COPYRIGHT
OFFICE

May 2, 1997

Re: Control No.: 60-501-2190(W) - ROCKING TABLE

Dear Mr. Weber:

LIBRARY
OF
CONGRESS

This is in response to your letter of August 20, 1996, addressed to David Levy, Attorney Advisor, Visual Arts Section, Examining Division, requesting a second appeal review or reconsideration of the Copyright Office refusal to register a claim to copyright in a "useful article" titled, ROCKING TABLE. Upon a careful examination of the work and analysis of the law you have advanced in support of registration, we regret that we have no alternative but to again refuse registration.

Washington
D.C.
20559

Administrative Record

On August 14, 1995, the claimant, Clover Toys, Inc. through its attorney, you, G. Donald Weber, submitted an application Form VA for the registration of a claim to copyright in "a 3-dimensional sculpture".

In a letter dated September 20, 1995, Examiner, John M. Martin refused to register the work because it lacked any features that could be identified as separable copyrightable authorship. The examiner explained that in the case of a useful article, the law protects only the separately identifiable pictorial, graphic, or sculptural copyrightable authorship; it does not protect the overall design of the useful article as such.

On October 19, 1995, you, as the applicant's counsel, appealed the Office's refusal to register ROCKING TABLE. You asserted that the work has separable authorship and is a "copyrightable work of art"; and that a similar work had been accepted for registration, presumably on a uniformly applicable standard of copyrightability, and, based on that standard, the ROCKING TABLE should also be accepted for registration.

In a follow up letter dated November 27, 1995, you cited a series of registrations issued by the Office, presumably of similar or like works. You maintained that based upon extensive past-track record and applying a consistent standard of examination, ROCKING TABLE should also be registered.

On June 19, 1996, the Copyright Office, through a letter, by Attorney David Levy, again refused registration on the basis that the work consists of uncopyrightable rectangles and other familiar designs and that ROCKING TABLE does not contain any separable copyrightable authorship apart from the useful functional aspects of the seating and table.

In your reply, dated August 20, 1996, you have underscored that the claim is not based on "familiar shapes" or mere ideas, methods or systems. And, in your view, "[a]pplicant's design is far more than an idea, a procedure, a system, a method of operation, a principle or a discovery" (Page 2). Rather you assert that the claim is based on the "uniqueness" reflected in the overall design of the ROCKING TABLE and in the individual portions or parts of the device, creating a 3-dimensional sculpture separable from the functional aspects of the ROCKING TABLE. We respectfully disagree for the following reasons.

The Copyright law protects pictorial, graphic, and sculptural works. 17 U.S.C. 102(a)(5). Such works include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned. Moreover, the design of a "useful article" is considered 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.C. 101 (1994). The legislative history confirms that this separability may be physical or conceptual. See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 55 (1976).

The Copyright Office implementation of the copyright statute, including the statute's legislative history, is reflected in Compendium II, Compendium of Copyright Office Practices, which 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." Sec. 505.03 (1984).

The holding in Esquire, Inc. v. Ringer, 591 F. 2d 796 (D.C. Cir. 1978), cert. denied, 440 U.S. 908 (1979), although decided under the 1909 law, most clearly enunciated the rule which supports the Office's refusal to register the rocking table. Esquire held that the Copyright Office regulation properly prohibited copyright registration for the overall shape or configuration of a utilitarian article, no matter how aesthetically pleasing that shape or configuration may be. Id. at 800. In fact, Section 505.03 of Compendium II is a direct successor to the Copyright Office regulation which

was affirmed in Esquire as an authoritative construction of the statute as explicitly stated in the legislative history. Id. at 802-03. The underlying rationale was more recently again followed in Custom Chrome, Inc. v. Ringer, 35 U.S.P.Q. 2d 1714, 1718 (D.D.C. 1995), where the court held that the Office's "conceptual separability test" as it is enunciated in Compendium II is consistent with the holding in Esquire, later cases decided under the present law, and the legislative history.

The Office follows the holding enunciated in Esquire and later cases-such as Brandir International, Inc. v. Cascade Pacific Lumber Co., 834 F.2d 1142 (2d Cir. 1987) that, despite a creative shape originating with the author, the overall design or configuration of a utilitarian article may not be copyrighted if it is incapable of existing as a work of art physically or conceptually separable from and independent of the utilitarian object in which it is incorporated. 591 F.2d 796 at 805.

The Appeals Board concludes that the principles espoused in Esquire and later cases also apply to the rocking table design in this case. There would appear to be no clearly separable work of sculpture on which to base a copyright registration. Granted that when viewed as a whole, the elements portray a pleasant appearance of the table, connected to a chair on seating position which rocks; however, that appearance cannot be identified separately from the article itself which has an intrinsic functional nature. Neither the overall shape of the table or of the seat nor the shape of the surface variations of parts nor the combination of all these particular elements contain such separable and copyrightable authorship. There is no artwork that can be identified separately from the intrinsic functional purpose of a rocking table, i.e., to seat, to rock, and to otherwise utilize the table in the process of doing so. Whatever artistic features, arguendo, there are, they are inextricably intertwined or merged with the utilitarian features. The functional table and its connected seat cannot be isolated or exist independently from any sculptural work of art which you maintain should enjoy the benefit of a copyright registration; the useful article and the claimed sculptural work cannot stand independently side by side.

The fact that the Office may have accepted similar works for registration cannot affect the decision of the Board in this instance, as each claim must stand or fall on its own merits. And the possible individual use of a copy of War and Peace as a stepping tool does not affect the copyright protection of the literary authorship which is obviously separate and distinct from the physical copy embodying the literary work. So, too, a copyrightable sculpture may be used as a paperweight in individual circumstances but this use does not vitiate or undermine distinct 3-dimensional sculptural authorship which may be present.

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May 2, 1997

For the reasons stated in this letter, we affirm 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

Nanette Petruzzelli
Acting General Counsel
for the Appeals Board
U.S. Copyright Office

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