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June 8, 2010

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RE: VILLA SOLEIL SCULPTURE
Control No. 61-416-7573(M)

Dear Ms. Meyerhoff:

We are writing on behalf of the Copyright Office Review Board in response to your second request for reconsideration for "Villa Soleil Sculpture," which is a cover or globe for lighting fixtures. We apologize for the delay. After reviewing the application from your client, Minka Lighting, Inc., and the arguments that you presented on Applicant's behalf, the Review Board upholds the Examining Division's refusal to register Villa Soleil Sculpture.

ADMINISTRATIVE RECORD

On June 26, 2006, the Copyright Office received separate applications from Minka Lighting, Inc., to register five works, each described as a three-dimensional sculpture, including Villa Soleil Sculpture. In a letter dated August 14, 2006, Visual Arts Examiner Kathryn Sukites refused to register all five works because, as components of lighting fixtures, none of them have separable features from the functional aspects of lighting fixtures. She also stated that, assuming *arguendo* that there are separable features, none of them have sufficient creativity to be copyrightable. Letter from Sukites to Meyerhoff of Baker & McKenzie, of 8/14/2006, at 1-2.

In a letter dated November 14, 2006 you submitted a first request for reconsideration on behalf of Minka Lighting, Inc., for Villa Soleil Sculpture.[1] You argued that it has conceptually separable features that are aesthetic and separate from its utilitarian features. Letter from Meyerhoff to R & P Division, of 11/14/2006, at 4-6. You also stated that the design decisions for Villa Soleil Sculpture were not a result of utilitarian considerations. You argued that the work has sufficient creativity to be copyrightable. *Id.* at 7-10.[2]

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[1] You also submitted a first request for reconsideration in a letter dated November 13, 2006, for one of the other works that Ms. Sukites had originally refused to register, Salon Grand 1561 Scroll. That work was registered as a result of the first reconsideration.

[2] The Board notes that the identifying material that Applicant deposited with the application for Villa Soleil has a somewhat different appearance than the work shown in the photograph that is Attachment B for your first request for reconsideration. For this reconsideration, the Board's review was limited to the identifying material that accompanied the written application. If you believe there is a different claim for copyrightable

(continued...)

In a letter dated March 16, 2007, Attorney Advisor Virginia Giroux-Rollow explained that Villa Soleil Sculpture would not be registered because it is a useful article that does not contain any separable elements that are copyrightable. Letter from Giroux-Rollow to Meyerhoff, of 3/16/2007, at 1-4. She stated that there is no separable authorship that is copyrightable because all the elements of the work are related to the utilitarian aspects of the function of the work and are subsumed within the overall shape, contour and configuration of the work. *Id.* at 5. She also concluded that, even if the Office were to consider the striated design on the surface of the lighting globe as conceptually separable, that design would not represent a copyrightable work of art; Ms. Giroux-Rollow cited the Office's regulations at 37 C.F.R. § 202.1 [uncopyrightable elements].

In your letter dated June 16, 2007 requesting a second reconsideration for Villa Soleil Sculpture, you reiterated the arguments you made for the first reconsideration. Letter from Meyerhoff to R & P Division, of 6/16/2007. You again asserted that Villa Soleil Sculpture has conceptually separable authorship that is sufficiently creative to be copyrightable. *Id.* at 2-9. You again pointed to elements in the design of Villa Soleil Sculpture that you argue are conceptually separable and have sufficient creativity to be copyrightable. Specifically you identified the fluted edge, striated design and color variations. *Id.* In addition, to support your arguments, you compared it to other works. You also argued that Villa Soleil Sculpture has as much creativity as another work that the Office registered which is owned by the applicant. *Id.* at 10-12.

DECISION

After reviewing the application and your arguments in favor of registering Applicant's work, the Copyright Office Review Board upholds the Examining Division's decision to refuse registration for Villa Soleil Sculpture. Villa Soleil Sculpture is a bell-shaped globe used in a lighting fixture. The bottom of the sculpture is slightly fluted; the material of which it is made is a light tan coloring and the surface of the lighting globe has a diagonally-shaped striation consistently placed across the globe. A more adequate way to describe the work currently before the Review Board is to reproduce a photo of it.



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[2](...continued)
authorship in the work shown in Attachment B that Applicant wishes to register, a separate application must be submitted for that work.

ANALYSIS

The Board's analysis of Villa Soleil Sculpture and the legal basis for its conclusions are discussed below. As you know, in order to determine whether a work is copyrightable, a threshold determination initially must be 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 second step is to determine whether it has any elements that are separable from its utilitarian function because Congress has decreed that there is no copyright protection for any element that is not separable from the utilitarian aspects of the article. 17 U.S.C. § 101 (definitions) If there are no separable elements, that ends the analysis and the work is not copyrightable. If there are separable elements, 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 thus independent of, and precedes, the creativity analysis for a given work.

A. Useful articles and separability

The statute, again, 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. Based on that definition and information in the application materials submitted for the registration for this work Villa Soleil Sculpture, the Board concludes that, as a light globe, in the overall shape as a simple, commonplace bell, Villa Soleil Sculpture is a cover for light bulbs used in lighting fixtures. Meyerhoff 6/16/2007 Letter, at 6 : contrasting a featureless sculpture to the Villa Soleil work at issue, the design elements are said to be based on "artistic, not utilitarian considerations; design elements for Villa Soleil "reflect the independent, artistic judgment of the author and are not related to the functionality of the light fixture." Meyerhoff 11/14/2006 Letter, at 4: Villa Soleil "is a sculptural work of art that is incorporated within a useful article (a light fixture);" "[S]pecifically, the Villa Soleil Sculpture may serve as a light globe positioned over a light bulb;" footnote at 4, referring to the Villa Soleil Sculpture as a "portion of the useful article (*i.e.*, the light globe.)" Because the work is a design for a part of a useful article, the Board must apply the separability analysis to determine whether there are any separable elements.

The Review Board concurs with the principle in *Mazer v. Stein*, 347 U.S. 201 (1954), that copyrightable works may be incorporated into utilitarian objects. In recognition of that principle, the separability analysis permits copyrightable subject matter to be registered while ensuring that utilitarian aspects of useful articles are not registered. We point out that, although *Mazer* is 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." *Mazer*, 347 U.S. at 218), it 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 light globe at issue here is separable from the remainder of the useful article – the light fixture– in which it is embodied.

1. **Separability tests– those of Copyright Office and copyright scholars**

The Copyright Office's policies and procedures for the separability analysis are based on statutory and legislative considerations, as discussed below. As referred to in your 11/14/2006 Letter, at 2, and your 6/16/2007 Letter, at 5, written guidelines for the separability analysis are found in *Compendium of Copyright Office Practices II*, § 505.02 (1984) (hereinafter *Compendium II*), which states that:

> Registration of claims to copyright in three-dimensional useful articles can be considered only on the basis of separately identifiable pictorial, graphic, or sculptural features which are capable of independent existence apart from the shape of the useful article. Determination of separability may be made on either a conceptual or physical basis. (Emphasis added.)

These guidelines are based on the legislative history of the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 254, (legislative history 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 and utilitarian aspects 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)

In your 11/14/2006 first request for reconsideration, you cited *Pivot Point International, Inc. v. Charlene Products, Inc.*, 372 F.3d 913 (7th Cir. 2004) and *Brandir International, Inc. v. Cascade Pacific Lumber Co.*, 834 F.2d 1142 (2d Cir. 1987). You argued that, unlike the facial features of the work in *Pivot Point*, there is no colorable argument that the design features of Villa Soleil Sculpture serve any functional purpose. As Ms. Giroux-Rollow stated in her 3/16/2007 Letter, those cases relied on what is widely known as the Denicola test for conceptual separability because it was first advocated by Professor Denicola.[3] Another alternative test is that proffered by Judge Newman in his dissent in *Carol Barnhart*, 773 F.2d 411 (2d Cir. 1985)[4] and another one often mentioned is advocated by Professor Goldstein.[5] Unfortunately, many of these tests offer few objective standards that can be applied with consistency by the Office in its statutorily-required

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[3] The Second Circuit in *Brandir International, Inc. v. Cascade Pacific Lumber Co.*, 834 F. 2d 1142 (2d Cir. 1987), adopted Professor Denicola's test for determining conceptual separability. That test considers whether or not a given feature or aspect of a useful article "reflects a merger of aesthetic and functional considerations;" if so, the artistic features of the useful article cannot be said to be conceptually separable; if not, conceptual separability may exist. *Id.* 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.*

[4] Judge Newman's test, sometimes referred to as a "temporal displacement" test, would take into consideration whether the observer of the article in question would be able to arrive at a "separate non-utilitarian concept that can displace, at least temporarily, the utilitarian concept." *Carol Barnhart*, 773 F.2d at 423.

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

examination of claims to registration. These alternative separability tests rely, to a great degree, on the exercise of subjective judgment; such judgment would likely lead to arbitrary decision-making if any particular one of the alternative tests were applied by the Office's registration specialists. These and other tests may engender problems of consistent examining practices, premised as these tests are, at least partly, on subjective perception: *e.g.*, when, how, and to what degree is the utilitarian purpose of an article displaced in a viewer's mind by the artistic purpose; when, how, and to what degree do the aesthetic and functional considerations underlying the design of a useful article merge.

Because such alternative tests might result in registration of works in conflict with the expressed congressional intent to deny copyright protection to the design of useful articles which happen to be aesthetically pleasing, the Copyright Office has not accepted as a registration practice any particular alternative separability test; nor has the Office found sufficient for its examination and registration purposes any other separability test advanced by any particular copyright scholar or commentator. The test applied by the Office must be one consistent with the expressed intention of Congress as it was set forth in the substantial legislative history that accompanied the 1976 major revision of the copyright law. Although one of the various alternative separability theories you cite may ultimately be endorsed by a majority of courts as the theory that is most consistent with expressed congressional intent ["courts have twisted themselves into knots trying to create a test to effectively ascertain whether the artistic aspects of a useful article can be identified separately from and exist independently of the article's utilitarian function," *Masquerade Novelty, Inc. v. Unique Industries, Inc.*, 912 F.2d 663, 670 (3d Cir. 1990)], no such separability test alternative to the current registration practices of the Copyright Office has yet emerged.

2. Analysis of separability of Villa Soleil Sculpture

Section 505 of *Compendium II*, *supra*, 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). *Esquire* enunciated the rule that is the basis for the Office's analysis of whether a pictorial, graphic or sculptural work may be considered separable from the utilitarian object in which it is incorporated. Relying on explicit statements in legislative history, the *Esquire* court found that the Office's regulation was an authoritative construction of the copyright law. *Id.* at 802-803. *Esquire* and later cases held that, despite an 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).

Based on the foregoing considerations, the Board has determined that the striated element on the surface of Villa Soleil Sculpture is a conceptually separable element. The striation is a surface element that can be imagined separately from the work without destroying its shape. However, the overall shape of the useful article would be destroyed by imagining the fluted, or slightly wavy, element as being removed. The fluted element appears at the outer edge of the lighting cover and thus a conceptual separation of the outer edge would alter the overall shape of the lighting cover; the fluted, or slightly wavy, outer-edge element plays an integral part of the overall shape of the globe and, thus, according to *Compendium II*, is not separable. You also identified color as a separable element. We agree; however, color per se is not a copyrightable element. 37 C.F.R. § 202.1(a). *See below for our analysis of the copyrightability of this particular separable element.*

Although you have not provided a photograph or a drawing of this lighting globe as it exists incorporated within a lighting fixture, your statements describing it are sufficient for the Office to consider it part of a useful article. *See above* at 3. 17 U.S.C. § 101 (definitions) "An article that is normally a part of a useful article is considered as 'useful article.'" You have also spent a great portion of both first and second reconsideration letters addressing separability. Separability is applicable only to useful articles. Your arguments have stated that you disagree with the original examiner's position and conclude that the design elements of the globe in question can be conceptually perceived as separable from the work itself. You state these design elements to include: [1] the fluted edge of the sculpture; [2] the striated design of the glass of which the sculpture is made; and [3] color variations of such glass. Letter from Meyerhoff of 6/16/2007, at 6. Under the Copyright Office's *Compendium II* separability test, the overall shape of the globe cannot be considered copyrightable. All aspects of that shape, including the fluted edge, constitute the shape.

You have also stated that these three features are based on artistic, not utilitarian, considerations and that one "can easily conceive of a multitude of other designs for a sculpture for a light fixture that would permit the light fixture to perform its utilitarian functions. Likewise, a featureless sculpture for a light fixture can readily perform its utilitarian functions. ... [T]he design elements of the Villa Soleil Sculpture ... are not related to the functionality of the light fixture. ... Villa Soleil Sculpture has numerous decorative elements." Meyerhoff Letter of 6/16/2007, at 9. These arguments do not address the issue of separability. Essentially, they address the issue of creativity but, as we have explained above, the step of creativity judgment is taken only after the initial step of judging separability, if any, with respect to a given work. Because the Office uses *Compendium II's* separability test, we do not agree that one of the artistic features you have identified– the fluted edge could be imagined separately and independently from this article without destroying the basic shape of the article. *Compendium II*, § 505.03. The "featureless sculpture" to which you refer in your 6/16/2007 Letter would not be the Villa Soleil Sculpture which is the work before the Review Board. Although Mr. Giroux-Rollow identified the striated design and the coloration, both surface elements appearing within the Villa Soleil, as not separable [Giroux-Rollow 3/16/2007 Letter, at 3], the Review Board does see coloration and the striations as surface elements which may be separable but are, nonetheless, not copyrightable.

B. Originality analysis

Having identified two separable elements within the work, the Board next did an analysis to determine whether the elements within the work are sufficiently creative to be copyrightable. The statute mandates that copyright protection is only available for "original works of authorship." 17 U.S.C. § 102(a). As you recognized, the Supreme Court found 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 Villa Soleil Sculpture satisfies the 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 design is not sufficient to satisfy the second prong.

In *Feist*, the Supreme Court's holding that a very 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 that the Supreme Court reaffirmed in *Feist* the precedent that only a modicum of originality is required for a work to be copyrightable, it also emphasized that there are works in which the "creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Feist* at 359. Such works are incapable of sustaining copyright protection. *Id.*, citing 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, § 2.01[B] (2002). The Court observed that "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 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 or designs; among such designs, standard geometric shapes may

fairly be included. 37 C.F.R. § 202.1 (2009). *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-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.

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

2. Separable elements of Villa Soleil Sculpture have *de minimis* creativity.

The Review Board finds that the level of creativity in separable elements of Villa Soleil Sculpture is *de minimis*. The appearance of the striation is ordinary and customary. The element consists of a single pattern, repeated throughout the lighting globe in a predictable and customary way. The separable element of striation, by itself, is used in a manner that has *de minimis* creativity. It is a garden variety use of a common, ordinary design, with the dividing lines of the striation nearly evenly spaced and, in order to term it a "striation," all lines are placed to point in the same direction. In addition to the striated-lines design on the surface of the Villa Soleil, the presence of the tan coloration, with few points on the striated lines being a darker tan, reflects another separable element. This almost consistent tan coloring, however, does not represent copyrightable [or registrable] authorship in itself. Copyright Office regulations, 37 C.F.R. § 202.1(a): coloring not subject to registration. This does not mean that color in itself cannot be one element in a design that overall is copyrightable: *Boisson v. Banian, Ltd.*, 273 F.3d 262, 271 (2d Cir. 2001), citing the Second Circuit cases of *Knitwaves, Inc. v. Lollytogs Ltd,* 71 F.3d 996, 1004 (2d Cir. 1995) and *Streetwise Maps, Inc. v. Vandam, Inc.*, 159 F.3d 739, 748 (2d Cir. 1998) for the proposition that a combination or arrangement of colors may be considered creative authorship, or part of a creative work, in itself sustaining copyright protection. Although coloration is separable, there is no such combination or selection and arrangement of colors present on the surface of the Villa Soleil lighting globe sufficient to be copyrightable in itself.

Further, assuming *arguendo* [and we do not make such a determination] that the fluted element at the bottom of Villa Soleil is separable, this fluted aspect of the lighting globe/bulb also lacks sufficient creativity to be copyrightable. Like the striation element, it is an ordinary, slightly wavy shape which appears in many designs; it is commonplace and may even be said to lie in the public domain. Like the striation element, it is simply a repeated wave shape, without adding more to the arrangement. Even considering the two elements in combination– the fluted shape at the bottom of the bulb combined with the striations along the entire surface of the bulb – there is not sufficient authorship that is more than *de minimis* because the selection, coordination or arrangement of these two elements [and even of the three elements if the color is included] is commonplace, trivial, and does not rise above a slightly flared ending to a bell-shaped lighting covering having a striated surface of essentially one color.

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; *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.

The Review Board finds that the separable element of striation on the surface of the lighting globe combined with the slightly fluted or wavy ending of the globe, without more, is too simple and its arrangement too predictable to rise to the level of copyrightable authorship. Like the alphabetical arrangement in *Feist*, the arrangement of the design elements in a simple and obvious manner falls within the category of simple, minimal authorship which *Feist* referred to as "entirely typical"or "garden variety" authorship. The Board is unable to recognize any authorship contribution that, if considered separable, is "more than merely trivial."

You have also sought to demonstrate that Villa Soleil Sculpture should be registered by comparing it to other works, including comparing it to another work that the Office previously registered. Letter from Meyerhoff of 6/16/2007, at 10. We point out that, in its analysis to determine whether there is sufficient creativity for a work to be registered, the Copyright Office does not compare works as part of its copyrightability analysis. *See, Compendium II*, § 108.03 Rather, the analysis for copyright registration involves considering the merits of each work, in itself, without comparison to other works and their features. The Office also 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. But, the authorship of a work that incorporates familiar, commonplace, or *de minimis* elements such as striated lines, uniformly separated along the surface, in combination with a slightly wavy design element, must be judged in its entirety, with analysis of the combination of the constituent elements of a work of authorship as well as the relationship of such elements to each other. The selection and arrangement of individual design elements that are *de minimis* in themselves, *i.e.*, they carry no copyright protection as such, within an overall design, be it 2-, or 3-dimensional, may be protected, depending on the use of such elements and whether the chosen elements are sufficient in quantity within the design as a whole. The Ninth Circuit said it well: "But it is not true that *any* combination of unprotectable elements automatically qualifies for copyright protection. Our case law suggests, and we hold today, that a combination of unprotectable elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship." *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003). The Ninth Circuit quoted *Feist* to bolster its explanation: "[T]he principal focus should be on whether the selection, coordination, and arrangement are sufficiently original to merit protection." 323 F.3d at 811, *citing Feist*, at 358. The focus, therefore, must be on the overall design that fairly may be said to be synonymous with the selection, coordination, or arrangement of individual (possibly) trivial elements, brought together to form a more-than-trivial, copyrightable overall design.

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

Sincerely,

/S/

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