COPYRIGHT
OFFICE

May 14, 1997

Re: Ansa Company, Inc., Infant Bottle
Control No. 60-410-7983 (W)

Dear Mr. Josephic:

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CONGRESS

This is in response to your letter dated September 11, 1996, addressed to the Copyright Office Board of Appeals on behalf of your client, Ansa Company, Inc., appealing the Office's refusal to register "Infant Bottle," originally submitted for registration on January 23, 1995.

The Copyright Office Board of Appeals has examined the claim and considered all correspondence from your firm regarding this claim. Because the bottle is a useful article whose shape does not contain sufficient original authorship that stands conceptually apart from its utilitarian form and functional considerations, the Board of Appeals affirms the Examining Division's decision to refuse to register this claim.

Washington
D.C.
20559

Administrative Record

The Copyright Office received the application for registration of this work on January 23, 1995. The registration application described the work as a "baby bottle," and described the "nature of authorship" as three-dimensional sculpture. The work is a bottle divided in the middle by an oval space forming a handle, and whose outside contours are slightly curved and irregular.

In a letter dated April 11, 1995, Visual Arts Examiner John M. Martin notified you that the Copyright Office could not register the work because it lacks "separable" artistic or sculptural authorship. Mr. Martin explained that the "Infant Bottle" is a useful article, protected under copyright law only to the extent it incorporates separately identifiable and copyrightable pictorial, graphic or sculptural features. He explained that any registration would cover only such separate elements, not the overall design of the useful article as such, and that in determining

separability, the Office considers two examples provided by Congress: "the carving on the back of a chair" and "a floral relief design on silver flatware." Mr. Martin said that this work has no features that can be identified as "separable" that also constitute a copyrightable work of art.

On August 7, 1995, you appealed the Copyright Office refusal to register "Infant Bottle." You noted that the work was originally a clay sculpture, whose copyright was assigned to your client, Ansa Company, Inc. You said the "Infant Bottle" was made in the image of that clay sculpture, and merely adopts that sculpture's artistic and aesthetic features. The bottle's application to a utilitarian end, you wrote, does not forfeit copyright to the sculpture. While conceding that "Infant Bottle" is a useful article, you said that the bottle has a unique and aesthetically pleasing overall appearance that is separate from the functional characteristics of the work. To support this argument, you cited three cases: Brandir Intern., Inc. v. Cascade Pacific Lumber Co., 834 F.2d 1142 (2d Cir. 1987); Masquerade Novelty, Inc. v. Unique Industries, 912 F.2d 663 (3d Cir. 1990); and Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989 (2d Cir. 1980). You also cited Mazer v. Stein, 347 U.S. 201 (1954), for the proposition that a copyrighted art work does not lose protected status merely because it is put to functional use. You noted that The Museum of Modern Art in New York has included the work in its design collection, and attached a letter from the museum so stating.

On May 15, 1996, after reexamining the work, the Office wrote you with a second refusal to register "Infant Bottle." In the letter, Visual Arts Attorney-Advisor David Levy explained that the work is a useful article as defined in section 101 of the Copyright Act: "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." He said that registration of a useful article is possible only to the extent that it contains pictorial, graphic or sculptural features conceptually or physically separable from the useful article. The Office examines such a work to determine if it has separate copyrightable elements,[1] but any such separable authorship in this case consists of de minimis material such as ovals and slightly irregular, curved lines, he said. Under 37 C.F.R. §202.1, such familiar symbols and designs are not copyrightable, and the combination here of such elements does not rise to the level of a copyrightable work. Moreover, even the bottle's slight irregular surface is functional in that it is more

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[1] See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 55 (1976) (discussing requirement of physical or conceptual separability).

adaptable to a child's thumb than would be a smooth surface. Mr. Levy noted that uniqueness and aesthetically pleasing qualities are not relevant to copyright. He agreed that Mazer v. Stein held that a copyrighted art work does not lose protection if put to a functional use, but explained that the Office can only examine the work before it -- here, a plastic infant bottle -- not the original clay sculpture itself. He also distinguished Kieselstein-Cord, a case involving sculptured designs on belt buckles, in that there is no comparable separable sculpture on the bottle design here.

Second Appeal

On September 11, 1996, you wrote to the Copyright Office Board of Appeals with a second request for reconsideration. In your letter, you dispute the Office's conclusion that "Infant Bottle" is a useful article containing no separable and copyrightable sculptural authorship because the combination of familiar symbols and designs such as ovals and slightly curved lines does not rise to the level of a copyrightable work. Citing Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340 (1991), for its statement that the requisite level of creativity is extremely low, you dispute attorney Levy's assertion that the work's "unique appearance" is not applicable to registration determinations. You argue that the work's unique, original appearance "is not only applicable to copyright registration, but, in fact, is the single most important factor." You assert that the prohibitions in 37 C.F.R. §202.1 on copyrightability for words and short phrases, ideas, methods and systems, blank forms and the like, do not apply to "Infant Bottle" because the work does not fall within those categories.

You note that "Infant Bottle" was originally based on a clay sculpture accepted into the collection of the Museum of Modern Art, and cite a letter from that museum as proof of the "artistic and original quality" of the work. You again cite Mazer and Brandir for the proposition that such a work does not lose protection merely because put to functional use. You dispute the Office's position that the original clay sculpture is not at issue. You also cite Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co., 74 F.3d 488, 493-95 (4th Cir. 1996)(plastic manequins used for mounting animal skins protectable as sculptural works); Masquerade Novelty, supra, 912 F.2d at 669 ("just because a sculpture is incorporated into an article that functions as other than a pure sculpture does not mean that the sculptural part of the article is not copyrightable"); and 37 C.F.R. § 202.10(a) ("The registrability of such a work is not affected by the intention of the author as to the use of the work...").

Conceptual Separability

As stated in our earlier correspondence, the Copyright Act excludes from copyright protection any "useful article," defining such an article 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. A "sculptural work" does not lose copyrightability even if it has utilitarian features so long as the "sculptural features can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." Id. §101 (definition of "pictorial, graphic, and sculptural work"). Registration of a useful article is possible only to the extent that it contains pictorial, graphic, or sculptural features conceptually or physically separable from the useful article. See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 55 (1976). The Office examines the work to determine if it has such separate copyrightable elements. Compendium II of the Copyright Office practices states that the required conceptual separability is met when "artistic or sculptural features...can be visualized as free-standing sculpture 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." U.S. Copyright Office, Compendium of Copyright Office Practices II, §505.03 (1984).

Under Copyright Office practices, the overall shape or configuration of a utilitarian object is not copyrightable, no matter how aesthetically pleasing that shape or configuration may be. In Esquire, Inc. v. Ringer, 591 F.2d 796 (D.C. Cir. 1978), cert. denied, 440 U.S. 908 (1979), the district court had ordered registration of outdoor lighting fixtures on the theory that to do otherwise would provide copyright protection to traditional works while denying it to modern art form such as abstract sculpture, but that decision was reversed on appeal. The U.S. Court of Appeals for the District of Columbia Circuit noted that, while the U.S.Copyright Office is not the arbiter of national taste, to hold useful articles copyrightable simply because their overall shape shows creativity or originality would force the Office into the role of overseers of the relative 'worth' or value of different forms of art. 591 F.2d at 805. Instead the court upheld the Register's decision that the overall shape of a utilitarian object is not copyrightable no matter now aesthetically pleasing that shape may be. Id. at 800. Although Esquire was decided under the 1909 Act, section 505.03 of Compendium II is the direct successor to the regulation affirmed in Esquire as an authoritative construction of the statute and legislative history. See Esquire, 591 F.2d at 802-03; see also Custom Chrome, Inc. v. Ringer, 35 U.S.P.Q. 2d 1714, 1718 (D.D.C. 1995) (holding Office "conceptual separability test" enunciated in Compendium II consistent with case law and legislative history). In Carol Barnhart,

Inc. v. Economy Cover Corp., 773 F.2d 411 (2d Cir. 1985), for example, the Second Circuit found life-like half-torso mannequin designs to be inextricably intertwined with their functionality, and not copyrightable. Like the mannequin features in that case, the center cut-out handle and irregular surface of "Infant Bottle" do not stand alone as conceptually separable sculptural or two-dimensional authorship.

In Brandir Intern., Inc. v. Cascade Pacific Lumber Co., supra, the ribbon-shaped bicycle rack of bent tubing in that case, like "Infant Bottle," was based on an original sculpture, which had won awards, and was included in gallery exhibits on design. 834 F.2d at 1143, 1146. The author claimed the bike rack, like the original sculpture, could be characterized as a sculptural work within the "minimalist art movement." However, the court said, "It is unnecessary to determine whether to the art world the Ribbon Rack properly would be considered an example of minimalist sculpture. The result under the copyright statute is not changed." While worthy of admiration for its aesthetic qualities, the bike rack was still a work of industrial design and was not copyrightable. Id. at 1147. You acknowledge that the Brandir court "went on to conclude that Brandir had in fact modified the existing sculptures to arrive at his bicycle work and, thus, the modified work was not copyrightable." However, you argue that the Office ignored the court's standard that "appearance of an article may be copyrighted where it is adopted from a sculpture, even where the article is applied to a utilitarian end." Letter from David J. Josephic, Esq., to Board of Appeals, U.S. Copyright Office 5 (Sept. 11, 1996).

Brandir did hold that a work remains a work of art even if put to commercial use, but, like the plastic infant bottle here, the bike rack in dispute was not the original sculptural work which served as the model, but, rather, a work created using utilitarian functions as the guideposts and, therefore, would be a useful article which must be viewed in terms of conceptually separable authorship analysis. Brandir held that the bike rack was a derivative of the original sculpture; the sculpture may have been copyrightable but the rack was the result of functional considerations and industrial design, using standard building materials in standard ways, and was not copyrightable. The Brandir court found that the aesthetic design elements were conceptually inseparable from the utilitarian elements.

The Copyright Office can examine only the work before it. Even if another separate work was the model or prototype, we cannot premise our decision as to this work's copyrightability on that work's protection. The Office recognizes the functional use of the bottle and then analyzes the bottle to determine if there is any protectible authorship apart from its overall shape and contours. Here, the "Infant

Bottle" is a useful article, as defined in section 101 of the Copyright Act, that lacks conceptually separable and copyrightable sculptural authorship. Any separable elements that may be considered present, such as the bottle's slight curves or rough surfaces, are de minimis.

To illustrate this, consider a case you cite, Masquerade Novelty, Inc. v. Unique Industries, Inc., supra. There, the U.S. Court of Appeals for the Third Circuit found that novelty animal nose masks for humans were not useful articles because their sole function was to portray the appearance of the article. 912 F.2d at 670-71. See also Gay Toys, Inc. v. Buddy L Corp., 703 F.2d 970 (6th Cir. 1983) ("toy airplane, like a painting, has no intrinsic utilitarian function..."). Similarly, in Dan Chase Taxidermy Supply Co., supra, the court held that the mere use of the sculpted animal forms to mount animal skins did not render the forms solely utilitarian. Although the court found that the animal sculptures performed a utilitarian purpose other than portraying themselves, the court, nevertheless, held the animal features to be conceptually separable from the works' functional features. 74 F.3d at 494. In contrast to these cases, the plastic infant bottle is clearly utilitarian in purpose. Notwithstanding 37 C.F.R. § 202.10(a) (registrability of a pictorial, graphic, or sculptural work "is not affected by the intention of the author as to the use of the work..."), as the Copyright Act makes clear, a useful article has as its function something more than portraying its own appearance. Id. at 493 (citing 17 U.S.C. § 101 (definition of "useful article")). Although you cite Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989 (2d Cir. 1980), that case held that belt buckles accepted by Metropolitan Museum of Art were copyrightable works of applied art rather than uncopyrightable industrial design. Kieselstein-Cord involved sculptured designs on belt buckles; there is no comparable separable sculpture on this bottle.

Any possible separable authorship de minimis

Again, we agree with the Examining Division that even if Infant Bottle's slightly curved and irregular surface is deemed conceptually separable from its overall useful design, that curved, irregular surface is nevertheless insufficient to meet even the low standard of originality enunciated in Feist Publications, 499 U.S. at 363-64. For example, in Towle Manufacturing Co. v. Godinger Silver Art Co. Ltd., 612 F. Supp. 986 (S.D.N.Y. 1985), the court considered whether the design of a decorative, mouth-blown hand-cut crystal baby bottle was entitled to copyright. The Towle court found that the common glassware cutting design failed to meet the modicum of originality necessary for copyrightability, and that the design elements

were not utilized in a sufficiently original manner to warrant copyright protection. Id. at 991-92. As stated in the Compendium of Copyright Office Practices, copyrightable expression consists of something more than the bringing together of two or three standard forms of shapes with minor linear or spatial variations. Compendium II § 503.02(b) (1984). See also 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 fleurs-de-lis could not support a copyright claim without additional original authorship).

Moreover, contrary to the assertion in your letter that the prohibitions in 37 C.F.R. §202.1 on copyrightability for words and short phrases, blank forms and the like, do not apply to "Infant Bottle" because it doesn't fall within those categories, we do consider that section to be applicable. Although not mentioned in your letter, section 202.1 also explicitly prohibits registration for "familiar symbols or designs." 37 C.F.R. §202.1 (1996). To the extent that "Infant Bottle" may contain separable authorship, that authorship consists of familiar symbols and designs which are not copyrightable.

Aesthetic or commercial value, or relative artistic merit, are not material or relevant to determining copyrightability. Trifari, Krussman & Fishel, Inc. v. Charel Co., 134 F. Supp. 551, 552 (S.D.N.Y. 1955). No matter how artistically pleasing it may be, this plastic infant bottle is a useful article whose shape is dictated by its functional or utilitarian aspects. As stated, to the extent that the bottle may contain separable authorship, that authorship consists of familiar symbols and designs which are not copyrightable. The Board of Appeals therefore affirms the decision of the Examining Division that "Infant Bottle" lacks the necessary originality to sustain copyright registration.

This letter constitutes final agency action.

Sincerely,

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