The Register of Copyrights
of the
United States of America

[redacted] of Congress
[redacted]ment 17
Washington, D.C. 20540

May 7, 1996

(202) 707-8350

Dear Mr. Borchard:

I am responding to your second appeal letter, dated January 31, 1996, regarding the work PLEASURES BOX DESIGN. In your letter, you asked that the Copyright Office register a claim to copyright in the work, which was submitted as two-dimensional artwork July 24, 1995. The Office notified you that the claim could not be registered in its letter of October 3, 1995. You requested reconsideration of that decision October 18, 1995. Copyright Office Attorney Advisor David Levy responded to this request, and in a letter dated January 4, 1996, explained that the work could not be registered. He noted that color is not copyrightable subject matter under 37 C.F.R. §202.1, and added that the iridescent shading of colors on the panels was not copyrightable under 17 U.S.C. §102(b).

In an associated matter, you applied December 5, 1995, to register a copyright claim in a discrete fanciful square shaped design on the back of the PLEASURES box. That element appearing on the box was found to contain original authorship, and the claim was registered May 9, 1995, as VA 733086.

The Copyright Office's Appeals Board examined de novo the deposit for PLEASURES BOX DESIGN, the application, and the correspondence between you and the Office. The Board could not find sufficient original authorship in the box design, consisting of panels of three different colors, each with shaded "stripes," or color variations, to support copyright registration.

You made two arguments in your January 31, 1996, letter. First, you suggested that the arrangement of colors on the box constituted copyrightable authorship. Second, you suggested that the Office register the box design under the rule of doubt to protect the design's copyrightable elements.

De Minimis Authorship

The Appeals Board found this work to be attractive; however, the fact that a work may be attractive to the eye, commercially valuable, and the result of substantial effort, does not mean that the work may be registered. In order to support a claim to copyright protection, a work must exhibit at least a minimal amount of original authorship. See Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884). This fundamental rule was affirmed in Feist Publications Inc. v. Rural Telephone Service Co. Inc., 499 U.S. 340 (1991). The court in Reader's Digest Association, Inc. v. Conservative Digest, Inc., 821 F.2d 800 (D.C. Cir. 1987), a case which you cite as support, found that the cover design of the magazine "combined and arranged common forms to create a unique graphic design and layout" that was copyrightable. Id. at 806. The court also described the arrangement of basic elements of the magazine cover as "distinctive" and "unique." The Appeals Board was not able to find such qualities in the PLEASURES BOX DESIGN. Neither the arrangement nor the combination of the colors in the design constitute authorship that qualifies the work for protection under the 1976 Copyright Act. As mentioned,

color is not copyrightable in and of itself. In addition, simple arrangements of colors are not copyrightable. The alternating shades of colors found in the box design are not copyrightable because they are a minor variation of a minimal combination of colors. 37 C.F.R. §202.1.

The Appeals Board reviewed the Amariage Box design you maintained was comparable to the PLEASURES BOX DESIGN, and which was registered by this Office. The Appeals Board was able to find distinctions between the two works. Particularly in its border design, the Amariage work embodied sufficient original authorship apart from its design as a functional package to support a copyright registration. 17 U.S.C. §101 (definition of "pictorial, graphic and sculptural works"). The PLEASURES BOX did not evidence such separately identifiable authorship.

Rule of Doubt Registration

The Appeals Board did not find it appropriate to register the box design under the rule of doubt. That rule applies where:

> ...there is a reasonable doubt about the ultimate action which might be taken under the same circumstances by an appropriate court with respect to whether (1) the material deposited for registration constitutes copyrightable subject matter or (2) the other legal and formal requirements of the statute have been met.

Compendium II, Copyright Office Practices 100-5 (1984).

A registration was made for the discrete, square shaped, fanciful design element on the box. However, registration cannot be made for the overall arrangement of colors on the box, for the reasons stated above. This decision constitutes final agency action.

Sincerely,

Marybeth Peters

Marybeth Peters
Register of Copyrights

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