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October 30, 1995

Niro, Scavone, Haller & Niro
Attn: Raymond P. Niro
181 West Madison Street, Suite 4600
Chicago, Illinois 60602-4515

Re: Snakelight - Snake Pipe and Snakelight - Snake Sculpt
Control Number: 60-409-1373(n)

Dear Mr. Niro:

LIBRARY
OF
CONGRESS

This is in reply to your letter dated July 27, 1995, requesting further reconsideration to our two earlier refusals to register claims to copyright in the above-entitled works. The Copyright Office Board of Appeals has met and decided, after carefully considering the points in your letter and reviewing the works, that registration is still not authorized, because the works do not contain copyrightable authorship. The copyright claimant for the works is Black & Decker, Inc.

Wa[redacted]gton
D.C.
20559

The works are useful articles, that is, they are articles having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. See Section 101 of the copyright statute. The statute provides that registration is possible only if and to the extent that the works contain authorship physically or conceptually separable from the utilitarian aspects of the works.

Your letter asserts that because the works have basic shapes that can take the form of an infinite number of configurations, this distinguishes them from applications for other useful articles in which registrations have been refused. You regard these configurations as separable copyrightable authorship. e.g., you mention that SNAKELIGHT-HOME sculpture is an independent sculpture that has been configured into a shape involving two leg portions connected by a loop, and that SNAKELIKE-COBRA is a representation of a snake uncoiling and rising up to a strike position.

However, even though the works are flexible to allow them to be twisted into different shapes, those shapes are not fixed shapes that would add to the copyrightability of the works. Each shape exists for no more than transitory duration in any particular position to photograph the work in that shape or, and this is the more frequent occurrence, to use the flashlight for whatever purposes the purchaser chooses. Even if any shape is of more than transitory duration, the changing shape results from the flexible tubing that functions as the means for utilizing and working with these flashlights. That sculptural feature, therefore, cannot be separated from its useful function. These flashlights are useful articles in whatever shape they manifest themselves, just as a Swiss army knife is no less a useful article because it can take different shapes to reflect the various useful functions it serves, such as a knife, a screwdriver and a bottle opener.

You assert that Brandir International, Inc. v. Cascade Pacific Lumber Co., 834 F.2d 1142 (2d Cir. 1987) and Carol Barnhardt, Inc. v. Economy Cover Corp., 773 F.2d 411 (2d Cir. 1985) are relevant, because although the courts in those cases held the works not to be copyrightable, they were, as you note, static in nature--in the former case, a bicycle rack, and in the latter case, mannequins. You assert that your client's works can be differentiated from the bicycle rack and mannequins, because your client's works are more like clay, which can be bent into various shapes. However, there are no physically or conceptually separable copyrightable sculptural elements in the works apart from their utility; no matter the varied shapes that the flashlight takes, and we point out again that the various shapes are dependent upon the particular user of the flashlight, each manifestation of the flashlight cannot be separated into utility and isolated sculpture. The shape determines the utility and, vice-versa; thus, the flashlight fails to reflect any separable copyrightable authorship either physically or conceptually.

In Esquire, Inc. v. Ringer, 591 F.2d 796 (D.C. Cir. 1978) the appellant argued that although the outdoor lighting fixtures were useful by night, they were derivative by day, and that the shape of the lights was therefore copyrightable as separate from the usefulness of the lights. However, the Court of Appeals upheld the Copyright Office Regulation that barred "copyright registration of the overall shape or configuration of a utilitarian article, no matter how aesthetically pleasing that shape or configuration may be." The court found no separable copyrightable authorship in the shape of the fixtures. See also Custom Chrome, Inc. v. Ringer, 35 U.S.P.Q. 2d 1714 (D.D.C. June 29, 1995), upholding the Register's reasonableness in factfinding concerning the denial of copyright claims in motorcycle parts and citing Esquire on the Register's acceptable interpretation of conceptual separability.

So, too, in the instant cases. The works are not copyrightable, regardless of how graceful, creative, or unique the shape a user may configure the flashlight to take.

Because registrations are not possible, we are again closing our file in this case. This represents final Agency action.

Sincerely yours,

Nanette Petruzzelli

Nanette Petruzzelli
Chief, Examining Division

writing for the Appeals Board:
Marybeth Peters, Register,
Marilyn Kretsinger, Acting General Counsel
and myself