COPYRIGHT
OFFICE

April 25, 1997

Re: PEARL PILLOWS
Control No. 60-510-8766(L)

Dear Mr. Singh:

LIBRARY
OF
CONGRESS

The Copyright Office Board of Appeals has met and reviewed your application for registration of the above-named work, together with the correspondence and documentation contained in the PEARL PILLOWS file. The Board determined that the design cannot be registered for copyright protection because it does not contain sufficient original authorship to support a copyright claim.

Washington
D.C.
20559

The Administrative Record

On July 15, 1996, Samoto Designs, LLC, submitted a Visual Arts application to the Copyright Office to register two dimensional artwork and design on sheetlike material. The application was accompanied by a request for special handling and a check to cover the special handling registration fee.

The Copyright Office responded July 15, 1996, writing that the work PEARL PILLOWS could not be registered because it lacked the artistic or sculptural authorship needed for registration. The Office also noted that ideas or concepts embodied in works can not be copyrighted, nor can familiar symbols and designs, typefaces, lettering, familiar shapes, or variations in coloring.

In a letter dated July 17, 1996, you requested reconsideration of the Office's refusal to register the design. You also submitted additional deposits to aid in examination of PEARL PILLOWS. You claimed that the design was original and contained more authorship than familiar symbols or designs, and you asserted that the work as a whole embodied "artistic craftsmanship and authorship necessary to support a copyright claim." In a letter dated July 18, 1996, you requested prompt reconsideration because the applicant's designs were being copied.

On July 29, 1996, Samoto Designs sent the Office a set of deposits for examination together with a statement by Santi Tiangratanakul attesting that he designed the pillows. He described his research into Indian apparel of the 15th century, as well as his experimentation with various sized pearls and varying placement of the pearls on the fabric surface, creating the pillows' "look."

The Office responded on August 8, 1996, explaining that PEARL PILLOWS could not be registered because the design did not embody sufficient authorship, either in its various parts or as a whole, to be protected under copyright law. In addition, the hard work, effort, and even inspiration that occur while producing a work are part of a process, and are not copyrightable expression under Feist Publications v. Rural Telephone Service Co., 499 U.S. 340 (1991).

A second appeal was filed December 6, 1996. Supplementary material to this request was submitted January 28, 1997. In this appeal you described the fabric design and enclosed a sketch of the design. You wrote that the Office's refusal seemed to be based on analysis of individual components of the design, and not the fabric design as a whole. You claimed that the fabric design, which combines simple shapes in a distinctive manner, when viewed as a whole, embodied sufficient original authorship to support a copyright registration.

In the supplementary filing, you requested that as an alternative basis for registering PEARL PILLOWS, two of the pillows should be considered as copyrightable compilations of pre-existing works. You asked that your client be allowed to amend its application to claim copyright protection in compilations. Further description of these items was included, and again the original efforts of the designer were highlighted.

Appeals Board Decision

The Copyright Office Appeals Board examined the PEARL PILLOWS design and considered the points you raised in your correspondence about the work. The Board was not able to detect expression of sufficient original authorship in PEARL PILLOWS that would permit the Office to register the work.

The Board does not question the source of the work, which you have documented. The Board does not question the intent of the claimant to produce an original, pleasing work. However, neither the quality of uniqueness you have referred

to nor the quantum of effort allegedly expended to produce PEARL PILLOWS constitute copyrightable elements under title 17, United States Code.

Under the Copyright Office regulations, 37 C.F.R. § 202.1, familiar symbols and designs such as the squares used in the pillows are not copyrightable. Neither do minor variations of a standard or common design furnish a basis for registration. This principle is supported by many judicial decisions. For example, in John Muller & Co. v. New York Arrows Soccer Team, Inc., 802 F.2d 989 (8th Cir. 1986), the eighth circuit appeals court held not copyrightable a logo consisting of four angled lines forming an arrow with the word "Arrows" in cursive script. In Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc., 634 F. Supp. 769 (W.D.Pa. 1986), the district court held that envelopes printed with solid black stripes and a few words such as "priority message" did not exhibit the minimal level of creativity necessary for copyright registration. In Bailie v. Fisher, 258 F.2d 425 (D.C. Cir. 1958), the appeals court held that a cardboard star with a circular center for photographs and two folded flaps allowing the star to stand for display was not a work of art within the meaning of 17 U.S.C. §5(g) (1909). In Jon Woods Fashions, Inc. v. Curran, 8 U.S.P.Q. 2d 1870 (S.D.N.Y. 1988), the district court upheld the Register's decision that fabric design of striped cloth with grid of squares was not copyrightable.

In your letter of December 6, 1996, you cited several copyright cases which you claimed demonstrated an inconsistency between those holdings and the Register's determination that PEARL PILLOWS did not contain sufficient original authorship for registration. In Soptra Fabrics Corp. v. Stafford Knitting Mills, Inc., 490 F.2d 1092 (2d Cir. 1974) and Concord Fabrics, Inc. v. Marcus Brothers Textile Corp., 409 F.2d 1315 (2d Cir. 1969), the copyright analysis concerned substantial similarity in infringement cases, not the copyrightability of works at issue. In Soptra, the court did not rule on the copyrightability of the designs, but did note that there exists a requirement of a "minimal quantum of originality in the textile pattern field." In Concord original authorship was not discussed.

In In Design v. Lynch Knitting Mills, Inc., 689 F. Supp. 176 (S.D.N.Y. 1988), the court discussed substantial similarity and copyrightability, noting that to be copyrightable a work must be original, not merely copied; the court failed to note that in addition to the requirement that a work be original, it must also possess at least a modicum of creative authorship. In Tennessee Fabricating Co. v. Moultrie Manufacturing Co., 421 F.2d 279 (5th Cir. 1970), the court's main point concerning copyright was that lack of artistic merit in a work is no bar to

copyrightability, citing Rushton v. Vitale, 218 F.2d 434 (2d Cir. 1955), and holding that the work at issue possessed at least the minimal degree of creativity to support a copyright claim. The plaintiff's work in Tennessee involved a design which we believe was more complex than PEARL PILLOWS, and embodied sufficient original authorship to be registered.

While the design of the overlapping and superimposed squares of PEARL PILLOWS may be original, it does not embody sufficient original authorship that rises to the threshold level of expression required under 17 U.S.C. § 102 and articulated by courts. In keeping with the court's holding in Atari Games Corp. v. Oman, 888 F.2d 878 (D.C. Cir. 1989), the work was examined as a whole for even minimal authorship in the elements comprising the work or in the work in its entirety. Examination of the work either as a whole or as individual squares highlighted by placement of pearl beads did not reveal copyrightable pictorial or sculptural material.

The Board was looking for elements in the applicant's work of more than a "trivial" variation of familiar shapes that would evidence the admittedly low threshold of original authorship. See Chamberlin v. Uris Sales Corp., 150 F.2d 512, 513 (2d Cir. 1945). See also L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 490 (2d Cir.), cert. denied, 429 U.S. 857 (1976), citing Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951). Such authorship was lacking in PEARL PILLOWS.

In its decision in Feist Publications v. Rural Telephone Service Co., 499 U.S. 340 (1991), the Supreme Court made it clear that although great effort may be expended to produce an original work, that effort alone is not to be rewarded by copyright registration, because effort itself does not constitute original authorship. In addition, although the threshold level of original authorship required for registration is low, there must exist an embodiment of more than a trivial degree of authorship in a work for copyright registration. The Board could not find such embodiment in PEARL PILLOWS.

You wrote in your January 28, 1997, Supplement that if the Board did not register PEARL PILLOWS as two dimensional artwork, your client wished to register the work, specifically the 18 inch neck roll with tassels and the 18 inch by 18 inch square pillow with tassels, as compilations. The Board considered this request when examining the works, and concluded that the two pillows do not represent a copyrightable compilation of pre-existing works.

It is clear after Feist that copyright protects only the selection or arrangement of pre-existing elements within a compilation, not the elements themselves. The public domain familiar shapes grouped into the overall design of PEARL PILLOWS constitute an arrangement that lacks sufficient originality to sustain copyright registration. Novelty is not required, but a work must "display some minimal level of creativity" to be protected. See Feist, 499 U.S. at 358.

For the reasons stated above, the Copyright Office cannot register the work PEARL PILLOWS. This letter constitutes final agency action.

Sincerely,

Julia B. Huff

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for the Appeals Board
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