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November 18, 1996

Re: ANTIQUE LOOKING BELT BUCKLE
Control No: 60-409 8929-A

Dear Ms. Dodderidge:

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CONGRESS

This concerns your letter dated July 8, 1996, to the Copyright Office's Board of Appeals requesting reconsideration of your first appeal following the Office's refusal to register your client's belt buckle as a 3-dimensional sculpture. The Appeals Board has considered your request and concluded it should affirm the refusal to register.

Administrative Record

Washington
D.C.
20559

Ms. Laurie Gentile of your firm submitted an application, fee, and identifying reproductions on a belt buckle entitled ANTIQUE LOOKING BELT BUCKLE. Ms. Gentile described authorship in this work as a "3-dimensional sculpture." On May 11, 1995, Examiner John Ashley refused to register the claim on the grounds that the belt buckle was a useful article which lacked separable artistic authorship.

In a letter dated August 10, 1995, you wrote Mr. Ashley requesting a reconsideration of his refusal to register. In that letter, you asserted that the examiner's refusal to register did not take into account the full scope of the controlling law. Your primary argument was that Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989 (2nd Cir. 1980), supports registration of this belt buckle as a sculptural design whose "ornamental features are primary and conceptually separate from their subsidiary utilitarian feature." (Letter from Dodderidge to Ashley 8/10/95, at 2) You also urged that the examiner failed to state that the belt was not original or creative. Id. at 3.

On June 17, 1996, Melissa Dadant wrote you affirming the refusal to register. In that letter, Ms. Dadant distinguished Kieselstein and the other cases cited in your letter of August 10, 1995. She concluded that, even assuming separability, "[T]he square shape [of the belt buckle in issue] is a familiar shape that, even with rounded corners, will not support registration of a claim to copyright." (Letter from Dadant to Dodderidge 6/17/96, at 2).

On July 8, 1996, you filed an appeal to the Appeals Board. In that letter you argued that under Kieselstein, a belt buckle only had to meet the test of conceptual separability, and the belt buckle in issue met that test. In addition, you asserted that since neither rejection letter stated that the belt buckle in issue lacked originality and creativity, such an omission was analogous to the appellate court's reversal of the lower court's holding in Kieselstein. Moreover, you argued that such an omission should weigh heavily towards finding the work copyrightable. You urged that for these reasons and those presented in your first appeal the Copyright Office erred in refusing to register your client's belt buckle.

Conceptual Separability

The Appeals Board believes that the Examining Division was correct in concluding that the case of Kieselstein-Cord v. Accessories By Pearl, Inc., 632 F.2d 989 (2nd Cir. 1980), does not support registration in this instance. The Kieselstein court does not say that belt buckles are something other than useful articles subject to the separability test. Instead it states, "This case is on a razor's edge of copyright law. It involves belt buckles, utilitarian objects which as such are not copyrightable." Id. at 990. Nor does the court say that all belt buckles are copyrightable. Instead it says that "these belt buckles are not ordinary buckles." Id. The belt buckles involved in Kieselstein contained fanciful shapes and lines which the court found were separately identifiable. In finding the buckles copyrightable, the court found that the buckles involved both contained conceptually separable artistic authorship and that such authorship rose to the level of creative art. The Copyright Office had registered those belt buckles for the same reasons.

The Office examined the buckle involved in the instant case and, in so doing, it followed the mandate of the copyright law and settled case law. Congress has repeatedly rejected protection for consumer or industrial products. See Esquire v. Ringer, 591 F.2d 796, 800 (D.C. Cir. 1978), cert. denied, 440 U.S. 908 (1979). The design of a useful article may be entitled to copyright protection as " a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article. 17 U.S. §101. (Emphasis added). See also H.R. Rep. No. 1476, 94th Cong., 2d Sess. 55 (1976).

The Appeals Board does not find any copyrightable conceptually separable pictorial, graphic, or sculptural authorship which could form the basis of registration under 17 U.S.C. §§ 101 (definition of pictorial, graphic, and sculptural works) and 102 (subject matter of copyright). Office practices state that "[t]he test of conceptual separability . . . is not met by merely analogizing the general shape of a useful article to the works of modern sculpture, since the alleged artistic features and the useful articles are one in the same, or differ in minor ways." U.S. Copyright Office, Compendium of Copyright Office Practices, Compendium II,

§ 505.03 (1984). Moreover, in Custom Chrome v. Ringer, 35 U.S.P.Q.2d 1714, 1718 (D.D.C. 1995), the court specifically stated that "it is the job of the administrative agency in the first instance to determine which is the better test for determining conceptual separability." Id.

The belt buckle in this case is merely a simple square shape with rounded corners and that shape is not separable from the buckle itself. A number of cases support the Office's refusal to register this belt buckle. They include Bailie v. Fisher, 258 F.2d 425 (D.C. Cir. 1958), a five-pointed star design; Norris Industries, Inc. v. International Telephone & Telegraph Corp., 696 F.2d 918 (11th Cir. 1983), a wire-spoked wheel cover; Esquire v. Ringer, 591 F.2d 796 (D.C. Cir. 1978), cert. denied, 440 U.S. 908 (1979), flood lights with rounded or elliptically-shaped housings; Brandir Intern., Inc. v. Cascade Pacific Lumber Co., 834 F.2d 1142 (2nd Cir. 1987), a bicycle rack; and Custom Chrome v. Ringer, 35 U.S.P.Q. 2d 1714 (D.D.C. 1995), motorcycle parts. In each of those cases the court upheld the Office's refusal to register useful articles that contained no separable features that were registrable as "pictorial, graphic, or sculptural works."

Secondary Consideration:
De Minimis Authorship

The Office found that the article in question does not contain sufficient copyrightable authorship to support registration. In determining whether a useful article is entitled to registration, the Examining Division looks first at whether or not there is any separable artistic authorship -- whether it be physically or conceptually separable. If there is such authorship, then the Examining Division considers whether such authorship rises to the level of authorship required under the law. 17 U.S.C. § 102 (1994). We note that the required authorship is modest. See Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991). Further, the Copyright Office follows the policy set forth in a long history of case law, beginning with Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903), which requires examination to be made on the basis of finding a certain modicum of original authorship, and not on a subjective determination of the quality of a work submitted.

Nor can registration be made on the basis that the first rejection only stated that there was no separable authorship.

If there is no separable authorship as the Office found in the instant case, the Office does not need to consider the second question nor necessarily note in the rejection that the work was not original or creative. See, e.g., Custom Chrome v. Ringer, 35 U.S.P.Q.2d 1714 (D.D.C. 1995) where the court approved registration denied on the ground that there was no separable sculptural and artistic features.

Notwithstanding the fact that the Office found no separable authorship, Ms. Dadant did point out in the second rejection letter that, even assuming separability, the belt buckle did not contain sufficient sculptural authorship. She noted the design was a familiar squared shape that would not support copyright registration. See Compendium II §505.03 (1984); 37 C.F.R. § 202.1(a) (1995). A common shape or a simple variation thereof lacks the originality and creativity needed to support a copyright claim. Even aesthetically pleasing designs may not be registered for copyright protection if the design lacks a minimum amount of original authorship. See Jon Woods Fashions v. Curran, 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988) (deference shown to Register's decision in rejecting de minimis fabric design); Forstmann Woolen Co. v. J.W. Mays, Inc., 89 F. Supp. 964 (E.D.N.Y. 1950)(reproduction of standard fleur-de-lis could not support a copyright claim without additional original authorship).

This work is both a useful article lacking separately identifiable artistic authorship, and, in the alternative, a simple shape lacking the modicum of original authorship needed to sustain a claim to copyright. Under either analysis, there is no copyrightable expression on which to base a registration.

For the reasons stated in this letter, the Appeals Board affirms the refusal to register the submitted claim and are closing the file in this case. This decision constitutes the final agency action on this matter.

Sincerely,

Nanette Petruzzelli

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Chief, Examining Division
for Appeals Board
U.S. Copyright Office

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