November 28, 2007

Peter S. Sloane, Esq.
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RE: ALVINA VALENTA (#9501)
ALVINA VALENTA (#9503)
ALVINA VALENTA (#9507)
Control No. 61-318-2323(O)

LAZARO (#3559)
Control No. 61-401-7297(O)

Dear Mr. Sloane:

I am writing on behalf of the Copyright Office Review Board in response to two second requests for reconsideration from you, dated April 5, 2006, and June 20, 2006. For this response, the Board has combined both of your requests because they concern similar works and issues and require the same analysis from the Board.

After reviewing the applications from your client, JLM Couture, Inc., and the arguments that you presented on Applicant's behalf, the Board is upholding the Examining Division's decision to refuse registration for four fashion design elements embodied within wedding dresses. The four works include a multi-tiered ruffle design for the train of a wedding dress, which is Alvina Valenta #9501; another multi-tiered ruffle design that is the skirt of a wedding dress, which is LAZARO #3559; a ribbon and lace design for trim, called Alvina Valenta #9503; and an overlapping bow design for the bodice, identified as Alvina Valenta #9507.

I. ADMINISTRATIVE RECORD

A. Submissions

On January 7, 2005, the Copyright Office received three separate applications from JLM Couture, Inc. to register fashion design elements for wedding dresses, entitled Alvina Valenta #9501, Alvina Valenta #9503, and Alvina Valenta #9507 (the waterfall design, ribbon and lace

design and overlapping bow design, respectively.[1] In a letter dated March 24, 2005, Visual Arts Examiner Sandra D. Ware refused registration for all three designs because they are useful articles of wearing apparel that do not have any "copyrightable pictorial, graphic, or sculptural expression" separable from their functional aspects. Letter from Ware of 3/24/2005, at 2.

On July 21, 2005, the Copyright Office received a separate, fourth application from JLM Couture, Inc., to register a fashion design element for wedding dresses, entitled Lazaro #3559. In a letter dated August 18, 2005, Visual Arts Examiner Geoffrey R. Henderson refused registration because the design does not have any features separable from the functional aspects of a wedding dress but, assuming *arguendo* that it does, it is not sufficiently creative to be copyrightable.

B. First requests for reconsideration

In individual letters each dated July 20, 2005, you submitted a first request for reconsideration on behalf of Applicant for each Alvina Valenta work in which you argued that the designs of the waterfall design, the ribbon and lace design, and the overlapping bow design are physically and conceptually separable from the wedding dresses themselves. You stated that the waterfall design mimics the appearance of a wedding cake with its multiple layers which could have been made of any kind of material besides the satin of the wedding dress. You stated that the display of ribbon bisecting the lace is a unique and original design. You stated that the overlapping and oversized bow design is a playful artistic statement, independent of the dress design. You cited *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980) as support for your statements that two of the three Alvina Valenta works at issue here contain the necessary physically or conceptually separable features to sustain registration. You also argued that all three Alvina Valenta gowns with their supposedly separable features are the result of artistic considerations. You argued that the three designs satisfy the low level of creativity required for protection.

In a letter dated November 28, 2005, you submitted another first request for reconsideration on behalf of Applicant for Lazaro #3559 for which you argued that the ruffle tier design is conceptually separable from the wedding dress. Again citing *Kieselstein-Cord*, you stated that the ruffle tier design "rises about the tiered skirt like wisps of clouds floating in

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[1] At the same time, Applicant submitted 19 separate applications to register fashion design elements for wedding dresses. In a letter dated March 24, 2005, Visual Arts Examiner Sandra D. Ware responded with a request for changes to the copyright claims in some of the applications and requests for more detailed photos of some works. She stated at the end of her letter that, if Applicant disagrees with the changes requested, the letter should be considered a refusal to register the designs because some of the designs are useful articles as items of wearing apparel that do not have any features separable from their functional aspects or are not copyrightable subject matter. Applicant then submitted individual, first requests for reconsideration for each design. In response to that request, all the designs were registered except the three Alvina Valenta that are the subject of this second request for reconsideration.

the sky." Letter from Sloane of 11/28/2005, at 2. You also described the design as being uniquely distinctive and you analogized its appearance to an "oversized cotton ball." *Id.* You argued that the design is the result of artistic considerations and stated that such design satisfies the low level of creativity required for protection, having been independently created by Applicant.

C. Copyright Office response to first requests

In a letter dated January 5, 2006, Attorney Advisor Virginia Giroux-Rollow responded to the first requests for reconsideration. She stated that the three Alvina Valenta designs– #s 9501, 9503, 9507– are not copyrightable. The three designs are each part of a useful article, a wedding dress. Ms. Giroux-Rollow reviewed in detail the legal basis for the separability analysis used by the Copyright Office. She determined that there are surface aspects of each gown design that are conceptually separable. For the waterfall design, she identified the multi-tiered ruffles as being separable. For the ribbon and lace design, she identified a satin ribbon interwoven through preexisting lace at the bottom of the dress and through the bodice with a satin bow centered at the back of the dress as being separable. For the overlapping bow design, the [physically] separable elements consists of two overlapping satin bows centered on the back of the dress. She determined that these design elements within each gown, although separable from the overall gowns, nevertheless lack sufficient creativity to be copyrightable.

In a second letter dated March 20, 2006, in response to your arguments on behalf of the work Lazaro, Attorney Advisor Virginia Giroux-Rollow stated that Lazaro is not copyrightable. Ms. Giroux again reviewed in detail the legal basis for the separability analysis used by the Copyright Office. She determined that, again, there are surface aspects of the gown design that may be conceptually separable– here, a multi-tiered ruffle design. However, she also determined that such separable element lacks sufficient creativity to be copyrightable.

D. Second requests for reconsideration

On behalf of Applicant, you submitted three separate letters, all dated April 5, 2006, requesting reconsideration a second time for waterfall design, ribbon and lace design, and overlapping bow design, respectively, in the Alvina Valenta wedding dresses. You again argued that they are copyrightable and reiterated your previous legal arguments. You argued that the waterfall and overlapping bow designs are conceptually separable from the wedding dresses and that the ribbon and lace design is conceptually, and partially physically, separable from the wedding dress. Letters from Sloane of 4/5/2006, at 2.

In a fourth letter dated June 20, 2006, you submitted another second request for reconsideration on behalf of Applicant in which you again argued that the Lazaro design element is copyrightable, reiterating your previous legal arguments. You argued that the ruffled

tier design is conceptually separable from the overall wedding dress and sufficiently creative to be copyrightable. Letter from Sloane of 6/20/2006, at 1-2.

II. DECISION

After reviewing the applications and arguments in favor of registering Applicant's four fashion designs for wedding dresses, the Copyright Office Review Board upholds the Examining Division's decision to refuse registration for them.

III. ANALYSIS

Below is the Board's explanation of its analysis to determine whether Applicant's designs incorporated into wedding dresses are copyrightable. The Office first determines whether the overall work in which each design is incorporated is a useful article. If so, the Office then determines whether there is any aspect of the overall work that is separable from its utilitarian function because only separable elements may be copyrightable. Finally, as a separate step, the Office examines the separable elements, if any, to determine whether such elements have sufficient originality (independent creation plus creativity) to be copyrightable. The separability analysis is independent of, and precedes, the creativity analysis.

A. Useful articles and the separability requirement

A useful article is defined as having "an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." 17 U.S.C. § 101 (definition of "useful article"). Also, any article that is "normally a part of a useful article is considered a useful article.'" *Id.* The purpose of the separability analysis is to ensure that utilitarian aspects of useful articles are not registered since they are not copyrightable subject matter. Written guidelines for the separability analysis are found in *Compendium of Copyright Office Practices II*, Ch. 500, § 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, 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 of a useful article may be copyrighted.

> [A]lthough the shape of an industrial product may be aesthetically satisfying and valuable, the Committee's intention is not to offer it copyright protection under the bill. Unless the shape of an automobile, airplane, ladies' dress, food processor, television set, or any other industrial product contains some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted under the bill. The test of separability and independence from "the utilitarian aspects of the article" does not depend upon the nature of the design — that is, even if the appearance of an article is determined by esthetic (as opposed to functional) considerations, only elements, if any, which can be identified separately from the useful article as such are copyrightable. And, even if the three-dimensional design contains some such element (for example, a carving on the back of a chair or a floral relief design on silver flatware), copyright protection would extend only to that element, and would not cover the over-all configuration of the utilitarian article as such.

H.R. Rep. No. 94-1476, at 55 (1976) (emphasis added)

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

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

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

> Conceptual separability means that the pictorial, graphic and sculptural features, while physically inseparable by ordinary means from the utilitarian item, are nevertheless clearly recognizable as pictorial, graphic or sculptural work which can be visualized on paper, for example, or as free-standing sculpture, as another example, independent of the shape of the useful article, *i.e.*, the artistic features can be imagined separately and independently from the useful article without destroying the basic shape of the useful article. The artistic features and the

> useful article could both exist side by side and be perceived as fully realized, separate works– one an artistic work and the other a useful article. (emphasis added)

Section 505 of *Compendium II*, as quoted above, is a valid interpretation of copyright law because it is a direct successor to the Copyright Office regulation that was affirmed in *Esquire, Inc. v. Ringer*, 591 F.2d.796 (D.C. Cir. 1978), *cert. denied* 440 U.S. 908 (1979). The Office relies on the authority of *Esquire* for the analysis it follows to determine whether pictorial, graphic or sculptural works are separable from the utilitarian objects in which they are incorporated. 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.

B. The overall works at issue; their design features; their separable features

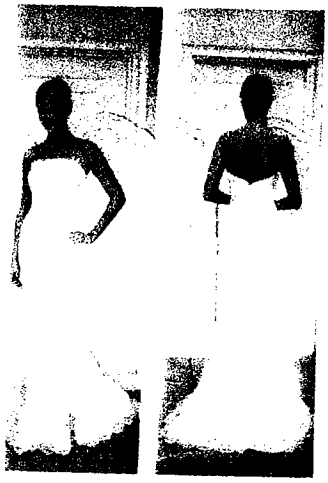
As we have said, clothing, including dresses, is considered useful for copyright purposes. *See* the House Report to the 1976 Act, H.R. Rep. No. 1476, 94th Cong., 2d Sess. 55 (1976):

> 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.

Based on the statutory definition and Congress's intent concerning the aspects of clothing which might or might not be subject to copyright, we must view the wedding gowns submitted for registration with their particular design elements from the viewpoint of useful articles. Your claim submissions as well as your correspondence to the Office have persuaded the Review Board that the Applicant is not claiming copyright in the wedding dresses as a whole– such dresses are useful articles in themselves– but, rather, on the four identified designs which are incorporated into, *i.e.*, are part of, the wedding dresses. This point is not in dispute. Letter from Sloane of 4/5/2006, at 2.

Reproduction of photos of the four gowns

Alvina Valenta (#9501)



Alvina Valenta (#9503)

Alvina Valenta (#9507)

Lazaro (#3559)

Describing the three Alvina Valenta works for which registration is sought: Alvina Valenta #9501, a multi-tiered, "sculptural-like train" "resembling the appearance of a waterfall;" Alvina Valenta #9503, "surface ornamentation consisting of lace through which a satin ribbon is also interwoven," "bisecting" the lace segment on the bottom of the dress, along with a ribbon "interwoven through the bodice segment with a bow in the center back of the dress;" Alvina Valenta #9507, a 3-dimensional "overlapping bow design" which is "conceptually separable from the overall wedding dress;" and, Letter from Sloane of 6/20/2006, at 2, describing the

Lazaro work for which registration is sought: a "ruffled tier design," which you state to be conceptually separable, and forming the skirt portion of the dress.

For all three Alvina Valenta dresses, you have stated that "applicant is not seeking registration for the overall design of the wedding dress." Letter from Sloane of 4/5/2006, at 2. Your letter of June 20, 2006, at 1, also states that the "examiner concedes that the ruffles on the surface of the overall wedding dress are conceptually separable from the utilitarian aspects of the work."

Based on the foregoing considerations, the Board has determined that the waterfall/ multi-tiered, ruffle design of Alvina Valenta #9501 is not separable, either physically or conceptually, from the wedding dress. The overall shape of the waterfall design in the garment Alvina Valenta #9501 is co-extensive with a specific portion of the shape of the wedding dress– the waterfall design represents the lower portion, or skirt, of the overall dress. The repeated pattern of cascading ruffles creates a general appearance of multiple layers. When the shape and design of an aesthetic element cannot be physically separated from the overall shape of the useful article in which it is incorporated, without altering the shape of the utilitarian object, no physical separability is possible. And, for any element to be conceptually separable from the utilitarian article in which it is embodied, its conceptual removal from the larger work must not change the overall shape or configuration of the useful article when one imagines the design elements as being separate. Given the *Compendium* test, the Board has reached the conclusion that the multi-tiered ruffles in Alvina Valenta #9501 cannot be considered conceptually separable from the wedding gown. The Board also reached the same determination with regard to the ruffle tiered design in Lazaro. The Lazaro design has a very similar appearance of multiple layers created by a cascade of repeated ruffles forming the skirt of the wedding dress. The overall shape of the skirt for the wedding dress is identical to the Lazaro design element for which you seek registration and, thus, according to *Compendium II*, is not separable.

However, the Board has found that the overlapping bow design, Alvina Valenta #9507, is physically separable. The bow design may be physically removed without changing the overall shape of the useful article, the wedding dress. The Board has also determined that the ribbon and lace design, Alvina Valenta #9503, is conceptually separable from the dress: the ribbon and lace design may be imagined as separable from the wedding dress without altering its overall shape or configuration.

C. Originality

After finding that an element of a useful article is separable, the Review Board then evaluates it to determine whether it is sufficiently original to be copyrightable. For each work, if there are multiple elements, the elements are evaluated separately as well as evaluated as a whole. Although the Board has determined that the overlapping bow design and ribbon and lace design are separable from the utilitarian function and overall configurations of the wedding

dresses, those elements, in themselves, do not have sufficient creativity to be copyrightable, whether considered individually or as a whole. Also, although the waterfall design, Alvina Valenta #9501, and the Lazaro design do not have physically or conceptually separable elements, assuming *arguendo* that they did, the Board has further determined that they also would not have sufficient creativity to be copyrightable.

The statute mandates that copyright protection is only available for "original works of authorship." 17 U.S.C. 102(a). The Supreme Court has stated that originality consists of two elements, "independent creation plus a modicum of creativity." *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 346 (1991). *See also Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d Cir. 1951) ("'Original' in reference to a copyrighted work means that the particular work 'owes its origin' to the 'author.' No large measure of novelty is necessary."); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (court defined "author" to mean the originator or original maker and described copyright as being limited to the creative or "intellectual conceptions of the author"). The Review Board concedes that all of the four works at issue here, if separability were conceded, Alvina Valenta #9501, #9503, #9507 and Lazaro, 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 four individual designs' elements [two of which, for the sake of argument, we are assuming the necessary separability] are insufficient to satisfy the second prong.

In *Feist*, the Supreme Court's holding that a minimal level is necessary to satisfy the creativity aspect of "original" was consistent with previous jurisprudence. Any "distinguishable variation" of a work constitutes sufficient originality as long as it is the product of an author's independent efforts, and is "more than a 'merely trivial' variation." *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903) ("... a very modest grade of art has in it something irreducible, which is one man's alone."). However, at the same time the Supreme Court reaffirmed, in *Feist*, the precedent that only a modicum of originality is required for a work to be copyrightable, it also emphasized that there are works in which the "creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Feist* at 359. Such works are incapable of sustaining copyright protection. *Id.*, citing 1 M. Nimmer & D. 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.

1. Office registration practices

Copyright Office registration practices have long recognized that some works of authorship exhibit only a *de minimis* amount of authorship and, thus, are not copyrightable. *See Compendium II,* Ch. 200, § 202.02(a) (1984). With respect to pictorial, graphic and sculptural works, which are Class VA [visual arts] works, § 503.02(a) of *Compendium II* states that a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." Further, there is no protection for familiar symbols, designs or shapes such as standard geometric shapes. 37 C.F.R. § 202.1 (2006). *Compendium II* essentially provides detailed instructions for Copyright Office registration procedures and reflects the principle that creative expression is the basis for determining whether a work is copyrightable, 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: common shapes, symbols, and designs, and minor variations of those, may not be copyrighted because that could limit their availability to the general populace. Common and ordinary shapes and symbols are in the public domain for use by all since they form the building blocks for creative works.

2. Design elements lack minimum creativity

The Review Board finds that the elements of each design [if the design is considered as separable], whether the elements are considered separately or as a whole, have *de minimis* creativity and thus are insufficient for registration.

You have cited *Express, LLC v. Fetish Group, Inc.*, 424 F. Supp.2d 1211 (C.D.Cal. 2006), for the proposition that the utilitarian functions of a tunic garment are irrelevant to the

copyrightability of lace and embroidery accents on that gown. The court in *Fetish*, in an analytical manner similar to that employed by the Copyright Office, first identified which elements within a garment are functional and which are not. In the court's analysis, it stated that articles of clothing are generally not copyrightable because they are useful articles. *Id.* at 1224. The court stated that any utilitarian elements or features in the tunic at issue in *Fetish* could not have copyright protection. *Id.* Citing, among other precedent on the scope of protection for clothing, *Galiano v. Harrah's Operating Co.*, 416 F.3d 411, 419 (5th Cir. 2005), the *Fetish* court said: "Stated otherwise, the pattern or design is copyrightable 'only to the extent that its artistic qualities can be separated from the utilitarian nature of the garment.'" The *Fetish* court concluded that the elements for which protection was being claimed– placement and arrangement of the lace design– are not related to the garment's function. 424 F. Supp. 2d at 1224-1225. This conclusion, that elements which are part of the functionality, *i.e.*, of the overall use, of a garment are not copyrightable, reflects the legislative history explained above at 4 - 5 and *Compendium II's* principle. The *Fetish* court then analyzed the lace design on the tunic garment at issue to determine whether it, as a non-functional separable element, was copyrightable. The court found "some small amount of creativity beyond the standard combination of standard elements, such that the GH268 [embroidery design on the tunic] deserves thin copyright protection." *Id.* at 1227.

In its analysis to determine whether there is sufficient creativity for copyright protection, the Copyright Office does not compare works. *Compendium II*, Ch. 100, § 108.03. Rather, the analysis for registration involves considering the merits of each work, by itself, without comparison to other works. The works at issue here must be judged on their own: the four works at issue are similar to the *Fetish* "patterns or other artistic features imprinted onto fabric," *id.* at 1224, but similarity does not mean that each of the four represents the necessary quantum of original authorship to sustain a claim.

Alvina Valenta #9501: You characterize #9501 as having a design that is reminiscent of a sculpture of a waterfall. You also said it resembles the multiple layers of a wedding cake or a Christmas tree shape. While the design may be analogized to those things, it consists solely of a few layers of ruffled material. The single element of the ruffle is repeated at regular intervals from about the knee level to the floor. There are five layers of ruffles. Layering ruffles results in a design that is a common element or configuration, representing a standard shape not sufficient in its outlines to sustain a registration to copyright.

Lazaro: You characterize Lazaro as having a uniquely distinctive, ethereal appearance that looks like wisps of clouds floating in the sky or looks like an oversized cotton ball. While the design may be analogized to those things, like design #9501, it consists solely of repeated layers of the same ruffle material. The single element of the ruffle is repeated. For clothing, layering ruffles is a common element, shape, or design, having been long used, and which is in the public domain. A repetition of a single common shape or element without adding more reflects a *de minimis* level of creativity.

Alvina Valenta #9503: You describe design #9503, the ribbon and lace design, as being an attractive and unique design. The design consists of a satin ribbon passing in and out, woven through lace that is located on the dress just above the hem and at the bodice. Again, the mere weaving of a strip of ribbon through lace results in a common design or dress element that does not rise to the level of copyrightable authorship.

Alvina Valenta #9507: Finally, you described design #9507, the overlapping bow design, as a whimsical overlapping arrangement of bows. Repeating the single basic shape of a bow twice by layering one on top of the other is a garden variety arrangement of a common shape– a bow. It is typical to place bows on clothing for women, such as a wedding dress. A single repetition of common shape without adding any other element reflects a *de minimis* level of creativity.

There is substantial support in case law for the Board's conclusions that the few basic shapes and arrangements of the 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. 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*, 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.

In support of your argument that Lazaro is sufficiently creative to be copyrightable, you cited *Folio Impressions, Inc. v. Byer California*, 937 F.2d 759 (2d Cir. 1991) in which the court found that a pattern consisting of a rose design was copyrightable. As Ms. Giroux-Rollow stated in her March 20, 2006, letter, Applicant's work at issue here does not exhibit a sufficient level of creative authorship as did the work in the *Folio* case. Lazaro, in its use of a single common design element, lacks distinguishable creativity; it does not exhibit more than a trivial variation on a common design.

For the reasons stated in this letter, the Review Board affirms the Examining Division's refusal to register Alvina Valenta #9501, #9503, #9507, and Lazaro #3559. This decision constitutes final agency action.

Sincerely

N. Petruzzelli

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