The Register of Copyrights
of the
United States of America

y of Congress
Department 17
Washington, D.C. 20540

(202) 707-8350

April 8, 1996

Dear Mr. Hickman:

This concerns your letter of October 18, 1995, regarding the work REX KITE KING OF THE KITES. Your client, Rex Zachary, wishes to register a claim to copyright in the work submitted as a "kite design, three-dimensional work of applied art." The Copyright Office could not find copyrightable elements in the work, as was communicated to you in letters dated February 28, 1995, and August 22, 1995. You submitted requests for reconsideration March 6, 1995, and October 18, 1995, explaining why you believed the design should be registered by the United States Copyright Office. The Copyright Office Appeals Board carefully made a de novo review of the application, deposit, and all correspondence between you and the Office. The Board could not find a basis for copyright registration in REX KITE KING OF THE KITES.

The Board examined the work for copyrightability under the Copyright Act of 1976, 17 U.S.C. 101 et seq., and failed to detect in the deposit even the minimum amount of original authorship required to support a claim to copyright protection. The deposit consists of one square (ten inches by ten inches) piece of bright orange paper, to which is attached by string (approximately three inches long) a strip (19 inches long by approximately one inch wide) of plastic wrap material. In addition, a piece of string (approximately eight and one half inches long) is taped to points on two opposite sides of the square. The square is folded once diagonally down the middle, and twice more to create "wings," which perform the utilitarian, noncopyrightable function of helping the kite to fly. The same functional aspect applies to the attachment of the tail to the kite's "body" and to attachment of the strings that allow the kite's operator to hang onto the flying object. Construction of the kite in such a deliberate manner in order to make the kite fly is not a copyrightable quality. See 17 U.S.C. §101 (definition of "useful article"), 17 U.S.C. §102(b) (subject matter of copyright). See also 37 C.F.R. 202.1 (material not subject to copyright).

Simple variations of standard designs, such as squares and rectangles, and their arrangements may be commercially successful and aesthetically pleasing, but they do not form the basis for copyright registration. See Bailie v. Fisher, 258 F.2d 425 (D.C. Cir. 1958). The Board was looking for elements in the applicant's work of more than a "merely trivial" variation of familiar shapes that would evidence the admittedly low threshold of original authorship. See Chamberlin v. Uris Sales Corp., 150 F.2d 512,

513 (2d Cir. 1945). See also L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 490 (2d Cir.) (en banc), cert. denied, 429 U.S. 857 (1976), citing Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951). This requisite authorship was lacking in REX KITE.

You have written that in 1961 a patent was issued to Mr. Zachary for the kite design. Copyright standards differ from patent standards. See 35 U.S.C. 171 (subject matter of design patents); see also 37 C.F.R. 1.151–1.155 (design patent regulations). For registration with the Copyright Office, original authorship must exist, while patent registration requires novelty and non–obviousness to one who is skilled in the art or craft.

Regarding the case in which a California state court found that the work was protected under common law copyright in that state (Zachary v. Western Publishing Co., 196 U.S.P.Q. 690 (1977), 75 Cal. App.3d 911, 143 Cal. Rptr. 34), the Copyright Office declines to offer an opinion or analysis of the decision or the grounds upon which the decision was made; however, it is noteworthy that the decision did not actually discuss or evaluate the copyrightability of the work.

For the reasons stated above, the Copyright Office must again refuse to register the work. The Appeals Board's decision as set forth in this letter constitutes final agency action.

Sincerely,

Marybeth Peters
Register of Copyrights

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