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OFFICE

February 5, 1997

Re: DOUBLE DIAMOND, DIAMOND SHAPE, and HEART SHAPE
Control No. 60-407-3178 (W)[1]

Dear Mr. Friscia:

This is in response to your letters dated July 23, 1996, addressed to Nanette Petruzzelli, Chief of the Examining Division, and forwarded to the Copyright Office Board of Appeals on behalf of your client, Elizabeth Fojon of PhenomaNails, appealing the Office's refusal to register the nail sculptures "**DOUBLE DIAMOND**," "**DIAMOND SHAPE**," and "**HEART SHAPE.**"[2] Ms. Fojon was represented on first appeal by Edward R. Weingram of Weingram & Zall, and on second appeal by your firm.

The Copyright Office Board of Appeals has examined the claims and considered all correspondence from your firm, and from the firm of Weingram & Zall, regarding these claims. Because these nail sculptures exhibit only familar symbols and designs, and basic geometric shapes, they do not contain sufficient authorship to support copyright and the Board of Appeals affirms the Examining Division's refusal to register these claims.

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Administrative Record

The Copyright Office received these applications for registration of the works described as "3 Dimensional Nail Sculpture" on September 13, 1994. The works consisted of heart-shaped, diamond-shaped, double diamond-shaped, and zig zag-shaped designs, carved into plastic nails meant to be applied to the hands as part of "nail art" manicures.

In a letter dated December 19, 1994, Visual Arts Examiner Joy Mansfield notified Mr. Weingram that the Office could not register **DOUBLE DIAMOND** and **ZIG ZAG** because they lacked the artistic or sculptural authorship necessary to support copyright claims. The letter noted that copyright does not protect familiar symbols and designs, minor variations of basic geometric shapes, lettering and typography, or mere variations in coloring.

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1 Note that Control No. 60-407-2018 (W) was merged with this one.

2 The Office is not in possession of a second appeal filed for the "Zig Zag" nail sculpture.

In a letter dated December 23, 1994, Visual Arts Examiner Geoffrey R. Henderson notified Weingram that the Office could not register **DIAMOND SHAPE** and **HEART SHAPE**, because they too lacked the artistic or sculptural authorship necessary to support copyright claims. This letter also noted that copyright does not protect familiar symbols and designs or minor variations of basic geometric shapes. (The two files were later merged.)

On April 19, 1995, Mr. Weingram submitted four, essentially identical letters, appealing the Office's refusal to register "**DOUBLE DIAMOND,**" "**DIAMOND SHAPE,**" "**ZIG ZAG,**" and "**HEART SHAPE.**" Mr. Weingram asserted that these works contained copyrightable features in "the 3-Dimensional, rolled shape of a nail sculpture having portions configured to represent" a double diamond, diamond, zig zag, or heart shape. He argued that "such sculpture is not inherent to a human fingernail and is the idea of the applicant expressed in 3-Dimensional form as a nail sculpture." He cited the statement in Copyright Office Circular 1 that the "categories" of copyrightable works in 17 U.S.C. § 102(a) "should be viewed quite broadly." Mr. Weingram noted that claimant Elizabeth Fojon has won awards, and enclosed articles recognizing her "artistic abilities with nail sculptures."

On September 5, 1995, the Copyright Office issued the Office's second refusal to register "**DOUBLE DIAMOND**" and "**[DOUBLE] ZIG ZAG.**" The letter, written by Visual Arts Attorney-Advisor David Levy after reexamination, noted that original authorship must constitute more than a trivial variation of public domain elements. Mr. Levy explained that the Office does not make aesthetic judgments, and that the attractiveness or commercial success of a work are not factors in determining its copyrightability. Citing 37 C.F.R. §202.1, he stated that familiar symbols or designs, or minor variations of standard or common designs, such as those represented by the sculptured nails, are not copyrightable. He cited case law including Bailie v. Fisher, 258 F.2d 425 (D.C. Cir. 1958) (star shaped display for photograph not copyrightable); John Muller & Co. v. New York Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986) (logo of four arrows not copyrightable); Forstmann Woolen Co. v. J.W. Mays, Inc., 89 F. Supp. 964 (E.D.N.Y. 1950) (label of three fleur-de-lis not copyrightable); and Jon Woods Fashions, Inc. v. Curran, 8 U.S.P.Q. 2d (BNA) 1870 (S.D.N.Y. 1988) (stripes combined with grid pattern not copyrightable). Mr. Levy also explained that the statement in Circular 1 referring to categories of copyrightable works addresses works that "are not easily viewed as belonging to one class or another." Although the nails are useful articles, the classification in this case would be as sculptural works because the works do reflect the requisite separability. However, as Mr. Levy noted, these works "represent familiar shapes or designs."

On September 26, 1995, the Copyright Office issued the Office's second refusal to register the other two nail sculptures, "**DIAMOND SHAPE**" and "**HEART SHAPE.**" The letter attached a copy of the September 5 letter, and noted that the Office was refusing registration "for the same reasons as given in our letter dated September 5, 1995 for similar nail sculptures entitled **DOUBLE DIAMOND** and **DOUBLE ZIG ZAG.**"

By three letters dated July 23, 1996, a second appeal was filed concerning "**DIAMOND,**" "**DOUBLE DIAMOND,**" and "**HEART SHAPE.**" Apparently, no second appeal was filed for "**ZIG ZAG.**" The letters were drafted by attorney Michael R. Friscia of Friscia & Nussbaum. Each of the letters attached "two (2) actual specimens of the work" (in contrast to the photographs previously submitted as identifying material). The letters argued that the nail sculptures contain far and above the necessary amount of original artistic authorship required by the Copyright Office to support a copyright claim; that they "are in no way useful but are rather decorative items;" and that the shapes created by Ms. Fojon "serve to enhance the decorative nature of the work." The three letters' headings referred individually to the three individual designs, but the bodies of all three letters were identical and referred only to the heart-shaped design as follows: "It can be seen that the heart-shaped design is carved into a three-dimensional nail shape having curvature along the length thereof, as well as curvature along the width thereof."

Useful Articles

Your correspondence asserted that these nail sculptures are not useful articles, but are purely decorative items. However, it is our opinion that, as an item which fits over and protects, as well as decorates, the natural nail, these works are both useful and sculptural. A useful article is defined as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a 'useful article'." 17 U.S.C. §101 (1994). The definition of "pictorial, graphic and sculptural works" limits copyrightability of the design of a useful article to "pictorial, graphic or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." Id.

You argued that these nail sculptures contain copyrightable authorship in their three-dimensional rolled shape, with a curved length and width that is not inherent to a human finger nail and is an idea expressed as a nail sculpture. However, the curvature of the basic nail sculpture here is a functional necessity to fit upon the natural nail, or is, at most, de minimis authorship. With respect to the shape of useful articles, the House Report accompanying the current copyright law states that, unless the shape of an industrial product such as a woman's dress or a television set contains some element that physically or conceptually can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted under the bill. H.R. Rep. No. 1476, 94th Cong., 2d Sess.

55 (1976). The test for separability from utilitarian aspects does not depend on the nature of the design; even if the appearance is determined by aesthetic (not functional) considerations, only elements which can be identified as physically or conceptually separate from the useful article as such are copyrightable. Esquire v. Ringer, 591 F.2d 796, 803 (D.C. Cir. 1978), cert. denied, 440 U.S. 908 (1979) (quoting House Report).

Familiar Symbols and Designs

In these nail sculptures, the material here that is conceptually separable consists of familiar shapes and symbols, such as diamond and heart shapes, forming the tips of the nails. Such shapes exhibit no original authorship and are not copyrightable. 37 C.F.R. § 202.1. Nor are such familiar symbols combined here in a way which adds to the copyrightability of the work. The nail sculptures therefore lack the artistic or sculptural authorship necessary to support a copyright claim.

In his correspondence of April 19, 1995, Mr. Weingram argued that copyright protection for sculptural works should be viewed broadly. He cited cases such as Mazer v. Stein, 347 U.S. 201 (1954) and Dan Kasoff, Inc. v. Gresco Jewelry Co., Inc., 204 F. Supp. 694 (S.D.N.Y. 1962). Mazer v. Stein concerned the issue of whether works of art lose their protected status if incorporated into a utilitarian article such as a table lamp base. Unlike the diamond and heart shapes at issue here, the Balinese dancing figures that were reproduced as lamp bases in Mazer, were capable of existing as works of art independent of the utilitarian article into which they were incorporated, and exhibited authorship far beyond common shapes. Mazer, 347 U.S. at 218. Similarly, Dan Kasoff involved ornamentation on a jewelry box that was more complex in its design than the basic shapes on these nails and, thus, was held copyrightable even though the box had utilitarian use as a container. 204 F. Supp. at 695. In Monogram Models, Inc. v. Industro Motive Corporation, et al., 492 F.2d 1281 (6th Cir. 1974), the issue was not quality of authorship, but whether plastic model airplane pieces were proper subject-matter for copyright. 492 F.2d at 1282, 1284. The court in Dollcraft Industries, Ltd. v. Well-Made Toy Manufacturing Company, et al., 479 F. Supp. 1105 (E.D.N.Y. 1978), found copyrightable authorship in stuffed toy animals that contained numerous sculptural features, independent creation and substantial originality. Id. at 1114-15. The court in Royalty Designs, Inc. v. Thrifticheck Service Corp., 204 F. Supp. 702 (S.D.N.Y. 1962), found copyrightable authorship in toy banks in the shape of Boxer and Cocker Spaniel dogs -- not for all such dog-shaped toy banks, but for "the particular novel and original renditions created and designed by" the author. Id. at 704. Here, the nail works would be protectable as sculptural works, if they contained sufficient original and creative authorship, but, unlike all the more complex and detailed works in the cases cited, they do not.

The principle of copyrightability resting on the presence of more than minimal authorship is supported by many judicial decisions. In John Muller & Co. v. New York Arrows Soccer Team, Inc., 802 F.2d 989 (8th Cir. 1986), the 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 court held that envelopes printed with solid black stripes and a few words such as "priority message" or "gift check" 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 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). See also Forstmann Woolen Co. v. J.W. Mays, Inc., 89 F. Supp. 964 (E.D.N.Y. 1950) (nothing artistic about way in which plaintiff's name or legend "100 % Virgin Wool" appeared on label, and no originality displayed in form or representation of fleurs de lis); and Jon Woods Fashions, Inc. v. Curran, 8 U.S.P.Q.2d (BNA) 1870 (S.D.N.Y. 1988) (upholding Register's decision that fabric design of striped cloth with grid of squares was not copyrightable).

Aesthetic and Commercial Value

You asserted in your correspondence that claimant Elizabeth Fojon is an award-winning nail artist, who has achieved wide recognition and commercial success. However, Ms. Fojon's awards and talents for creating nail designs, and the attractiveness or success of those designs, do not determine their copyrightability. Aesthetic commercial value, or relative artistic merit is not material or relevant in determining copyrightablity. Trifari, Krussman & Fischel, Inc. v. Charel Co., 134 F. Supp. 551 (S.D.N.Y. 1955).

These nail sculptures are useful articles whose shape is largely dictated by their functional or utilitarian aspects. We do agree, however, that the nail sculptures contain separable material. That material consists of familar symbols and designs which are not copyrightable. The Board of Appeals therefore affirms the decision of the Examining Division that the nail sculptures **"DOUBLE DIAMOND," "DIAMOND SHAPE,"** and **"HEART SHAPE"** lack the necessary originality to sustain copyright registration.

This letter constitutes final agency action.

Sincerely,

Nanette Petruzzelli

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