United States Copyright Office
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March 1, 2007

Marc A. Lieberstein, Esq.
Pitney Hardin LLP
7 Times Square
New York, New York 10036-7311

RE: STEELBOOK
Control No. 61-316-7250(P)

Dear Mr. Lieberstein:

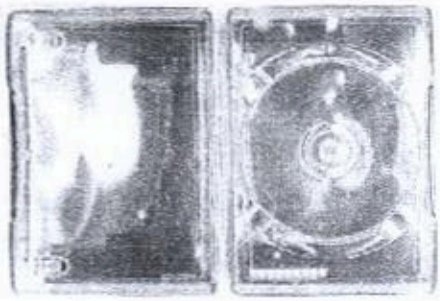
I am writing on behalf of the Copyright Office Review Board in response to your second request for reconsideration, dated March 27, 2006. After reviewing the application from your client, Glud & Marstrand A/S, and the arguments you presented on Applicant's behalf, the Board is upholding the Examining Division's decision to refuse registration for Applicant's work, entitled "SteelBook," a packaging container for optical media.

ADMINISTRATIVE RECORD

On March 1, 2005, the Copyright Office received an application from Glud & Marstrand A/S, to register a design for a packaging container for optical media, entitled SteelBook. On June 17, 2005, Visual Arts Examiner Sandra D. Ware refused to register SteelBook because it is a useful article that does not have any feature separable from its functional aspects. An image of the work in question, SteelBook, is produced here.



Metallic outer shell



Plastic interior

In a letter dated September 15, 2005, you submitted a first request for reconsideration on behalf of Applicant in which you argued that SteelBook is copyrightable. You argued that the metallic surface appearance, with the spine, curved corners and book-like edge pattern are physically and conceptually separable elements that create a unique and original visual

appearance of a sleek metallic book. The design elements you specifically identified include curved corners, a book-like edge/shape and a unique spine design. You said that the plastic interior case, not the external metallic cover, performs the utilitarian function of holding and housing optical media, such as DVDs or CD-ROMs. You also argued that the metallic surface of the outer shell does not have any utilitarian purpose and is a copyrightable design element. You stated that, because these elements can be imagined as existing separately from the plastic interior and are separable from the function and configuration of a DVD case, SteelBook's artistic elements are copyrightable. As evidence in support of that conclusion, you provided copies of awards for SteelBook's packaging design. You described the exterior of SteelBook as having a unique cool tactile feeling that gives the impression of exclusivity and precision.

You reviewed the requirements for separability contained in the *Compendium of Copyright Office Practices II* (1984) [hereinafter *Compendium II*] and, applying those to SteelBook, reiterated the above arguments as evidence that it has copyrightable elements that are separable from its utilitarian purpose. To support your arguments you also relied on the analyses in *Pivot Point Int'l, Inc. v. Charlene Prods., Inc.*, 372 F.3d 913 (7th Cir. 2004) *rehearing en banc denied* (August 10, 2004); *Brandir Int'l, Inc. v. Cascade Pacific Lumber Co.*, 834 F.2d 1142 (2d Cir. 1987); *Carol Barnhart, Inc. v. Economy Cover Corp.*, 773 F.2d 411 (2d Cir. 1985); *Kieselstein-Cord v. Accessories By Pearl*, Inc., 632 F.2d 989 (2d Cir. 1980) and *Act Young Imports, Inc. v. B and E Sales Company, Inc.*, 673 F.Supp. 672 (S.D.N.Y 1987).

You argued that, under the conceptual separability test applied in *Kieselstein-Cord*, the primary ornamental aspects of SteelBook supersede the secondary utilitarian function and therefore are conceptually separable. You stated that, in contrast to the bicycle rack in *Brandir* and the human torsos in *Barnhart*, SteelBook's design elements are comprised of purely aesthetic choices that do not relate to the utilitarian aspects of an optical media case. You also analogized SteelBook artistic aspects to those of the backpacks in *Act Young Imports*, which were animal images, saying that SteelBook's shape, which resembles a book, was created to exist independently of the utilitarian function of storage for optical media which is performed by the internal plastic case.

In a letter dated December 28, 2005, Attorney Advisor Virginia Giroux responded to the first request for reconsideration by stating that SteelBook does not have any elements separable from its functional aspects. Ms. Giroux reviewed in detail the legal basis for the separability analysis used by the Copyright Office. Applying that analysis to SteelBook, she stated that there are no elements that may be considered separable from the work's utilitarian function without destroying the basic shape of the work.

Ms. Giroux stated that the fact that a design is aesthetically appealing or could have been designed in a different way is not relevant to whether the elements are separable. She refuted your arguments based on case law by either distinguishing SteelBook from works in the cases

you cited that had separable authorship or by finding it comparable to those in which there was no separable authorship.

In a letter dated March 27, 2006, you submitted a second request for reconsideration on behalf of Applicant in which you again argued that SteelBook is copyrightable, reiterating your previous legal arguments. After conceding that SteelBook is a useful article, you discussed the requirements for separability contained in *Compendium II* and applied them to SteelBook. You concluded that the work satisfies the *Compendium's* requirements for separability. You argued that SteelBook's design elements can be drawn as a two-dimensional drawing and can be imagined as a three-dimensional piece of free standing art. You stated that because the design elements are separable, they are copyrightable. In addition to again arguing that, under *Kieselstein-Cord*, the design elements are separable, you stated that they could be peeled away from the interior plastic case and exist as a free standing sculpture.

As additional support for registering SteelBook, you advocated that the design elements of SteelBook, individually and as a whole, have sufficient creativity to be copyrightable. You pointed out that the required level of creativity required is very low. You concluded that the level of creativity in SteelBook's artistic elements is sufficient to be copyrightable.

After reviewing the application and arguments in favor of registering Applicant's work, the Review Board upholds the Examining Division's decision to refuse registration for SteelBook. The Board determines that the work has no elements separable from its utilitarian function. And, even assuming that separable elements exist, as you allege, they would lack sufficient creativity to be copyrightable.

DISCUSSION

I. Useful articles

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"). Further, any article that is "normally a part of a useful article is considered a useful article.'" *Id.* Based on that statutory definition and the evidence in the submission for this work, the Board determines that Applicant's work is a useful article: SteelBook is a packaging container to protect, transport and store optical disks, such as DVDs and CD-ROMs. This point is not in dispute because you have conceded that SteelBook is a useful article in your second request for reconsideration. Letter from Lieberstein to Copyright Office of 3/27/06 at 2. As a useful article, SteelBook is subject to the separability analysis that copyright law requires.

A. Separability

The purpose of the separability analysis is to ensure that utilitarian aspects of useful articles are not registered since they are not subject to copyright protection. Written guidelines for separability analysis are found in § 505.02 of *Compendium II*, 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 or features 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 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)

In the case of physical separability, *Compendium II*, section 505.04, states:

> The physical separability test derives from the principle that a copyrightable work of sculpture which is later incorporated into a useful article retains its copyright protection. ... However, since the overall shape of a useful article is not copyrightable, the test of physical separability is not met by the mere fact that the housing of a useful article is detachable from the working parts of the article.

In the case of conceptual separability, *Compendium II*, section 505.03, states:

> Conceptual separability means that the pictorial, graphic and sculptural features, while physically inseparable by ordinary means from the utilitarian item, are nevertheless clearly recognizable as pictorial, graphic or sculptural work which can be visualized on paper, for example, or as free-standing sculpture, as 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. (emphasis added)

Section 505 of *Compendium II*, as quoted above, 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). The Office relies on the authority of *Esquire* for the analysis it follows to determine whether pictorial, graphic or sculptural works are separable from the utilitarian objects in which they are incorporated. Relying, in turn, 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 aesthetically pleasing, novel or unique 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. Again, as noted above, 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).

B. *Compendium* and other separability tests applied to SteelBook

You have put forth an argument that "under the prevailing test for conceptual separability," the work at issue here, SteelBook, may be registered because its design elements are physically and conceptually separable from the plastic DVD interior case. Letter from Liebertstein of 3/27/06 at 4-5. It is at this point that we explain that the Board considers the two casings– the inner plastic case and the outer metallic case– to be two parts, or features, of the same useful article. Again, the statutory definition of a useful article states that "an article that is normally a part of a useful article" is considered a useful article. 17 U.S.C. 101. The materials you have submitted in support of registration for this work show that SteelBook is marketed with the outer metallic casing always in place. The work SteelBook is not simply the inner plastic case which holds the optical digital medium; rather, the work consists of both inner and outer housing and the outer housing is a stronger protective casing for the inner plastic case. As such, the metallic outer housing is an integral part of the useful article.

The Board finds that the design features which you assert to be separable, both physically and conceptually from the inner plastic housing, are not separable under the Office's *Compendium* test because the features are part of the overall shape of the article itself. The "sleek metallic surface" [Letter from Lieberstein of 3/27/06 at 2] is not a separable feature of the work– it is the very material of which the outer portion of the work is made and, thus, is not separable from the useful article. As we have previously stated, all useful articles are constructed of some material: the choice in itself does not constitute a separable feature. SteelBook's exterior surfaces are not separable from its utilitarian functions. The metal surfaces of the plastic container are integral aspects of its structure as a box and, with the plastic internal compartment and its hinges, function to secure the container in a closed position until external pressure is applied to pry apart the two sides of the container. Therefore, these elements are functional; physical or conceptual separability is not present– the metallic and plastic containers constitute the overall non-protectible shape of the constituent elements of the work at issue here.

1. Kieselstein-Cord

You have cited several hallmark cases in your argument for the separability of the "metallic outer shell, the curved corners, the book-like edge/shape, and unique spine design" [Letter from Lieberstein of 3/27/06 at 2; 4-5]. In your discussion, you cite *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980), as support for the separability of the

features you enumerate in SteelBook. You state that the "primary ornamental aspects of the SteelBook ... supersede the secondary utilitarian function and therefore are conceptually separable. Furthermore, the design elements, including the entire metallic surface, can conceptually be peeled away from the interior plastic case and the ultimate result would be the freestanding sculptural elements from the SteelBook and the fully-functional interior plastic shell." Letter from Lieberstein of 3/27/06 at 5.

We do not see support for registration of SteelBook in *Kieselstein. Kieselstein* involved two belt buckles, registered by the Copyright Office, which incorporated ornamental features consisting of geometric shapes with "several surface levels" and wavy lines. 632 F.2d at 990. These identifiable ornamental features were found by the Second Circuit to be conceptually separable from the utilitarian function of the belt buckles. We further note that the Winchester and Vaquero belt buckles reflected sculpted, contoured lines which could not fairly be said to be co-extensive with the entire shape of the buckles. It is the overall shape of the useful article that Congress has determined cannot be protected by copyright. *Above at 4*. The metallic outer portion of SteelBook with its spine which opens [granted, in the manner of a book] is, nevertheless, the overall shape or configuration of the useful article and is not conceptually separable under the legislative history to the 1976 Act, under *Esquire* which reflected congressional intent, or under the reasoning of *Kieselstein*.

The Second Circuit explicitly said that, in considering the sculptural features of the *Kieselstein* belt buckles conceptually separable, it came to a conclusion of conceptual separability which "is not at variance with the expressed congressional intent to distinguish copyrightable applied art and uncopyrightable industrial design." 632 F.2d at 993. We see no similar separable authorship in the metallic outer portion of the SteelBook work at issue here. To, in your words, "peel away" [Letter from Lieberstein of 3/27/06 at 5] the outer casing with its spine structure from the interior plastic case would, in essence, destroy the basic shape of the useful article, in violation of *Compendium II's* test that the supposed artistic and independent features can be visualized on paper separately, as, for example, a free-standing sculpture, independent from the useful article aspects without destroying the basic shape of the useful article. We conclude with certainty that the outer casing with its spine and its three-sided opening *is a requisite part of* the basic shape of the article. Such conceptual "peeling away" would also be inconsistent with *Kieselstein* in its emphasis that any justifiably protectible features are those which are not utilitarian but, rather, purely ornamental and artistic. 632 F.2d at 993. The metallic outer casing is useful because it is a constituent part of a useful article, making the packaging-article sturdy as it travels throughout commerce.

2. Brandir and the Denicola separability test

You have also cited other cases which put forth separability tests other than that found in *Compendium II*. In *Brandir Int'l, Inc. v. Cascade Pacific Lumber Co.*, 834 F.2d 1142 (2d Cir. 1987), the Second Circuit adopted the conceptual separability test offered by Professor

Denicola: "copyrightability ultimately should depend on the extent to which the work reflects artistic expression uninhibited by functional considerations." *67 Minn. L. Rev. 707, 741.* You have urged that the SteelBook's "artistic design elements are comprised of purely aesthetic choices that do not relate to the utilitarian pressures for the design of an optical media case." Letter from Liberstein of 3/27/06 at 5. You again itemize these design elements as the sheer metallic case and the unique spine design. Again, we point out that the material of which a work is made is part of the fundamental structure of the work; and, the design of the 'spine' of the book-like casing in SteelBook is entwined with the functioning of the useful article and, thus, cannot be considered conceptually separable. The packaging or casing must have an opening at some point within or along it in order for the consumer to get to the optical medium inside; thus, the structure of the spine and any other aspect of the manner in which the casing opens, no matter how attractive or able to remind the consumer of a book, is not conceptually separable. *Brandir* says it clearly: "... 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." *Brandir,* 834 F.2d at 1145. The work at issue here, SteelBook, does not exhibit separable elements under either the Office's *Compendium II* test which incorporates the separability analysis in *Esquire* or under the Denicola test which *Brandir* adopted and courts within other federal circuits have favorably cited. *See, e.g., 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).

The Fourth and Seventh Circuits have taken the position that where a particular work, a useful article, is "as much the result of utilitarian pressures as aesthetic choices," "form and function are inextricably intertwined," and the "artistic aspects of the object cannot be separated from its utilitarian aspects for purposes of copyright protection." *Pivot Point*, 372 F.3d at 931, *citing Brandir*, 834 F.2d at 1147.[1] The work at issue here, SteelBook, is a plastic container surrounded by a metallic container. The materials of which an object is made are not the subject of copyright. Plastics and metals are foundational materials out of which objects are created and, as such, are not in themselves amenable to copyright protection. Such materials per se, although created / manufactured by humans, lack the creativity required for copyright protection. *Feist*, 499 U.S. at 363 ("As a constitutional matter, copyright protects only those constituent elements of a work that possess more than a de minimis quantum of creativity.") Within the configuration of a work, there may be an element or feature which can be physically or conceptually separated from the overall configuration or shape itself of the object. The foundational materials of which a work is made are not such elements or features. The materials of which SteelBook is made do not exhibit any feature, existing independently of the substratum metal material, which can be the subject of copyright protection.

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[1] The work at issue in *Pivot Point*, the Mara mannequin, was submitted and registered by the Copyright Office as a sculptural work. Separability issues did not arise in the registration process.

Not only is there no such element with respect to the metallic outer packaging in SteelBook; the spine and openings associated with the metallic outer shell are only functional in nature. Thus, the Board sees no separable element in the sheer metallic case or in the "unique spine design" or even in the slightly rounded corners of the container. This conclusion is the same under either [1] *Compendium II's* test of the necessary separate visualization of the work of art juxtaposed to the independently existing useful article, or, under [2] the *Brandir* test which requires that a separable feature of a useful article be a result which reflects *solely* artistic / aesthetic judgment, completely independent of functional considerations. The overall book surface, the spine function and any opening of the metallic packaging, and the minimally rounded corners of the packaging may be aesthetically pleasing but cannot be said to be independent of, *i.e.*, separable from, the functional considerations [*Brandir's* requirement] or the overall shape of [*Compendium II's* requirement] the useful article.

II. Creativity: *Feist*

After finding that a feature of a useful article is separable, the Review Board then evaluates it to determine whether it is sufficiently original to be copyrightable. If there are multiple elements, they are evaluated separately and as a whole. Although the Board has determined that there are no features separable from SteelBook's utilitarian function, for the sake of argument the Board has considered, nevertheless, certain features you allege to be separable and whether they are copyrightable, individually or as a whole. The Board has determined that they are not copyrightable.

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*, 499 U.S. at 346. *See also Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d 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). *Burrow-Giles* defined "author" to mean the originator or "he to whom anything owes its origin." *Id.* at 58. The Board accepts that SteelBook satisfies the *Feist* prong of independent creation. However, although the level of creativity required by law is very modest, as discussed below, the *de minimis* level of creativity in the separable elements of SteelBook is insufficient to satisfy the second prong.

In *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), the Supreme Court held that a minimal level is necessary to satisfy the creativity aspect of "original" which was consistent with previous jurisprudence. Any "distinguishable variation" of a work constitutes sufficient originality as long as it is the product of an author's independent efforts, and is "more than a 'merely trivial' variation." *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 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 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, 2.01[B] (2002). 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, [*also above at 8*] 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.

A. *Compendium II* registration guidelines

Copyright Office registration practices have long recognized that some works of authorship exhibit only 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, § 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. *Compendium II* essentially provides detailed instructions for Copyright Office registration procedures and 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.

Section 503.02(a) reflects one of the fundamental principles of copyright law: common ordinary shapes and designs, and minor variations of those, may not be copyrighted because that could limit their availability to the general populace. Basic, common and ordinary shapes, designs, and symbols are in the public domain for use by all since they form the building blocks for creative works.

B. SteelBook's supposedly separable features would lack minimum creativity

The metal elements that you allege are separable include the metal exteriors on the front and back of SteelBook and the metal strip along the back of the plastic spine that connects the plastic hinges. You characterize these elements as having a metallic surface appearance, curved corners, a book-like edge and a unique spine design. Letter from Lieberstein of 327/06 at 2; 4-5. Individually, each of those elements is made up of only one or two common shapes. The front and back metal coverings with their edges and minimally curved corners are basic rectangular shapes with curves at the corners, which are simple arc shapes. The silver metal on the spine is a simple rectangular shape [not taking into consideration its functional use in the work]. The silver metallic surface appearance is not copyrightable. Color in itself is not a copyrightable element and, therefore, not relevant. *Compendium II*, § 503.02(a), *above at 9.*

You have argued that the artistic expression of SteelBook's elements together are designed and arranged in such a way as to create an original work of authorship that is copyrightable. 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 also 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).

If the Board considered the elements of the metallic outer shell, the curved corners of the SteelBook as a container, the book-like overall shape, and the spine design as separable features– which it does not– the Board would still, nevertheless, conclude that the selection and arrangement of these elements in SteelBook, which you argue together create the appearance of a book, is commonplace, combining only a few ordinary shapes such as straight lines, rectangles, and slightly curved arcs. These features are minimal, when viewed both individually and as an ensemble, and, again, they are subsumed within the functionality of the plastic packaging. It is commonplace to package, transport and store optical media in packaging that has the same basic arrangement as SteelBook. SteelBook appears to be a typical design for packaging for DVDs and CDs and, indeed, many commercial products have two covers that open and shut along a spine, like a book. The selection and arrangement is geometrically balanced and the elements, individually and taken as a whole, are devoid of any distinguishing surface features. The front and back of SteelBook are identical and symmetrical; both are plain and unadorned metal covers of a diptych-type structure. Along the side where the front and back panels separate is a groove or indentation, not sufficiently creative in its outline or configuration, that is also functional since it is located where pressure must be applied to pry the two sides apart and open the case. The supposedly separable elements of SteelBook do not exhibit sufficient creativity, considered individually or as a whole.

As an entirety, the elements you allege are separable are *de minimis* in their essence. They are trivial variations of common shapes [as well as serving as functional elements within SteelBook]. As *Compendium II* states, 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 spacial variations." *Compendium II*, § 503.02(a). Here, the combination of a few basic shapes that are circular or spherical, square or rectangular, and straight would not rise to the level of creative authorship if we were to consider the features you have itemized to be separable– which we do not.

There is substantial support in case law for the Board's conclusions that, were it to agree with you on the separability issue, the few basic shapes of the elements for which you argue the separability are not copyrightable: in *Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q.2d 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 U.S.P.Q.2d 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.

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

Sincerely,

/S/

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