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October 28, 2008

Jacqueline M. Daspit
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RE: PIERCE PAXTON DESIGN STUDIO COPYRIGHT COLLECTION 4 THE WILLIAMSBURG COLLECTION
Control No. 61-319-9698(G)

Dear Ms. Daspit:

I am writing on behalf of the Copyright Office Review Board in response to your second request for reconsideration dated October 2, 2006. After reviewing the application from your client, Karyl Pierce Paxton, and the arguments you have presented on Applicant's behalf, the Review Board confirms the Examining Division's refusal to register Applicant's collection of designs for interior lighting fixtures, "Pierce Paxton Design Studio Copyright Collection 4 The Williamsburg Collection (Builder Interior 2003)," hereafter, "Williamsburg Collection."

ADMINISTRATIVE RECORD

On December 8, 2004, the Copyright Office received an application from Karyl Pierce Paxton to register three-dimensional sculpture and two-dimensional artwork in a collection of designs for interior lighting fixtures entitled Pierce Paxton Design Studio Copyright Collection 4 The Williamsburg Collection (Builder Interior 2003). In a letter dated February 9, 2005, Visual Arts Examiner Joanna Corwin refused to register the Applicant's collection on the basis that the works are not copyrightable as sculpture and no claim may be made in the lamp designs themselves. Letter to Paxton from Corwin of 2/9/2005, at 1.

Ms. Corwin stated that the deposit material displaying the lighting fixtures may be registered if the Applicant amended the application to delete the claim in three-dimensional sculpture and, rather, state a claim in the "illustrations and photographs" of the lighting fixtures.

In a letter dated June 7, 2005, Seth Nehrbass, Esq., of your law firm [Garvey, Smith] stated that Ms. Paxton would not amend the application as Ms. Corwin advised because the illustrations and photographs identify Ms. Paxton's three-dimensional sculpture copyright claim. Mr. Nehrbass also stated that the works in the collection have sculptural features that

are separable elements from the functional aspects of the light fixtures. Letter to Corwin from Nehrbass of 6/7/2005, at 1.

Ms. Corwin then responded by letter dated August 19, 2005, reiterating her previous arguments in greater detail as the basis for continuing to refuse registration for Williamsburg Collection. She stated that, although the collection in question included utilitarian works which contained separable features, such features were not copyrightable. Letter from Corwin of 8/19/2005, at 1-2.

In a letter dated December 16, 2005, Mr. Nehrbass submitted a first request for reconsideration on behalf of Ms. Pierce. He argued that the individual designs in the collection do have separable features– "adornments (that) could be removed without interfering with the utilitarian aspects"– and that these features are copyrightable in themselves. As an example, Mr. Nehrbass discussed specific features of Liberty sculpture, item KP-1-5008-12-40. Letter from Nehrbass of 12/16/2005, at 1.

On July 7, 2006, Attorney Advisor Virginia Giroux-Rollow wrote in response to the first request for reconsideration that Williamsburg Collection is not copyrightable because, although some of the elements in the individual lighting fixture designs are separable from the utilitarian function of the lighting fixtures, these elements are not copyrightable because they are common shapes or designs that are in the public domain. Letter from Giroux-Rollow of 7/7/2006, at 3. In her letter, Ms. Giroux-Rollow first reviewed the legal basis for the separability analysis used by the Copyright Office. *Id*., at 1-2. She then agreed that the beading on the surface of the designs is separable but found that it is not copyrightable, either individually or taken as a whole, because it is a common circular or spherical shape that is in the public domain; thus, as the beading appears in the particular placement on the collection's designs, it is not sufficiently original or creative. *Id*., at 3. In response to Mr. Nehrbass's arguments in favor of separability of certain C-shaped rods with their grooves and indentations of the lighting fixture designs [Letter from Nehrbass of 12/16/2005], Ms. Giroux-Rollow stated that such elements are not separable. However, even assuming *arguendo* that these elements are, they lack sufficient creativity to be copyrightable. Letter from Giroux-Rollow of 7/7/2006, at 3.

You, Ms. Jacqueline Daspit of the law office of Garvey, Smith, in a letter dated October 2, 2006, requested a second reconsideration of the Office's refusal to register the lighting fixtures as 3-dimensional sculptural works. You explicitly acknowledged that the Williamsburg Collection designs are designs of useful articles. Letter to Review Board from Jacqueline Daspit of 10/2/2006, at 2. You asserted that the works have separable authorship that is sufficiently creative to be copyrightable. *Id*., at 3-5. As evidence that the Office had previously acknowedged the validity of arguments which you made for the copyrightability of Williamsburg Collection, you identified copyright registrations made for other works owned by the applicant and you alleged that those designs are similar to Williamsburg Collection. *Id.*, at 2. You pointed to elements in the lighting designs that you argued are separable and copyrightable, specifically, you stated that removing the beading, the grooves, ridges and indentations, the C-curls and/or the finial-type ornamentations at the bases would destroy the artistic craftsmanship but not the mechanical or utilitarian aspects of the underlying useful article. *Id*., at 4. You further stated that the selection of separable

elements and their arrangements in the lighting designs are not common and familiar nor do they consist of minor variations; you concluded that the "particular selection and arrangement of familiar symbols and designs is registrable because it shows at least a minimum amount of originality and creativity in their placement and use." *Id.*, at 5.

DECISION

After reviewing the application and your arguments in favor of registering the Applicant's work, the Copyright Office Review Board upholds the Examining Division's decision to refuse registration for Williamsburg Collection.

ANALYSIS

The Board's analysis of Williamsburg Collection and the legal basis for its conclusions are discussed below. In addition to describing the lighting fixtures within Williamsburg Collection at various points within this letter, we reproduce the identifying photos of the works which were initially submitted at the time of registration, December 8, 2004, as perhaps the best way in which to identify the works. The individual works include: chandeliers; hanging glass-surround rectangular lighting fixtures; wall sconce lighting fixtures; and smaller, single-globe lighting fixtures that adhere to the ceiling.



KP-1-5008-12-40



KP-1-5005-5-40



KP-1-5006-6-40



KP-1-5007-9-40



KP-1-5000-3-40



KP-1-5001-5-40



KP-1-5002-3-40



KP-1-5004-5-40



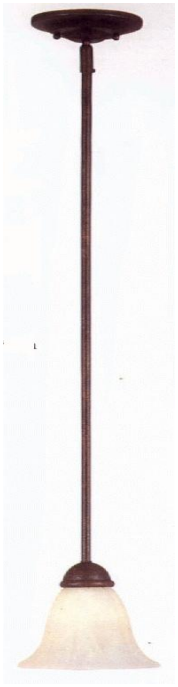
KP-1-500-3-40



KP-1-502-5-40



KP-7-504-2-40



KP-7-5009-1-40



KP-7-505-3-40



KP-3-502-3-40



KP-3-500-2-40



KP-3-503-6-40



KP-3-504-8-40



KP-6-507-2-40



KP-6-508-3-40



KP-6-506-15-40



KP-6-506-13-40



KP-6-506-11-40



KP-6-509-9-40



KP-6-509-8-40



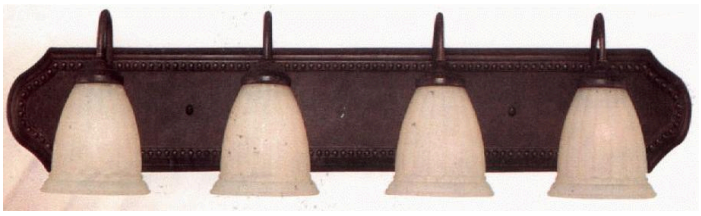
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KP-8-511-2-40



KP-8-511-3-40



KP-8-511-4-40



KP-8-510-3-40



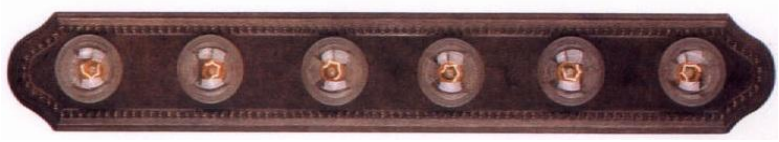
KP-8-510-1-40



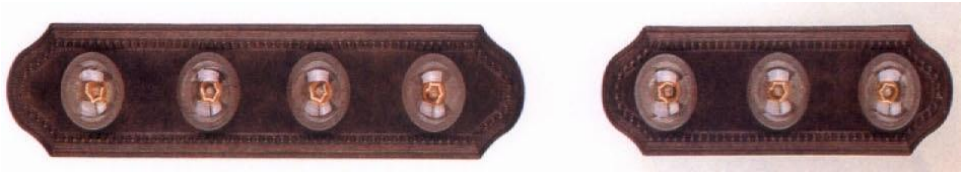
KP-8-510-2-40



KP-8-512-8-40



KP-8-512-6-40



KP-8-512-4-40 KP-8-512-3-40

In determining whether a work submitted for copyright registration is copyrightable, a threshold determination is made about whether a work is a useful article or not. If it is not a useful article, the analysis proceeds immediately to the question of whether the work is sufficiently original to be copyrightable. However, if it is a useful article, the next step is to determine whether it has any elements that are separable from its utilitarian function:

Congress has decreed that there is no copyright protection for any element associated with the configuration of a useful article that is not a separable element. If there are no separable elements, that ends the analysis and the work is not copyrightable. If there are separable elements, however, the Office examines them to determine whether they have sufficient originality (which requires both independent creation and sufficient creativity) to be copyrightable. The separability analysis is independent of, and precedes, the creativity analysis.

A. Useful article

The statute defines a useful article 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"). Based on that definition and evidence in the application, the Board concluded that the designs for the individual works in Williamsburg Collection are designs of lighting fixtures which are in themselves useful articles. There is no disagreement about that conclusion which you explicitly acknowledged in your arguments. Letter from Daspit of 10/20/2006, at 2. Thus, because the work submitted for copyright registration is a collection of designs for useful articles, the separability analysis must be applied to determine whether the individual useful article designs contain any separable features or elements.

1. Separability

The Copyright Office's policies and procedures for the separability analysis are based on statutory and legislative considerations. The purpose of the separability analysis is to ensure that utilitarian aspects of useful articles are not registered since they are not copyrightable subject matter. Written guidelines for the separability analysis are found in *Compendium of Copyright Office Practices II* (1984) (hereinafter *Compendium II*); Chapter 5, § 505.02, 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 or the overall shape 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*, § 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*, § 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*, 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 on 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. 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).

2. Application of the Compendium II and the Denicola-Brandir separability tests

Based on the foregoing considerations, the Board agrees with you that some of the elements you have identified in the second request for reconsideration are conceptually separable. These are: certain of the C-shaped adornments on the various works within the Williamsburg Collection; the decorative beading; the grooves, ridges and jagged patterns as well as the indentations *on the surface of these lighting fixtures.* We take this opportunity to explain why we consider only certain of the C-shaped features to be separable.

Under the principle of *Esquire* as well as that test's articulation in *Compendium II*, the C-shaped features which are part of the overall shape of the useful article or which can be fairly said to be part of a feature which fulfills a function of the article, cannot be found separable. As *Esquire* reasoned, although the feature[s] of a useful article may be pleasing, they are not separable if they may fairly be said to be part of the basic configuration of that article or may fairly be said to serve a function of that article. The C-shaped ornaments which hold the candles serve a useful purpose. These may be contrasted with those C-shaped ornaments which, for example, appear at the 'end' portion of the parts that hold candle coverings/cups within the overall lighting fixtures but, being at the opposite end of the attachments holding the candle coverings/cups, these C-shaped decorations are merely that– they are decorative of, and surplus to, the actual attachment of the candle coverings/cups to the main stem of the lighting fixtures. *See, e.g.*, work KP -1- 5001-5- 40, pictured above.

For these certain surplus C-shapes, the overall shape of the functional aspects of the lighting fixture designs would not be destroyed by imagining them removed under *Compendium II's* separability test. For the C-shapes which are, indeed, the portions of these lighting designs which actually function by holding the candles/lights or which are the

'ending' shape of the parts of the design which attach the candles/lights coverings/cups to the main vertical stem of the design, the C-shaped ornaments are part of the basic shape of these designs and, under the directions provided in the House Report to the 1976 Act, they are not separable. *See references to House Report, above at 4 - 6.*

You have stated that conceptual separability exists when the artistic aspects of an article can be conceptualized as existing independently of the utilitarian function. This independence is necessarily informed by whether the design elements can be identified as reflecting the designer's artistic judgment exercised independently of functional influences. You have stated that when the design of a useful article is as much the result of utilitarian pressures as aesthetic choices, the useful and aesthetic elements are not conceptually separable. Letter from Daspit of 10/2/2006 at 3. For this principle underlying one of the non-Copyright Office conceptual separability tests, you cite *Brandir International v. Cascade Pacific Lumber Co.*, 834 F.2d 1142, 1145 (2d Cir. 1987); the reasoning of *Brandir* has also been accepted by *Pivot Point International, Inc. v. Charlene Products*, 372 F.3d 913 (7th Cir. 2004). The *Brandir / Pivot Point* test requires copyright protection in a useful article to depend on "whether the design elements can be identified as reflecting the designer's artistic judgment exercised independently of functional influences." *Brandir*, 834 F.2d at 1145.

Judging a creator's intent, given the factual circumstances of creation, and determining whether design elements in a particular work reflect "the designer's artistic judgment exercised independently of functional influences," *id.*, is not the type of judgment the Copyright Office normally undertakes in its examining process. Such judgments would necessarily rely on interpreting the specific actions surrounding the creation of a work; these actions occur outside the registration process. Any investigation and questioning of the method and circumstances of creation lie beyond the administrative capability of the Office. *See, e.g., Compendium II*, § 108.05. Thus, the Office uses as its tests for separability those adopted in *Esquire* and found in *Compendium II*, in carrying out its mandate at 17 U.S.C. § 410(a) to examine works submitted for registration under the copyright law. However, judicial acceptance of separability tests other than those found in *Compendium II* leads us, as we have mentioned, to analyze the work in question here under the alternative test you have raised in order to determine as objectively as possible whether the work at issue here, the lighting designs included in Williamsburg Collection, do, indeed, contain any separable features which might be subject to copyright registration.

You have raised the Seventh Circuit's decision in the influential *Pivot Point* case which you have also cited as support for the separability of the enumerated features of the lighting designs, including all C-shaped features. Letter from Daspit of 10/2/2006, at 3 - 4. *Pivot Point* adopted the test articulated in *Brandir*, which in turn was derived from that proffered by Professor Robert C. Denicola in an influential law review article.[1] *See* Robert C. Denicola, "Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles," 67 *Minn. L. Rev*. 741 (1983). Under the Denicola test, "copyrightability

[1] We note that the bicycle rack that was the work in question in *Brandir* ultimately failed the Denicola test: "[W]hile the rack may have been derived in part from one or more 'works of art,' it is in its final form essentially a product of industrial design." 834 F.2d at 1147.

ultimately should depend on the extent to which the work reflects artistic expression uninhibited by functional considerations." *Id.,* at 741. In the words of the *Pivot Point* court, "If the elements do reflect the independent, artistic judgment of the designer, conceptual separability exists. Conversely, when the design of a useful article is 'as much the result of utilitarian pressures as aesthetic choices,' the useful and aesthetic elements are not conceptually separable." *Pivot Point*, 372 F.3d at 931 (quoting *Brandir,* 834 F.2d at 1147); *see also Brandir*, 834 F.2d at 1145 ("[I]f 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.").

Specifically addressing the C-shaped elements of these lighting fixtures, the C-shapes in many instances are part of the very configurations which the connecting features take as an design aspect of the lighting fixture; as such, certain C-shaped elements attach or connect one feature of the light to another, *e.g.*, the design lines which connect the lamps/coverings/cups to the circular outgrowth from the central stem of the lighting fixture in KP 1 - 5001-5-40. *See reproduction, above at 3.* Compare this C-shape to the C-shape which is positioned above the circular surround of the stem and which obviously is in its position as an embellishment which repeats the shaping of the lines connecting the lamps to the stem. We consider the first C-shape to be an integral part of the connecting lines, the second C-shape to be a design choice to reflect the theme of the first. One C-shape is an integral part of a functional feature and is not separable– under either *Compendium II's* test or under the *Brandir* test; the second C-shape we have identified is merely a repetitive theme feature whose absence within the lighting fixture would most likely not affect the usefulness or functioning of the fixture.

The lighting fixtures comprising Williamsburg Collection fail the Denicola test because their various forms, in Professor Denicola's words, do not "reflect purely aesthetic visions," Denicola, *supra, at 743.* At best, the artistic aspects of the various lighting fixtures at issue here "reflect a merger of aesthetic and functional considerations" and thus " cannot be said to be conceptually separable from the utilitarian elements." *Brandir*, at 1145. These lighting fixtures do not meet the description of the work in *Pivot Point*, *i.e.*, they are not works that are the products "of a creative process unfettered by functional concerns" and only certain of their sculptural features can be identified separately from, and are capable of existing independently of, utilitarian aspects. *Pivot Point*, 372 F.3d at 932.[2]

The Review Board, in agreement with your arguments, has also identified these elements as separable because they meet the separability requirement of *Compendium II*: they include the surface beading, the grooves, ridges and indentations, **some of** the C-curls, and the finial-style ornamentations at the perpendicular endings [or bases] of the fixtures. A note on **some of** the C-curls: the particular C-curls to which we refer are those which are the ending configuration for many of the connecting lines within the chandeliers. The connecting lines are just that– lines made of the material which predominates in a given lighting fixture which bring together various components within the fixture. At the end of

[2] The work at issue in *Pivot Point*, a mannequin of a female face and head entitled MARA, was registered by the Copyright Office as a sculpture; the issue of MARA's also serving as a mannequin to teach the proper application of makeup and hair arrangement did not arise during the registration process.

many of these connecting lines are C-shaped curls or ornamental shapings. These C-curls are not necessary for the functioning of the connecting lines within the fixtures yet they are, indeed, part of the very lines themselves. As such, they present the more difficult feature for the separability determination. Under *Compendium II's* separability test, they are part of the overall shape of the article and, thus, are not separable. *See* Letter from Giroux of 7/7/2006, at 3. For the sake of argument and fairness, however, given the alternative separability tests adopted in some judicial settings, the Board will consider the non-functional C-shaped feature as conceptually separable under the theory of *Pivot Point*: where design elements "do reflect the independent, artistic judgment of the designer, conceptual separability exists." *Pivot Point*, 372 F.3d at 931.

There is no functional necessity for the C-shaped ends to many of the endings of the connectors within the lighting features. And, although one viewpoint would accept *Esquire's* and *Compendium II's* theory that any such C-shape is part of the shaping of the internal structure of the lighting fixtures, a contrasting viewpoint would accept the basic Denicola test and its application within *Pivot Point*. A few years ago, a Fifth Circuit case articulated its test for considering the separability of the artistic aspects of an article: "In other words, where artistic discretion dominates practical necessity as the driving force behind design choices, a useful article may nonetheless qualify for protection as a pictorial/graphic/sculptural work." *Galiano v. Harrah's Operating Co., Inc.*, 416 F.3d 411, 418 (5th Cir. 2005). And that same appellate court, citing *Pivot Point*, qualified its explanation of finding separability by saying that the "contested features may be considered in the aggregate." *Id.*, citing *Pivot Point*, 372 F.3d at 925.

In summary, the Review Board is willing to consider the C-shapes within many of the lighting fixtures as separable, *i.e.*, the C-shapes themselves are not an integral element of the lighting fixtures' functionality. *See, e.g.*, *Chosun International, Inc., v. Chrisha Creations, Ltd.*, 413 F.3d 324, 328-329 (2d Cir. 2005). This, however, leaves a second step of consideration– that of determining the necessary level of copyrightability.

B. Originality analysis

Having determined that there are separable elements in the collection's designs, the Board next determined whether the separable elements are sufficiently creative, individually or as a whole, to be copyrightable. The statute mandates that 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.*, 499 U.S. 340, 346 (1991). *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) (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").

The Review Board accepts that Williamsburg Collection satisfies *Feist's* independent creation prong of originality. However, although the level of creativity required by law is

very modest, as discussed below, the level of creativity in the separable elements of the collection's designs, as well as the combination of those elements in any one particular lighting fixture, is not sufficient to satisfy the second *Feist* prong of a modicum of creativity. We set out our analysis.

In *Feist*, the Supreme Court's holding that a minimal level is necessary to satisfy the creativity aspect of "original" 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.").

At the same time 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 "as 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.

1. Office registration practices

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) (1984). 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 (2006). *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; an assessment of aesthetic merit is not the basis for determining copyrightability. 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-lis 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.

This *Compendium* section reflects one of the most fundamental principles of copyright law: commonplace and ordinary shapes and symbols, and minor variations of these, may not be copyrighted because that could limit the availability of these design elements 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.

2. Williamsburg Collection works have *de minimis creativity*

The Review Board finds that the level of creativity in the designs included in the Williamsburg Collection is *de minimis*. As useful articles, the Williamsburg Collection lighting fixtures possess traditional or near-traditional designs appearing among chandelier structures and the separable features are consistent with that. The Board notes that, either singly or in varying combinations within each chandelier, these elements– based on common or standard shapes and symbols– have a consistent appearance and placement in the approximately 55 designs in the collection. Some designs are identical and differ only in size or with regard to a single or a few elements.

The appearance of the beading and other surface ornamentation, such as the simple grooves, ridges, and indentations, merely follows the lines, circles, or other surface elevations and depressions of the shape of the fixtures. The C-shaped curls and the finials consist of common shapes: a "C" and a small half-cone topped by a flat circular top, sometimes with the top's being beaded and other times with the top having simply two layers. For each design, evaluating its separable elements, individually or together as a whole, the creativity is *de minimis* because the elements are arranged in customary, if not simple and straightforward, ways for the category of chandelier works.

Individually, the separable elements of each design are in the public domain. The beading, the grooves, ridges and indentations are each either a single, simple shape or a repetition of a single, simple shape: small circles and straight lines, small cone shapes that are the finials, and convex or concave markings with no further distinguishing marks, are not sufficient in themselves to sustain registration. The same is true for the C-curls where they can fairly be said to be separable from any functional aspect of the lighting fixtures. Each of these features, considered individually, has *de minimis* creativity.

For each design, considering its separable elements as a whole, the Board has further concluded that the selection and arrangement is commonplace with respect to the lighting fixture-environment in which the elements are found. In fact, the title of the collection includes the name of "Williamsburg" which hints that the collection's designs may imitate

traditional styles and structures. The appearance of the individual separable elements and even their combination or arrangement within each lighting fixture design reflects common placement of features or a minor variation on traditional combinations and arrangements for lighting fixtures. The selection, coordination and arrangement of the separable elements is commonplace, failing to rise to the level of *Feist*-required creativity. Such authorship is *de minimis* and not sufficiently creative to be copyrightable. The "choice of type and size of beading and the placement of beading, the arrangement of the grooves, ridges and indentations, the type and size of C-curls and the arrangement of the C-curls, and the selection of the finial-type ornamentation" [Letter from Daspit of 10/2/2006, at 5] do not, in coordination and as an entirety, comprise overall designs or patterns sufficient to sustain a registration for any of the individual lighting fixtures in Williamsburg Collection : "It is true, of course, that a *combination* of unprotectible elements may qualify for copyright protection. But it is not true that *any* combination of unprotectible elements automatically qualifies for copyright protection. Our case law suggests, and we hold today, that a combination of unprotectible elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.") (emphasis in original) *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003).

There is substantial support in case law for the Board's conclusion that a few basic shapes or a simple arrangement of a few basic shapes 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. v. New York Arrows Soccer Team, Inc.*, 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; *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.

The Review Board finds that the separable elements in the lighting fixtures are too simple and their arrangements in each design also too simple to rise to the level of copyrightable authorship. Like the alphabetical arrangement in *Feist,* the arrangement of these design elements in a commonplace and tradition-like manner for lighting fixtures falls within the category of simple, minimal authorship which *Feist* referred to as "entirely typical"or "garden variety" authorship; the "selection and arrangement" of separable features "cannot be so mechanical or routine" as to be equivalent to the minimal authorship that *Feist* does not protect. *Feist,* at 362-363. The Board is unable to recognize any

separable contribution, or a combination of these contributions, for these lighting fixtures that is more than merely trivial or routine.

The Office does not evaluate the aesthetic qualities of a work. An applicant's work may be highly valued for its aesthetic appeal and, yet, not be copyrightable. Rather, as has been already emphasized, copyright law requires evidence of more than a *de minimis* quantum of authorship. Such authorship may consist of a selection, coordination and arrangement of preexisting elements or features that are in the public domain. 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 virtually nonexistent." *Feist,* at 359.

Also, you made the argument that Williamsburg Collection is entitled to be registered on the basis that it has as much creativity as other works owned by the applicant that the Office previously registered. In its analysis to determine whether there is sufficient creativity for copyright protection, the Copyright Office does not compare works. *See*, *Compendium II* § 108.03. Rather, the analysis for copyright protection involves considering the merits of each work, by itself, without comparison to other works.

CONCLUSION

For the reasons stated in this letter, the Review Board affirms the Examining Division's refusal to register Pierce Paxton Design Studio Copyright Collection 4 The Williamsburg Collection (Builder Interior 2003). This decision constitutes final agency action.

Sincerely,
/s/

Nanette Petruzzelli
Associate Register for
Registration & Recordation Program
for the Review Board
United States Copyright Office