United States Copyright Office
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June 18, 2009

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Dear Mr. Cislo:

I am writing on behalf of the Copyright Office Review Board in response to your second request for reconsideration, dated March 6, 2006. We apologize for the long delay in getting this decision to you. After reviewing the applications from Amini Innovation Corp. ("AICO") and the arguments that you and your colleague, Donald M. Cislo, presented on Applicant's behalf, the Board is upholding the Examining Division's decision to refuse registration for all seventeen [17] of Applicant's furniture works, titled as follows:

1. Boulevard Chair with Arms
2. Boulevard Dresser
3. Boulevard Dresser Mirror
4. Milano China Cabinet/Buffet
5. Milano Table
6. Milano Dresser Mirror
7. Milano Footboard
8. Boulevard Footboard
9. Boulevard Headboard
10. Boulevard China Cabinet/Buffet
11. Park Avenue China Cabinet/Buffet
12. Park Avenue Table
13. Park Avenue Chair with Arms
14. Park Avenue Dresser Mirror
15. Park Avenue Dresser
16. Park Avenue Headboard
17. Park Avenue Footboard

Control No. 61-400-1617(C)

I. ADMINISTRATIVE RECORD

A. Initial submission; Office refusal to register; first request for reconsideration

On March 18, 2005, the Copyright Office received seventeen [17] individual applications from your law firm, Cislo & Thomas LLP, on behalf of its client, Amini Innovation Corporation [AICO], to register ornamental carvings associated with various pieces of furniture. The nature of the works submitted for registration was described on the applications as "ornamental carvings" and the authorship for each work was given as "3-dimensional sculpture." On June 7, 2005, Visual Arts Examiner Kathryn Sukites refused to register these works because they are useful articles that do not have any feature separable from their function that is also copyrightable. Ms. Sukites, after setting forth the principles followed by the Copyright Office in is examining activity, concluded that "many

of the sculptural elements of the works deposited are either related to the utilitarian aspects or function, or are subsumed within the overall shape, contour, or configuration of the articles." Ms. Sukites further wrote that even though several of the works submitted for registration contain sculptural features which might be considered separable, they would not be copyrightable because the features of these works represent an insufficient amount of original authorship. Letter from Sukites to Donald Cislo of 6/7/2005, at 2.

In a letter dated June 20, 2005, Donald Cislo, submitted a first request for reconsideration on behalf of AICO for all17 works in which he argued that the AICO furniture carvings are copyrightable. He argued that ornamentation that does not contribute to the utilitarian aspect of an article is conceptually separable and, therefore, copyrightable. According to Mr. Cislo, "AICO's furniture pieces are sculptural works under 17 U.S.C. § 102, and the ornamentation on each of them is not necessary for the utilitarian aspects of the furniture." Letter from Cislo to Examining Division of 6/20/2005, at 3. He also asserted that, given the record which has been produced for the registration of these works, "there are no facts demonstrating that AICO's designs are 'familiar.'" *Id.* at 4. Finally, pointing out that the Office has, in the past, registered a number of AICO's furniture pieces, Mr. Cislo concluded that the Examiner should have registered the works at issue here because the works were independently created, were not copies from others works, and that the furniture designs were not commonplace. *Id.* at 5.

B. Refusal to register on first request for reconsideration

In a letter dated December 7, 2005, Attorney Advisor Virginia Giroux-Rollow responded to the first request for reconsideration by stating that six works would be registered, including (1) Boulevard Footboard, (2) Boulevard Headboard, (3) Boulevard China Cabinet/Buffet, (4) Park Avenue China Cabinet/Buffet, (5) Park Avenue Footboard and (6) Park Avenue Dresser. She refused registration for the eleven [11] remaining works on the basis that they do not contain any authorship that is both separable and copyrightable. Letter from Giroux-Rollow to Donald Cislo of 12/7/2005, at 1- 2. In her letter, Ms. Giroux-Rollow referred to the statutory definition of useful article and explained the Copyright Office's test for conceptual separability as it is presented in *Compendium of Copyright Office Practices, Compendium II* (1984). Letter from Giroux-Rollow of 12/7/2005, at 2 - 3.

She also gave the Office's understanding of *Esquire v. Ringer* (copyright cannot be based on the overall shape, styling, or configuration of a useful article, no matter how aesthetically pleasing that shape or configuration might be) and of *Norris Industries v. International Telephone and Telegraph Corp.* (a wire-spoked wheel cover is a useful article not protected by copyright because it does not contain any sculptural design that can be identified apart from the wheel cover itself.) Letter from Giroux-Rollow of 12/7/2005, at 3. Ms. Giroux-Rollow also explained that, given *Compendium II's* test for conceptual separability, with the exception of concentric squares and the design of horizontal and vertical lines on Park Avenue Headboard and Park Avenue Chair with Arms, none of the design elements of the rest of the furniture pieces can be considered physically or conceptually separable from the furniture itself without destroying the basic shape of the furniture pieces. And, even if the concentric squares and vertical and horizontal line design were regarded as conceptually separable, these element, "individually or even if taken as a whole," do not constitute a copyrightable work of art, even given the principle of a low level of creativity required by the 1991 Supreme Court decision in *Feist v. Rural Telephone*. *Id.* at 4.

C. Second request for reconsideration

In a letter dated March 6, 2006, you submitted a second request for reconsideration on behalf of Applicant for seven [7] of the AICO furniture carvings that were refused registration; you again argue that these seven work of furniture design possess separable design elements that are copyrightable. These seven works are: (1) Boulevard Chair with Arms, (2) Boulevard Dresser, (3) Boulevard Dresser Mirror, (4) Milano China Cabinet/Buffet, (5) Milano Table, (6) Milano Dresser Mirror and (7) Milano Footboard.

In addition to restating the arguments from the first request for reconsideration, you argued that each of the AICO furniture carvings, individually, contain elements you allege to be separable and which represent "non-trivial ornamentation." Letter from Daniel Cislo to Review Board of 3/6/2006, at 2. You objected to the Copyright Office's reliance on *Esquire, Inc. v. Ringer*, 591 F.2d 796 (D.C. Cir. 1978), *cert denied*, 440 U.S. 908 (1979) and *Norris Industries, Inc. v. International Telephone & Telegraph Corp.*, 696 F.2d 918, 924 (11th Cir. 1983), *cert denied*, 464 U.S. 818 (1983), distinguishing AICO's works on the basis that, unlike the works in those cases, AICO is not seeking to register the overall shape and design of the utilitarian article, only the separable elements, *i.e.*, the ornamental features of the furniture items. Letter from Daniel Cislo of 3/6/2006, at 2. Although you state this, you also comment that your client's works should be analyzed in terms of "contours of the pieces, [and] the relative sizes of various portions of the piece" with the conclusion that the various "shapes, sizes, proportions, and configurations" of the furniture result in the "creative spark" necessary for copyright protection. *Id.* at 4 - 5.

Finally, you have analyzed conceptual separability and its meaning as focusing on whether the items would lose their functionaity if the ornamentation "were omitted for a more generic structure that would accomplish the function." *Id.* at 5. In support of this understanding of conceptual separability, you cite *Collezione Europa U.S.A., Inc. v. Hillsdale House, Ltd*, 243 F. Supp. 2d 444 (M.D.N.C. 2003), *Leicester v. Warner Bros.*, 232 F.3d 1212, 1219 (9th Cir. 2000), and *Severin Montres Ltd. v. Yidah Watch Co.*, 997 F. Supp. 1262, 1265 (C.D. Cal. 1997) (where design elements can be identified as reflecting the designer's artistic judgment exercised independently of functional influences, conceptual separability exists). You then list the seven furniture items at issue here and, for each, you identify what, in your opinion, are the ornamental features that are "at least conceptually separable." Letter from Daniel Cislo of 3/6/2006, at 6 - 7.

D. Further correspondence

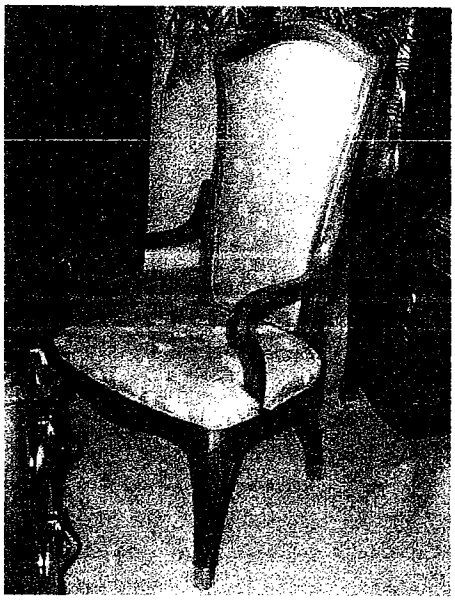
Upon commencing its review of Applicant's second request for reconsideration, the Review Board became aware that the Examining Division had decided to register six [6] of Applicant's works included in this submission upon the first request for reconsideration. In a letter dated July 3, 2006, the Board notified you that it was proposing the contrary– not to register these works on the basis that they do not have sufficient creativity to be copyrightable. Applicant was afforded additional time to present any arguments in support of registration for those works.

You responded in a letter dated July 26, 2006 that Applicant chose not to defend the registrations for Park Avenue China Cabinet/Buffet, Park Avenue Footboard and Park Avenue Dresser because it was discontinuing use of those three works. In support of registrations for the remaining three works, Boulevard Footboard, Boulevard Headboard, Boulevard China Cabinet/Buffet, you stated that the arguments set forth in the second request for reconsideration were incorporated by reference for each of those works. In addition, you discussed details of each furniture design that you allege support a determination that each work is copyrightable.

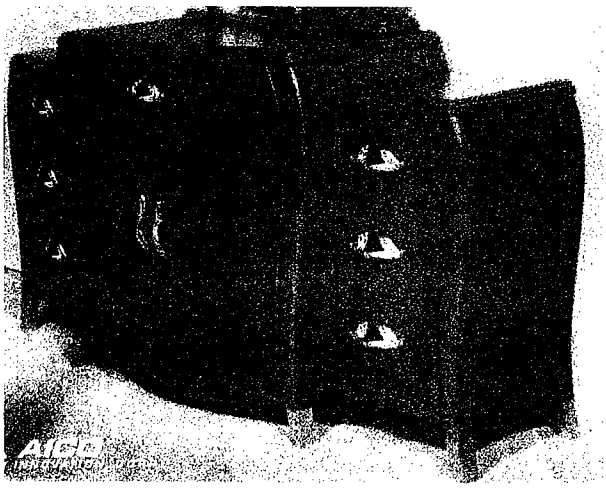
II. ANALYSIS AND DECISION

We have reviewed the applications and your law firm's arguments in favor of registering the AICO furniture works, including the three [3] AICO furniture works for which the Office has stated its intention not to register after you were informed on first request for reconsideration that registration would take place. The Review Board is refusing registration for all seventeen [17] of these works [we realize you are not providing arguments for three of the Park Avenue works]. Following are depictions of the 17 works for which registration is refused. We will consider description and analysis of these works below.

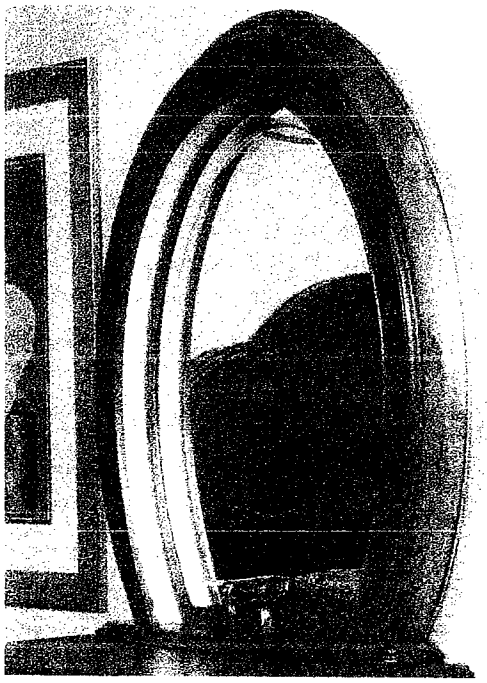
BOULEVARD CHAIR WITH ARMS



BOULEVARD DRESSER



BOULEVARD DRESSER MIRROR



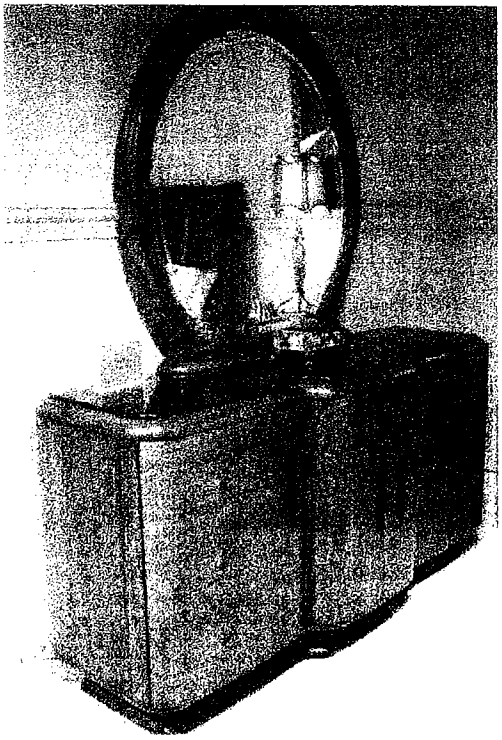
MILANO CHINA CABINET/BUFFET



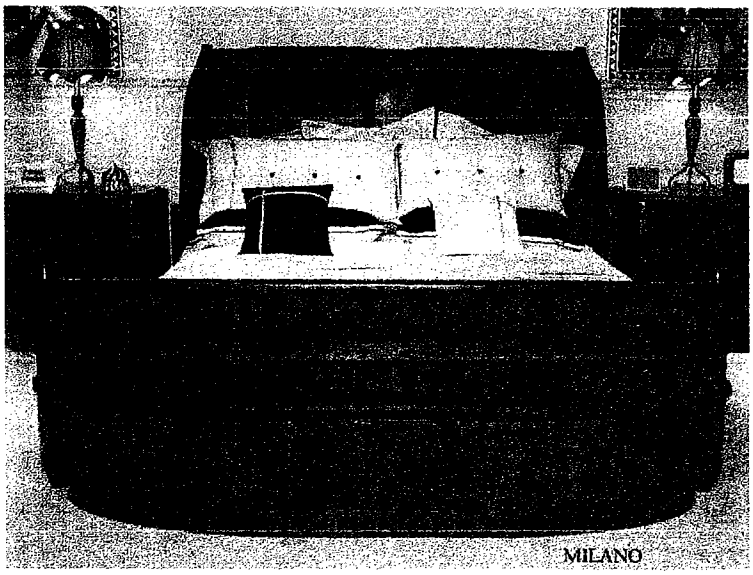
MILANO TABLE



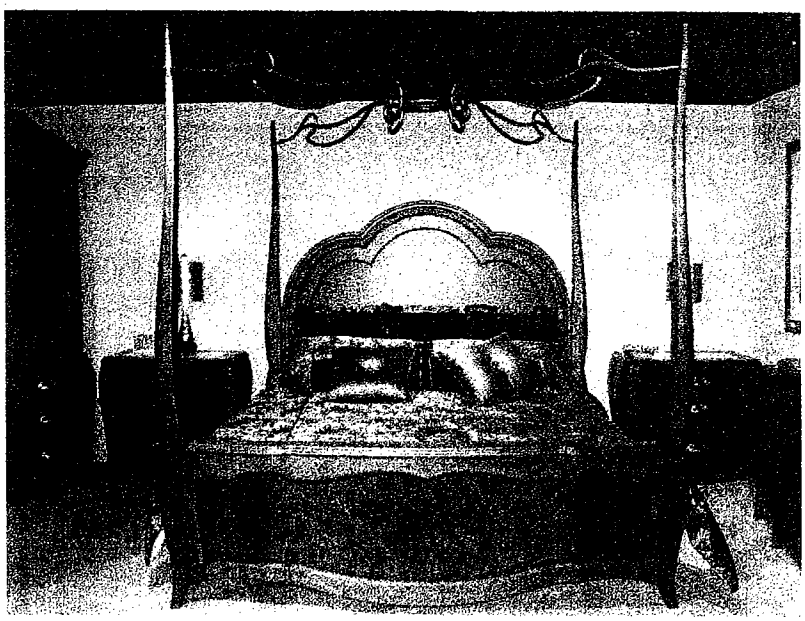
MILANO DRESSER MIRROR



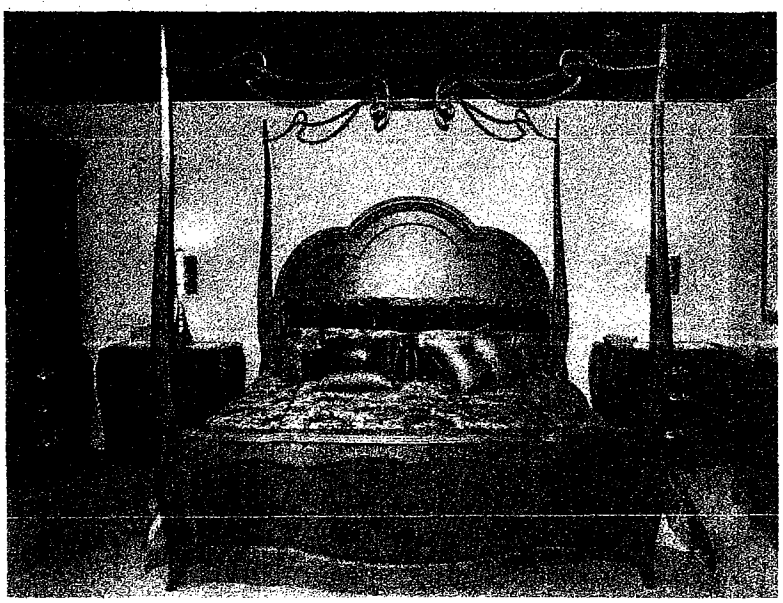
MILANO FOOTBOARD



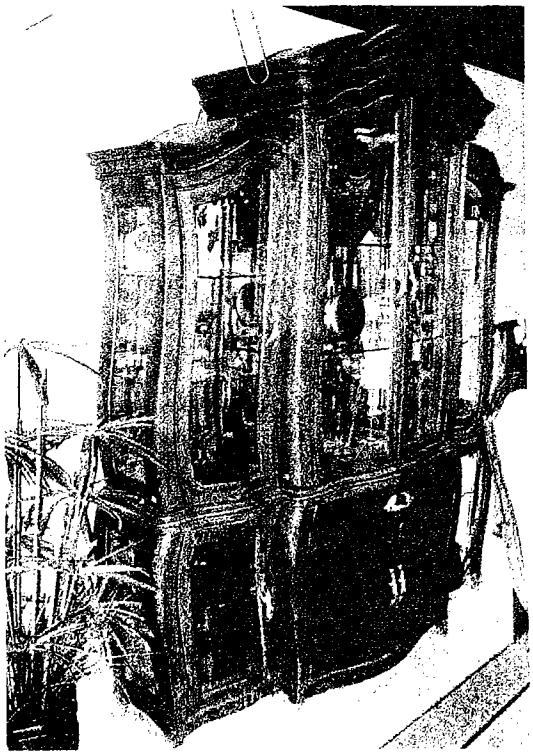
BOULEVARD FOOTBOARD



BOULEVARD HEADBOARD



BOULEVARD CHINA CABINET/BUFFET

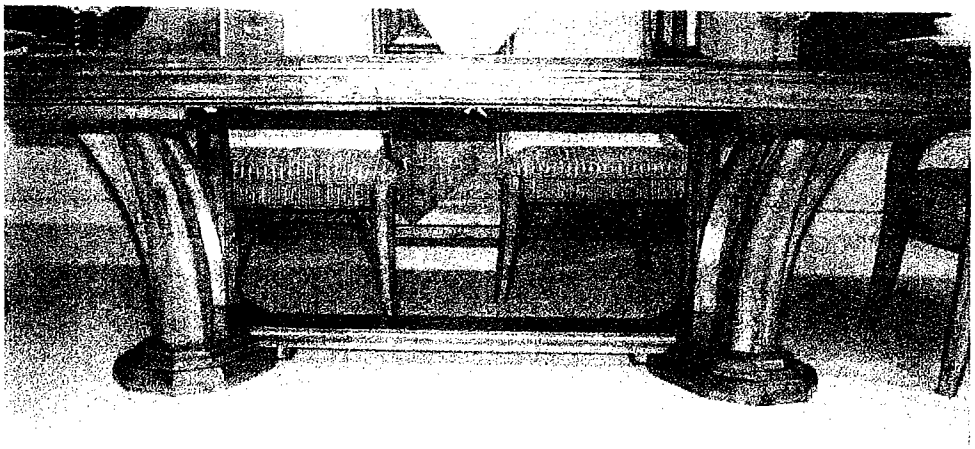


PARK AVENUE CHINA CABINET/BUFFET



PARK AVENUE

PARK AVENUE TABLE



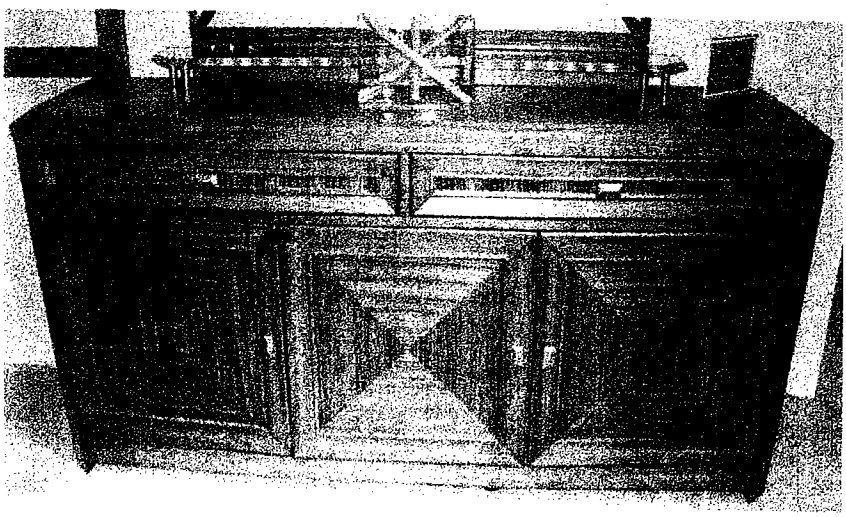
PARK AVENUE

PARK AVENUE CHAIR WITH ARMS



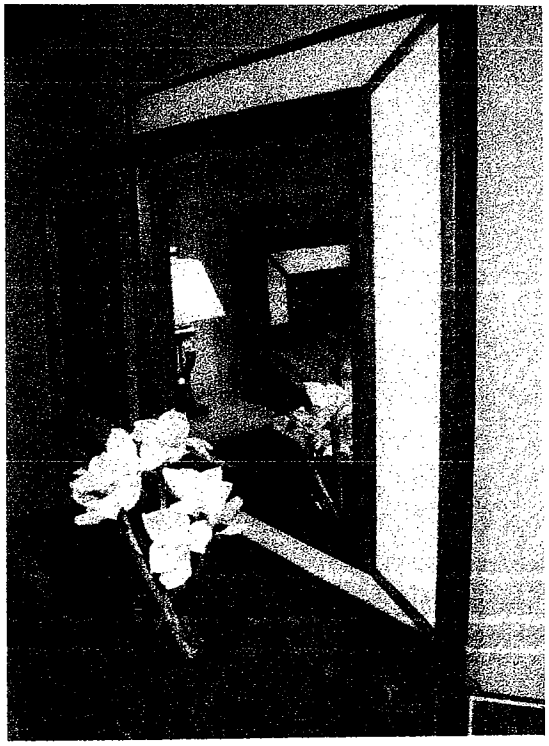
PARK AVENUE

PARK AVENUE DRESSER



PARK AVENUE

PARK AVENUE DRESSER MIRROR



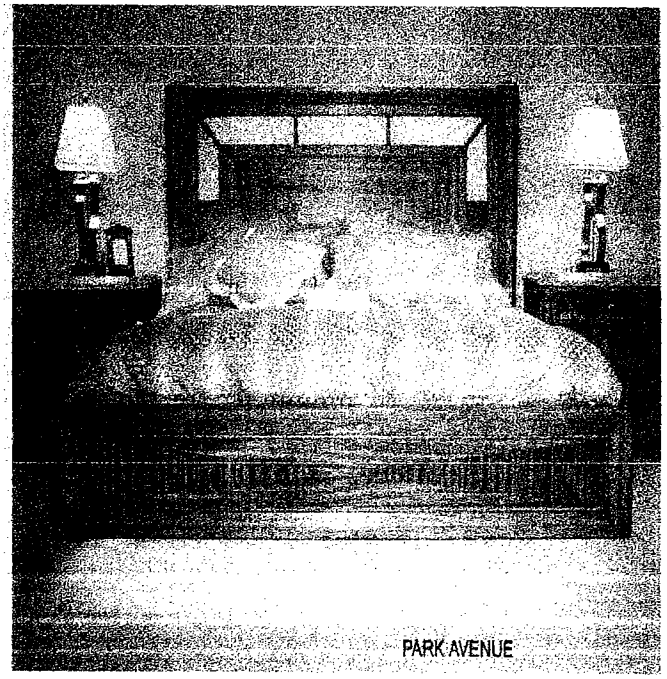
PARK AVENUE

PARK AVENUE HEADBOARD



PARK AVENUE

PARK AVENUE FOOTBOARD



A. Useful articles and separability

1. Compendium test for separability

You agree that a furniture item "as a whole constitutes a useful article." Letter from Daniel Cislo of 3/6/2006, at 2. As a useful article, each furniture piece is subject tot he separability test. As a general proposition, copyright protection does not extend to a useful article, defined as "an article 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. However, works of artistic craftsmanship, which may be useful articles themselves or incorporated into a useful article, can receive protection as pictorial, graphic or sculptural works pursuant to 17 U.S.C. § 102(a)(5). This protection is limited, though, in that it extends only "insofar as their form but not their mechanical or utilitarian aspects are concerned." *Id.* § 101. As you correctly note in your second request for reconsideration, you and the Office agree with the principle that separability can be "conceptual and not merely physical." Letter from Daniel Cislo of 3/6/2006, at 5. Congress has explained that:

> [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 . . . 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).

Physical separability means that the subject pictorial, graphic or sculptural features must be able actually to be physically separated from the useful article by ordinary means, leaving the overall usefl article intact. This principle is found in the manual of examining and registration practices which the Copyright Office uses– *Compendium of Copyright Office Practices, Compendium II,* § 505.03 - 505.04 (1984) [hereinafter *Compendium II*].

The Copyright Office also applies the test for conceptual separability that is found in *Compendium II.* Conceptual separability, under the *Compendium* test, means that the subject features are "clearly recognizable as a pictorial, graphic, or sculptural work which can be visualized on paper, for example, or as a 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." *Compendium II*, § 505.03. For example, while a carving on the back of a chair cannot readily be physically separated from the chair, it can easily be conceptually separated because one could imagine the carving existing as a drawing. The chair, meanwhile, would still remain a useful article having retained its basic shape, even absent the carving. The carving would therefore qualify as conceptually separable.

You have distinguished the furniture works at issue as being ones in which AICO is seeking registration not for the items "as a whole (as was the situation in the *Esquire* and *Norris* cases cited by the Copyright Office in its determination on the first appeal)" but rather for the "ornamental features of the items," "ornamental carvings." Letter from Daniel Cislo of 3/6/2006, at 2, 7 - 8. We take this opportunity to discuss *Esquire* because your other supporting arguments include reference to the shapes, the manner in which portions of the furniture pieces are connected and/or separated, and the varying structures of the parts/pieces of the furniture. Such analysis involves more than the ornamental features of the furniture; it involves the configuration itself of the furniture and *Esquire* becomes relevant. *Esquire, Inc. v. Ringer*, 591 F.2d 796, 800 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 908 (1979).

Under *Compendium II's* guidelines, copyright protection is not available for the overall shape or configuration of a utilitarian article, no matter how aesthetically pleasing that shape may be. In *Esquire*, the Office had refused to register an outdoor lighting fixture which arguably contained non-functional, purely aesthetic features. The Court upheld the Office's refusal, noting that

"Congress has repeatedly rejected proposed legislation that would make copyright protection available for consumer or industrial products." *Id.*[1], [2]

Section 505 of *Compendium II*, discussed above, is a valid interpretation of copyright law because it is a direct successor to the Copyright Office regulation that was affirmed in *Esquire*. The Copyright 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 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. The Office considers its separability test consistent with the stated intention which Congress put forth in the House Report accompanying the 1976 Act; that stated intention has served as a guidepost for the concept of separability under the current law [above at 9]. We have also cited above the statutory definition of "pictorial, graphic and sculptural works" and pointed out that the statute explains that such works are protected by copyright only "insofar as their form but not their mechanical or utilitarian aspects are concerned." 17 U.S.C. § 101 (definitions). We again stress what we have cited above– that the House Report unequivocally states that "[a]though 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"– the bill which became the 1976 Copyright Act.

2. Compendium test and Brandir test

Because the Copyright Office realizes the existence of tests for conceptual separability other than that found in its manual of practices, *Compendium II*, it, therefore, examines works submitted for copyright registration in light of its *Compendium* principles as well as in light of the case law which is cited to us by applicants for registration.

You have argued that the furniture pieces at issue here "contain conceptually separable artistic elements that warrant registration" because each piece reflects separable ornamentation which "does not contribute to the utilitarian functions of the article but represents an artistic work," citing *Collezione Europa U.S.A.* and *Leicester*. Letter from Daniel Cislo of 3/6/2006, at 6. You have also argued that "where design elements can be identified as reflecting the designer's artistic judgment, exercised independently of functional influences, conceptual separability exists." For this principle you cite *Severin Montres, Ltd. v. Yidah Watch Co.*, 997 F. Supp. 1262, 1265 (C.D. Cal.

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[1] Although *Esquire* was decided under the 1909 version of the Copyright Act, its reasoning is, nevertheless, applicable to cases arising under the 1976 Act. "[T]he 1976 Act and its legislative history can be taken as an expression of congressional understanding of the scope of protection for utilitarian articles under the old regulations." 591 F.2d at 803.

[2] Similarly in *Norris Industries, Inc. v. International Telephone & Telegraph Corp.*, 696 F.2d 918, 924 (11th Cir. 1983), *cert. denied*, 464 U.S. 818 (1983), the court held that a wire-spoked wheel cover was not entitled to copyright protection because it was a useful article used to protect lugnuts, brakes, wheels and axles from damage and dust.

1997). In its separability analysis, *Severin Montres* relies on *Brandir Int'l, Inc. v. Cascade Pacific Lumber Co.*, 834 F.2d 1142, 1145 (2d Cir. 1987). The *Brandir* case is widely cited for adopting Professor Robert Denicola's test for determining conceptual separability. That test considers whether or not a given feature or aspect of a useful article "reflects a merger of aesthetic and functional considerations;" if so, the artistic features of the useful article cannot be said to be conceptually separable; if there is no merger, conceptual separability may exist. *Brandir,* 834 F.2d at 1145.

Professor Denicola's test encompasses a consideration of the design process involved in the useful article in question as well as the artistic choices of the creator of the article and whether the artistic aspects of the article were significantly influenced by the functionality requirements. 67 Minn. L. Rev. 707 (1983). Professor Denicola argued that "the statutory directive requires a distinction between works of industrial design and works whose origins lie outside the design process, despite the utilitarian environment in which they appear." *Id.* at 742. He advocates that copyrightability "ultimately should depend on the extent to which the work reflects artistic expression uninhibited by any functional considerations." *Id.* Because alternative tests such as that embraced by *Brandir* might result in registration of works in conflict with the expressed congressional intent to deny copyright protection to the design of useful articles which happen to be aesthetically pleasing, the Copyright Office has not accepted as a registration practice these alternative separability tests.

3. Analysis of furniture pieces under Compendium II

We here note the descriptions you have given in your March 6, 2006 and your July 26, 2006 letters and we analyze these furniture works under the *Compendium* test.

You have described the works at issue here in terms of their overall shapes. You have described BOULEVARD DRESSER, for example, as having a "protruding and slightly taller front middle portion," with a "curvilinear shape" to the dresser drawers and a "serpentine profile of the front of the top of the dresser." Letter from Daniel Cislo of 3/6/2006, at 6. For BOULEVARD DRESSER MIRROR, you have described that work as evidencing a "contoured and serpentine base" of the mirror, a "shape of the mirror (partially elliptical with flat bottom), "the concavity of the outer wood element around the mirror." You also explain that "mirrors are typically square or rectangular and have a single layer frame as a border." In contrast, the BOULEVARD DRESSER MIRROR's "contoured and serpentine shape" makes it "clearly ornamental, not functional." *Id.*

Both of these descriptions refer to the shape, including the concavity, and the parts of the furniture such as base, border, and the middle portion of a particular piece. These references are to parts of the overall configuration of the furniture pieces, and, as such, to the shape or partial shape– however unusual, attractive, or elegant– of a useful article for which Congress meant no copyright protection. *Compendium II*, § 505.03: the shape or configuration of supposedly artistic features cannot be considered to provide the requisite separability merely because the features are nonfunctional.

As another example, for MILANO TABLE, the description which you give of this furniture piece is "the shape of the base of the table as two different-sized, semicircular, interlocking wood elements," the "contours and ridging along the edges of the table," and "the base of the legs as being highly stylized." Letter from Daniel Cislo of 3/6/2006, at 7. For MILANO CHINA CABINET/BUFFET, you cite the "uneven front profile of the china cabinet with the middle portion protruding," the "curvature of the outer edges," the "angled shape and contour of the base," the

"handles for the top and bottom doors are highly stylized and contoured in a way that is not necessary for their function of opening the doors."

Again, these aspects of the furniture pieces are descriptions of parts or portions of the actual overall shape of the pieces and, as such, are not separable under *Compendium II's* separability test. That test, again, says that, in order to conclude conceptual separability in a useful article, the supposedly separable features must be clearly recognizable as a 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. *Compendium II*, § 505.03. This conceptual exercise cannot be done with respect to the furniture pieces at issue here. We further note that the handles or pulls for opening and closing furniture doors and drawers are functional in their essence, no matter their attractive shape or configuration.

To take yet another example, in BOULEVARD CHAIR WITH ARMS, the curved and sloping arm structure is just that– the structure of a part of the chair; the arms, however stylized and unusual they may be, are an integral part of the shape of the chair and, thus, not amenable to *Compendium's* separability test. The conclusion is the same when the "curvilinear outer border of the chair" or the "swollen upper portions of the front legs"of the chair or the "serpentine profile of the wood elements at the front of the chair" are analyzed: these aspects or features of the furniture piece are essentially parts of the chair's shape. These features constitute the way in which the chair is put together or structured; in other words, they are essential parts of the overall configuration of the chair and, thus, of the shape of the chair. In the words of the House Report, [above at 9], although the shape of this article may be aesthetically pleasing, the outer border of the chair as well as the unusual shape of the front legs and the chair's sloping arms all speak to the functional considerations of the piece of furniture and, thus, cannot be considered conceptually separable. The general shape of an industrial product was not Congress's intended subject of copyright protection. These features are also not, obviously, physically separable since the physical removal of them from the rest of the furniture piece would destroy the piece. [The physical removal of the handles or pulls would, obviously, significantly interfere with the intended use of the furniture pieces.] And, conceptually speaking, these features cannot be imagined as free-standing sculpture under *Compendium II's* separability test without destroying the basis shape of the chair within the conceptual image of the same chair.

We further list features of furniture pieces which you have argued are conceptually separable but which, under *Compendium II*, are not:

MILANO FOOTBOARD: "a second footboard that does not reach the floor; right-angle relationship between the main footboard and the outer portion of the footboard"

MILANO DRESSER MIRROR: "non-rectangular, slightly curved shape of the mirror; protruding and slightly curved base"

BOULEVARD FOOTBOARD: "curvilinear shape of the posts; serpentine profile of the footboard; manner in which the footboard proper is separated from the posts; scalloped bottom portion of the face of the footboard"

BOULEVARD HEADBOARD: many of the same features as the FOOTBOARD– "the three-lobed design of the headboard; manner in which the headboard proper is separate from the posts"

BOULEVARD CHINA CABINET/BUFFET: "protruding and slightly taller front middle portion; curvilinear shapes of the drawers and doors; serpentine profile of the front of the top"

4. Analysis of furniture pieces under Brandir

You have cited *Brandir*'s separability test as supporting registration of these furniture pieces because, in your opinion, these furniture pieces show design elements that can be identified as reflecting the designer's artistic judgment exercised independently of functional influences. Letter from Daniel Cislo of 3/6/2006, at 6. This concept is put forth by *Yidah Watch*, as we have noted [above at 11], citing the *Brandir* theory. If we apply Professor Denicola's separability test which was favorably discussed in *Brandir*,[3] we arrive at the conclusion, however, that the features you have identified as separable because "they do not contribute to the utilitarian functions of the article, but represent an artistic work" do not meet the Denicola/Brandir test. For instance, in the work BOULEVARD DRESSER, you identify the "protruding and slightly taller front middle portion with a curvilinear shape to the dresser drawers and a serpentine profile of the front of the top of the dresser" as representing conceptually separable features. As we stated [above at 12-13], these features– the dresser as it is slightly taller in its middle portion, the drawers of the dresser which have a curvilinear shape, and the front of the dresser which you have described as "serpentine"– all these features comprise constructed areas and portions of the overall dresser. The features, thus, as essential parts of the dresser do not, in contradiction to the Denicola/Brandir test, represent design elements which reflect artistic expression uninhibited by any functional considerations. 67 Minn. L. Rev. at 742. There are many ways in which to design a dresser which holds drawers and which, by necessity, contains a front portion or structural face. Here function and style are intermingled; the stylistic aspects of the dresser are inhibited, *i.e.*, affected, by the function and necessity of having the piece of furniture serve as a dresser. It is immaterial that the configuration of BOULEVARD DRESSER could have been aligned or set differently or that the configuration or makeup of the furniture piece could have reflected a different style or fashion. Under any analysis, the dresser is a useful article whose parts serve a purpose. The particular style or fashion of the parts is irrelevant: the parts, attractive as they may be and resulting in an overall attractive piece of furniture, are nevertheless parts of the article and their design and their usefulness are interwoven such that the Denicola requirement cannot be met– that utility and artistic qualities be kept separate and non-overlapping.

We also, as another example, address the furniture work MILANO FOOTBOARD. You have described the furniture work as having "bullet-shaped posts equiplanar with the footboard closest to the bed portion; a second footboard-like element outside of the main footboard that does not reach the floor; and a right-angle relationship between the main footboard and the outer portion of the footboard." Letter from Daniel Cislo of 3/6/2006, at 7. You have described these features as "ornamentation." *Id.* They are, rather, the actual shape and contour of the furniture piece and, as such, they combine the utility of a footboard with the style the designer chose for this particular furniture. The arguably unusual and attractive style of the form mixes with the function of the

[3] We note that the bicycle rack that was the work in question in *Brandir* ultimately failed the Denicola test: "....while 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." *Brandir*, 834 F.2d at 1147.

footboard; the piece, again, fails the Denicola separability test. As *Yidah Watch*, citing *Brandir*, held the design of the [furniture piece] must be separable from the utilitarian aspects of the [furniture]. In all 17 furniture pieces submitted for registration, including those for which the Office has now, again, concluded refusal, the design elements of the uneven profile of the various pieces, the angled shape and contour of the bases, the bases of the legs in tables, the uneven portions of a footboard, the curved shape of a mirror, posts which rise above a footboard but which are connected to a canopy, are designer choices made for the purpose of fitting together the parts or the furniture pieces. They are, therefore, functional since they are the very furniture features– the prominent characteristics or parts of the particular furniture piece– which are meant for a specific use of the furniture.

5. Other considerations

a. Mazer

You have also pointed out *Mazer v. Stein*, 347 U.S. 201 (1954) to support the proposition that ornamental features on a useful article, when not contributing to the utilitarian functions, may be considered conceptually separable. Letter from Daniel Cislo of 3/6/2006, at 5 - 6. Although an important case which teaches that works of art may be used in commercial or industrial products and still retain copyright ("We find nothing in the copyright statute to support the argument that the intended use or use in industry of an article eligible for copyright bars or invalidates its registration. We do not read such a limitation into the copyright law." 347 U.S. at 218), we nevertheless do not consider *Mazer* to be support for your separability arguments for these furniture pieces. The Office admits the possibility that a useful article may contain separable features, *i.e.*, features which may, in themselves, be works of art protectible by copyright; but we point out that *Mazer* did not explicitly address the separability issue and, thus, provides no detailed analysis or framework that can be used in support of your position that the particular features of these furniture pieces which you have enumerated are separable.

b. Leicester v. Warner Brothers

We also refer to *Leicester v. Warner Brothers*, 232 F.3d 1212, 1219 (9th Cir. 2000) which you cited in support of registration of the furniture pieces at issue here. Letter from Daniel Cislo of 3/6/2006, at 6. We do not agree that the case helps your client's cause. That case involved the filming of an architectural work with elements that the plaintiff argued were separable and thus, not amenable to 17 U.S.C. § 120(a). In a lengthy decision which contained the opinion, a concurrence, and a dissent, the decision focused on Congressional intent which sought to render copyright protection for architectural works "free of the separability conundrum presented by the useful articles doctrine applicable for pictorial/graphic/sculptural works" [H.R. Rep. No. 101-735, at 21 (1990)]. The opinion determined that towers containing certain features were part of the streetwall of a building in question; these towers, designed to extend the building in question along two streets and being "equally integrated" and "serv[ing] the same purpose" on both streets, were "part of the functional and architectural vocabulary of the building" in question. Thus, the towers were integral parts of an overall architectural work-- not a pictorial, graphic, or sculptural work-- which could fairly be described, in the words of the statutory definition, as an "arrangement and composition of spaces and elements" and, therefore, not amenable to the separability requirement. *Leicester*, 232 F. 3d at 1218-1219. Thus, the Review Board does not see the *Leicester* case as helpful to your arguments for registration of these furniture pieces.

c. Other judicial opinions

Your March 6, 2006 Letter objected to the Examining Division's reliance on *Esquire* and on *Norris Industries, Inc. v. International Telephone & Telegraph Corp.*, 696 F.2d 918 (11th Cir 1983), and distinguished the furniture works at issue here from those in *Esquire* and *Norris* because those cases "pertain to refusals of copyright registration where the copyright protection was sought for the entire useful article and not merely the ornamental portions thereon." Letter from Daniel Cislo of 3/6/2006, at 7. As we have explained, your description of the aspects of the furniture works for which you seek registration are, in reality, under the separability tests of either *Compendium II* or Denicola/Brandir, part of the overall shape of the furniture pieces and/or part of the structure necessary for actual use of the piece– thus, not separable. The *Norris* Court's discussion of the work at issue focused on whether the appearance of the wire-spoked wheel on the tire cover, which was intended to simulate the appearance of a wire wheel, was separable from the functioning of the wheel cover. The Court found that the design and function of the wheel covers were inseparable; the court did not find any superfluous sculpted design that served no function and that could be identified apart from the wheel cover itself. *Norris*, 696 F.2d at 924. Furthermore, the *Esquire* Court, it is true, noted that Esquire's lamp was not protected because, copyright registration being sought for the lighting fixture itself, the overall shape of the fixture and its aesthetic characteristics were not separable from the utilitarian aspects of the lighting article. *Esquire*, 591 F.2d at 804-805.

Although the Applicant here, AICO, has submitted claims described on the applications as "ornamental designs on 3-dimensional sculpture," the supporting argumentation for the registration of these works consistently describes the subject of the registrations sought as actual portions of the furniture; the manner in which those portions are structured, connected, and/or interfaced with each other; the overall shape– concave, contoured, curvilinear; the outer border of certain pieces; the protruding and slightly curved base; the three-lobed outer design of certain pieces; the protruding portions of certain parts of the furniture piece over other contiguous portions, *i.e.*, the particular relationship of parts of the furniture pieces to other parts. These descriptions can fairly be said to be those of the construction or the assembly or the contour of the furniture– thus, the overall shape of a useful article which Congress expressed an intention not to protect and which the Denicola/Brandir analysis would consider as the combining of necessary parts of the useful furniture articles with aesthetic qualities. In *Spectrum Creations, Inc. v. Catalina Lighting, Inc.*, 2001 U.S. Dist. Lexis 11861 (W.D. Tex 2001), the work at issue there was protectible because it was a stained glass design used as a lamp shade. In comparing the outdoor lighting fixture in *Esquire* with the stained glass design, the *Spectrum Creations* Court pointed out the stained glass design there was not co-extensive with the entire lamp article; in *Esquire* [as we have explained above], copyright protection was sought for the shape of the lamp, i.e., the lamp as a whole. *Spectrum Creations*, *37. Your arguments for the registration of the furniture designs at issue here rest on including large portions of the pieces, which are either integral segments of the shape or furniture outline as a whole or which are necessary parts of the furniture. We use "necessary" here to indicate that the particular parts serve the purpose of identifying the furniture piece as being what it is categorized to be– a cabinet to hold artifacts, a headboard for a bed, a chair. The great majority of the furniture pieces as you have described them do not exhibit separable features.

We note again that you have also cited *Collezione Europa U.S.A.* for support that the furniture pieces at issue here reflect conceptually separable features. Letter from Daniel Cislo of 3/6/2006, at 5. The works at issue in *Collezione Europa* were also items of furniture– dinette table, chairs, baker's rack, bar stool. The feature that the Court found separable and copyrightable were sculpted leaves. The District Court found these leaves comparable to the ornamental design on the belt buckles in *Kieselstein-Cord (Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 993

(2d Cir. 1980)) and to the "intertwined banana leaf design," found to be separable from the lamp base in *Sunset Lamp Corp. v. Alsy Corp.*, 698 F. Supp. 1146, 1151 (S.D.N.Y. 1988). Your March 6, 2006 Letter mentions Professor Goldstein's test for separability: that a feature [pictorial or sculptural] embodied in a useful article is conceptually separable if it can stand on its own as a work of art traditionally conceived, and if the useful article in which it is embodied is equally useful without it. *See, e.g., Pivot Point International, Inc. v. Charlene Products, Inc.*, 372 F.3d 913, 923 (7th Cir. 2004). Although you have not made an extensive argument that the Goldstein test should be used in determining separability, we nevertheless point out that the concentric squares and the straight-line ridges and carvings, the latter of which follow the shapes of portions of the useful articles that are the furniture pieces, even taken in the aggregate, can be argued to be not the "work of art traditionally conceived" that forms part of the Goldstein test. The sculpted leaves of *Collezione Europa* and the *Kieselstein* belt buckles, incorporating ornamental features consisting of geometric shapes with "several surface levels" and wavy lines sculpted and contoured beyond the belt's shape itself [632 F.2d at 990] more easily fit the Goldstein concept of traditionally conceived works of art.

B. Certain design features: separable but not copyrightable

1. Feist

Although the Review Board has determined that most of the features which you have argued are not separable, the Board also recognizes that certain features within some of the furniture pieces are, indeed, separable elements under *Compendium II's* separability test as well as under the Denicola/Brandir test; these features are, nevertheless, 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 Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 346 (1991). *See also, e.g., 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). The Review Board accepts that Applicant's furniture carvings satisfy the independent creation prong of originality. 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 in each work, individually and as a whole, is insufficient to satisfy the second prong of creativity.

As you have pointed out [Letter from Daniel Cislo of 3/6/2006, at 3], *Feist* holds that a very minimal level is sufficient to satisfy the creativity aspect of "original." 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 (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 long-standing 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, 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.

2. 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). 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, Office regulations state that 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 most fundamental principles of copyright law: commonplace shapes, symbols, and designs, and minor variations of those, may not be copyrighted because that could limit the availability of these authorship building blocks to the general populace. These basic shapes and symbols lie in the public domain for use by all; claiming such shapes and symbols for copyright protection would give a [perhaps] unintended monopoly which would prevent the further production of creative works using such fundamental authorship elements.

3. Separable design elements lack the necessary minimum creativity

We have identified separable design elements in the following furniture piece works: Boulevard Chair with Arms, Boulevard Dresser, Boulevard Dresser Mirror, Boulevard Headboard, Boulevard Footboard, Boulevard China Cabinet/Buffet, Milano China Cabinet/Buffet, Milano Table, Milano Dresser Mirror and Milano Footboard. The minimal lines and ridges embodied in these pieces are not, however, in themselves copyrightable features or elements of design. In each work, the same separable element appears which is a raised, carved line or ridge. In some works, the

carved ridge is repeated. Neither copyrightable are the concentric squares appearing on the surface of Park Avenue Headboard and Park Avenue Chair with Arms. For the copyrightability analysis, separable elements are evaluated both individually and as a whole with any other separable elements in the same work but independently of the utilitarian article in which it is embodied. Any element or combination of elements must be sufficiently copyrightable and independent of the useful article of which it is part.

The carved or raised line or ridge and the concentric square pattern in these works are simple, common shapes or designs that lacks sufficient creativity to be copyrightable. Copyright protection is not available for common and/or geometric shapes or symbols. 37 C.F.R. § 202.1(a): copyright not available for familiar symbols or designs, for mere variations of lettering or coloring. You cited *Compaq Computer Corp. v. Ergonome, Inc.*, 137 F.Supp. 2d 768, 775 (S.D. Tex. 2001) for the principle that the combination of elements and their relationship to each other should be examined for originality: "atomistic parsing is inappropriate in this copyright inquiry; copyrightability of text [*note– the Copyright Office believes it may be added here "of any category of authorship elements"*] turns not on the number of letters in its component words, or on the words themselves (for no common word may be copyrighted...) but rather, on whether the relationship of the words evinces a modicum of creativity by the author." The Board agrees with this principle that public domain elements may satisfy the requirement for copyrightable authorship as a compilation, through their selection, coordination, or arrangement. Although the individual components of a given work may not be copyrightable, the Copyright Office follows the principle that works should be judged in their entirety and not judged in terms of the protectibility of individual elements within the work. *See, e.g., Atari Games Corp. v. Oman*, 979 F.2d 242, 244-245 (D.C. Cir. 1992). Works based on public domain elements may be copyrightable if there is some distinguishable variation 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")

The separable elements of an individual piece are examined as a whole but independent of the overall shape of the furniture. In each AICO furniture piece, the separable elements as a whole are a garden variety arrangement that is typical for furniture. For each work, its separable elements, individually and as a whole, are devoid of any distinguishing features apart from the simple shape of a ridge or of a square inside a square. Take for example, Boulevard Chair with Arms. The only feature of the chair which can fairly be said to be apart from its overall shape and configuration is the carved lines which follow the shape of the arms and the slightly fan-shaped high-back of the chair. These lines are just that– simple, uninterrupted lines that follow along the back and arms [and the bottom legs of the chair]. Individually they lack even the low level of creative authorship that *Feist* requires and, taken together across the chair as a whole, they still are not an ensemble of simple features [straight lines] that together form any design which is copyrightable in itself. They are simply elementary, linear highlights of the shape of the furniture piece.

Again, take Boulevard Headboard. This work consists of a broadly, three-looped scallop of the overall shape, with posts attached to the outer edge of the headboard. The separable features which the Board has identified are the single lines or ridges which follow the three-looped shape of the outer scalloped headboard. These single lines are multiple; they merely repeat the shape of the headboard and form a familiar, wide, three-looped scalloped design which does not vary from the overall shape and configuration of the headboard. Individually, the lines, carved or raised, are just that– simple lines that themselves contain no variation and together merely form two or three

outlined-repetitions of the headboard shape. The same analysis holds true for the other works which the Board does not intend to register.

It is not uncommon for furniture to have carved lines or ridges or decoration which reflects a square shape. Nor is it uncommon for a given piece of furniture to include more than one ridge or one carved, linear emphasis within it. A simple repetition of a common design element reflects only a *de minimis* level of creativity. Furthermore, as we have described, the ridges and emphasizing lines are symmetrically placed and follow the general contours of the overall shapes of portions of the useful articles; the concentric squares are a trivial variation on a geometric shape. The Board has determined that the coordination and arrangement of these, granted, separable elements in Applicant's furniture are not only commonplace but almost inevitable arrangements. While each furniture piece may be aesthetically pleasing, it represents a commonplace, almost predictable selection, coordination, or arrangement of simple design elements. 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 lines that are circular or spherical in shape, square or rectangular, as well as simple square figures does not rise, when taken together as design elements within the individual furniture piece, to the level of creative authorship.

There is substantial support in case law for the Board's conclusions that the few basic shapes of the separable line-elements in Applicant's works 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.

You cited *Covington Industries, Inc. v. Nichols*, 2004 WL 784825 (S.D.N.Y.) for the proposition that an author's design choices and selections are the basis for evaluating creativity– in your words, "the quintessence of creativity." Letter from Daniel Cislo of 3/6/2006, at 4. The Board agrees with this general proposition. However, the Board cannot and does not evaluate an author's creative choices based on the range of possibilities that may have been available for an author to select, coordinate or arrange. Rather, the Board evaluates the end result of such authorial choices, *i.e.*, the fixed expression present in the final work that is presented for registration. The AICO furniture pieces each include Applicant's choice of two common elements– a line that follows the shape of parts or portions of the furniture piece and the square– thus repeated in a simple, obvious arrangement which reflects the overall configuration of the furniture piece. Similarly, the *Covington* Court's analysis of creativity was based on the final result of the work before it, in which the Court

found evidence of more creative choices than the Board believes is found in Applicant's furniture pieces with their variously placed single emphasis lines/carvings/ridges/concentric squares. The work at issue in *Covington* was a plaid design consisting of intersecting horizontal and vertical stripes of five colors, in a 17-inch repeat; the sequences of stripes is then repeated in reverse around pivot points for the length of the fabric. The stripes, additionally, vary in width. *Covington*, at *3 - 4. No such comparable bringing-together of several design elements exist in the furniture pieces at issue here.

You also cited *Jewelers Circular Publ. Co. v. Keystone Publ. Co.*, 274 F. 932 (S.D.N.Y. 1921) to argue that Applicant's choices and selections as to the shapes, sizes, proportions, and configurations in these furniture works are entitled to the same type of creativity analysis such as might be used for photographs. Letter from Daniel Cislo of 3/6/2006, at 4. We point out that a significant difference between the creativity analysis applied to a photograph and your application of such analysis to the works at issue here is that these furniture works, being useful articles, must first undergo a statutorily-required separability analysis in order to determine which separable features can then legitimately be considered for the creativity analysis. Having performed a separability analysis for the furniture pieces at issue here, the Review Board determined that the creativity analysis, based solely on the separable elements, resulted in the determination that these separable elements– the straight-line emphasizing ridges and carvings which follow the shapes of the overall portions of the furniture and the surface decoration of concentric squares, represent extremely limited authorship that is, in essence, *de minimis*.

III. COMPARISON WITH OTHER WORKS

A. Copyright Office examining practice

You have also argued that the Copyright Office did not produce evidence of other furniture that is similar in appearance; and, you argued that design choices clearly were made in the furniture pieces at issue here. Letter from Daniel Cislo of 3/6/2006, at 8. The Copyright Office does not make findings of fact, although it reserves the right to request explanations of statements made by applicants, in appropriate cases. *Compendium II*, § 108.05. The Office's review of a claim for registration is confined to the information provided in an application and to the materials deposited. However, the Office does take administrative notice of matters of general knowledge. *Id.* at § 108.05(b). When the Office has reasonable grounds for questioning the essence of a work of authorship, the burden becomes the applicant's to provide documentation that the works at issue satisfy the statutory requirements of section 410(a): that the material deposited constitutes copyrightable subject matter and that all other legal and formal requirements of the copyright statute [17 U.S.C. § 101, *et seq.*] have been met.

B. AICO furniture pieces previously registered

You have also stated that the Copyright Office has registered other furniture pieces by Amini Innovation Corporation [AICO], allegedly similar to those at issue here, arguing that these seventeen [17] works are equally entitled to registration. Letter from Daniel Cislo of 3/6/2006, at 2. However, unlike examination of other intellectual properties sought to be protected by patent and/or trademark laws, the Office does not compare works. *Compendium II*, §108.03. Each individual work of authorship is considered on a case- by-case basis, without regard to any other specific work, any work either concurrently submitted for registration or any work registered [by

the same claimant or by a third-party] in the past.[4] Because you have sent to us a long list of AICO furniture works which have been registered and which you claim are similar to the works for which we are now refusing registration, we have reviewed those previous registrations for the sake of consistency and fairness to your client. We find, however, that these previous registrations were properly made: they extended to authorship which the registration specialist found clearly conceptually separable; they extended to photographic authorship; and they extended to adding to the public record supplementary information where the party acting as agent for the Applicant had made an error in the initial submission for registration. Thus, all of the previous registrations, upon review, will remain on record.

IV. CONCLUSION

Registration for these seventeen [17] pieces of furniture is denied because, although the pieces can be said to contain separable carvings and surface depiction of a common symbol, these elements, taken individually and together as an ensemble, cannot sustain registration. Simple highlighting lines and ridges within the furniture pieces, as well as decorative squares appearing on the surface of parts of several pieces, represent only *de minimis* authorship.

For the reasons stated in this letter, the Copyright Office Review Board affirms the refusal to register these claims. This decision constitutes final agency action in this matter.

Sincerely,

/s/

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

[4] The D.C. Circuit has noted that even inconsistencies in the Register's decisions to register are not sufficient to undermine the deference owed to the Register's determinations: the Register's test requires the application of subjective judgment to some extent, and given the large volume of copyright applications that must be processed, there may be some results that are difficult to square with the denial of registration for a particular work. This does not mean, however, that the Register has employed different standards in reaching these decisions. *Esquire*, at 802.