall resulting design or

overall pattern, taken in its entirety, constitutes more than a trivial variation of such elements. *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 103 (2d Cir. 1951); *Atari Games Corp. v. Oman*, 979 F.2d 242, 244 - 245 (D.C. Cir. 1992); *Compendium II*, § 503.02(a). The Board applies this standard by examining a work to determine whether it contains elements, either alone or taken as a whole, on which a copyright can be based. We do not dispute that a substantial amount of time and effort went into creating the C-LEG Table. However, as you know, *Feist* struck down the "sweat of the brow" doctrine. 499 U.S. at 353-354. Therefore, factors such as the C-LEG Table's commercial success, the expense of creating it, the human effort expended in creating it, the professional skills and expertise of the designer or artistic recognition of the design are not relevant to the Board's determination of C-LEG Table's copyrightability. *See, e.g., Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q.2d 1074, 1076 (D.D.C. 1991).

You describe the elements of the C-LEG Table's top as possessing the following attributes: (1) an eight-pointed inlaid bronze star comprised of overlapping geometric shapes; (2) a pattern of lines emanating outward from the star to the edge of the table; and (3) a bronze circle design spanning the circumference of the table. We believe that you are referring to the 2-dimensional pattern that the Copyright Office has already offered to register. Further, you describe the table's four legs to be shaped like the letter "C" with what you have termed is protectible spacing of the legs relative to one another. Letter from Hendershot of 5/12/2006 at 3 - 4. Apart from the registrable 2-dimensional table top design applied to the top's surface, the Board finds [for the sake of argument, if we were to concede separability– which we do not] that the C-LEG Table as a whole would not evidence the minimal level of creativity necessary under Feist. The table consists of common and familiar geometric shapes: a rather standard oval shape for the table top, with legs shaped like a "C," the character of the alphabet, or a minor variation of the "C" shape. In between the four legs is a plain, wooden, square-shaped connector, tying together the four legs. The overall pattern for the shape of the Table results from a bringing together of a few standard shapes, or minor variations thereof– such a combination fails to rise to the level of creativity required to support a copyright registration.

It is true that public domain elements may satisfy the requirement for copyrightable authorship as a compilation, through their selection, coordination and arrangement. 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"). This principle underlying the bringing together of public domain elements does not, of course, mean that *all* combinations and arrangements of commonplace, simple, or unprotected-in-themselves elements will rise to the level of copyrightable authorship. In *Satava v. Lowry*, the Ninth Circuit held unprotectible sculptural arrangements which combined elements not copyrightable in themselves. 323 F.3d 805 (9th Cir. 2003). The court explained that not "any combination of unprotectable elements automatically qualifies for copyright protection. Our case law suggests, and we hold today, that a combination of unprotectable elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship." *Satava*, 323 F.3d at 811.

Although the individual components of a given work may not be copyrightable, the Copyright Office does follow 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). And, as stated in *Compendium II*, § 503.02(a): "It is not possible to copyright . . . a simple combination of a few standard symbols such as a circle, a star, and a triangle with minor linear or spatial variations."

The Board concludes that the C-LEG Table here, upon examination of the design elementally and as a whole, does not contain a sufficient amount of original and creative authorship to sustain a copyright claim. Further, 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*, §108.03. Rather, each work is examined for registrability based on its own merits, without comparison to prior art or to other existing/registered works.

As such, the Board determines, but solely for the sake of argument because the Board has also determined the lack of separable features, that C-LEG Table, as a 3-dimensional sculpture, apart from the 2-dimensional copyrightable pattern on the surface of the table top, consists of a combination of a few simple variations of standard shapes and arrangements, which combination does not contain the minimal amount of original artistic authorship to support a copyright registration. The courts have consistently upheld the Office's refusal to register such works. *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); *Jon Woods Fashions, Inc. v. Curran*, 8 U.S.P.Q.2d 1879 (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); and *Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q.2d 1074 (D.D.C. 1991) (upholding Copyright Office's refusal to register chinaware design pattern).

For the reasons stated herein, the Copyright Office Review Board affirms the refusal to register the C-LEG Table as a 3-dimensional sculpture. This decision constitutes final agency action in this matter.

Sincerely,

/S/

Nanette Petruzzelli
Special Legal Advisor for Reengineering
for the Review Board
United States Copyright Office