COPYRIGHT
OFFICE

April 4, 1997

Re: TERRY TOWEL
Copyright Control Number 60-502-7121(H)

LIBRARY
OF
CONGRESS

Washington
D.C.
20559

Dear Mr. Earley:

I am responding to your second appeal letter, dated October 16, 1996, regarding the work TERRY TOWEL. In that letter you asked the Copyright Office to register a claim to copyright in a fabric design submitted by Shen Manufacturing Company, Inc. The Copyright Office Appeals Board has reviewed the application, a copy of the work submitted, and the correspondence in this matter. After consideration of the points you raised in your letters, the Board concluded that the work cannot be registered by the Copyright Office because it does not contain sufficient original authorship to support a claim to copyright.

The Office first notified you that the TERRY TOWEL claim could not be registered in its letter of November 29, 1995. The letter stated that the work did not contain the minimum amount of original authorship which could support a copyright registration. You disagreed with the Office's conclusion, and requested reconsideration of the rejection on December 21, 1995. The Office reviewed the work in light of points you raised on behalf of the claimant, and responded in a letter dated June 19, 1996, explaining that the work could not be registered because the fabric design did not contain even the minimum level of original authorship required to sustain a registration.

Your second appeal, which reiterated some of the points you made in the first appeal letter, stated that the "applicant seeks copyright registration for its novel, original and artistic fabric design...." Although originality and artistic authorship are necessary for copyright registration, novelty is not a characteristic needed to copyright a work under title 17 of the United States Code. Novelty is, however, an element required for patent registration under 35 U.S.C. § 102 (1984).

You asserted that TERRY TOWEL meets the originality requirement set forth by the Supreme Court in Feist Publications, Inc. v. Rural Telephone Service Company, Inc., 499 U.S. 340 (1991). As the Office stated in its June 19, 1996, letter to you, we accept the Court's holding in Feist. Using Feist as the articulation from the

Supreme Court that the requisite level of creativity for copyright is very low, the Board examined the elements you described in this work. The work you submitted, however, fails to meet even that low threshold of copyrightable authorship. Cf. Thomas Wilson & Corp. v. Irving J. Dorfman Co., 433 F.2d 409 (2d Cir. 1970)(floral lace design deemed copyrightable); H.N. Kolbe Co. v. Armgus Textile Co., 315 F.2d 70 (2d Cir. 1963)(textile design of clusters of roses, enclosed and separated from each other by square border of leaves and petals and alternately inverted deemed copyrightable).

Also, you asked that the Office examine the work as a whole. This was done. The Office accepts the principle established in Atari Games Corp. v. Oman, 979 F.2d 242 (D.C. Cir. 1992), that a work should be viewed in its entirety, with individually uncopyrightable elements judged not separately but, rather, in their over-all inter-relatedness within the work as a whole. However, even under the Atari standard of review of copyrightability, the fabric design of TERRY TOWEL fails to rise to the level of copyrightability.

You mentioned in your appeal that TERRY TOWEL should be recognized as a copyrightable writing "in the constitutional sense," and cited West Publishing Co. v. Mead Data Central, Inc., 799 F.2d 1219 (8th Cir. 1986) for your proposition that intellectual labor expended in creating a work qualifies the work for copyright protection. The court in West noted "that the arrangement West produces...is the result of considerable labor, talent, and judgment" and that "to meet intellectual creation requirements a work need only be the product of a modicum of intellectual labor." 799 F.2d at 1226-27.

Five years later in Feist the Supreme Court clarified the industrious collection, or "sweat of the brow" theory as it applies to copyright cases. The Court made a critical interpretation of law when it held that the "sweat of the brow" theory which rewarded creators for hard work involved in compiling facts was not an acceptable interpretation of copyright law or basis for copyright protection. Although Feist involved the non-copyrightability of the white pages of telephone directories, the court made clear that "sweat of the brow" is not applicable as a test of copyrightability regardless of the type of work involved. In following Feist, the Copyright Office cannot register TERRY TOWEL on the basis of the intellectual effort put into producing the work.

You asserted that fabric designs are copyrightable. The Board would modify that assertion to say that fabric designs may be registered in the Copyright Office if they embody more than a de minimis amount original authorship. Not every fabric design embodies the original authorship required by title 17, United States Code, and the

implementing regulations at 37 C.F.R. to support a registration. See Jon Woods Fashions v. Curran, 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988) (stripes combined with grid pattern not copyrightable). TERRY TOWEL's weaving of fabric in repeated, alternating tufted and untufted squares in continuous rows does not comprise copyrightable pictorial, graphic, or sculptural authorship. This is the case whether examined in the context of the familiar shapes or designs incorporated in the work or examination of the work as a whole.

As mentioned in the Office's previous correspondence, a work itself may be pleasing to observers and may be the result of considerable effort and expense, but this does not make the work copyrightable.

Conclusion

The Copyright Appeals Board has determined that the TERRY TOWEL fabric design cannot be registered due to lack of original authorship. This letter constitutes final agency action.

Sincerely,

Julia B. Huff

Julia B. Huff
Acting Chief, Examining Division
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