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May 16, 1997

Dear Mr. Schwartz:

This is in response to your letters of January 3, and September 10, 1996, requesting a second review or reconsideration of the Copyright Office refusal to register claims to copyright in the COLLECTED (SNOWGLOBE) artists' books by William Charles Brent Harroff. We apologize for the long delay in responding. Upon a careful reexamination of the works and analysis of the statutory and case law you have advanced in support of registration, we regret that we have no alternative but to again refuse registration.

Administrative Record

On November 9, 1992, the applicant/claimant, William Charles Brent Harroff, submitted an application Form Va for registration of a claim to copyright in the work identified as "Artist's Books-Snowglobe". In a letter dated January 26, 1993, Examiner James L. Shapleigh sought a clarification of the claim. He pointed out that copyrightable works must be fixed in a copy or phonorecord. He suggested that, if the globes contain any fixed original authorship, Mr. Harroff should complete a new application with a clear identification of the nature of the authorship in space 2.

On April 30, 1993, applicant submitted a new application designating the nature of the authorship as "Artist's Books-Snowglobes": three - and two - dimensional artwork" in spaces I and 2, respectively. In the letter of enclosure, the applicant explained that he had "never expected the floating aspect of the snowglobes to be copyrighted". He furthermore explained that he had worked as a "book artist for the last decade". .... "Book artists use the structure of the book as an art form, rather than seeing it as a simple bearer of text". His "works add words, color, unusual containers and similar subjects to the [book] medium.... and shift control of the text's order from the author to the physical manipulations of the viewer/reader." (Letter of 4/23/93 from William Harroff to Examiner James L. Shapleigh (Emphasis added).

In a letter dated June 17, 1993, Examiner Shapleigh sought further clarification of the nature of the authorship; he also suggested the possibility of a

registration based on "photographic authorship for the slides showing the globes as they constitute 'fixed pictorial authorship.'"

In a letter dated October 19, 1993, applicant's attorney, Steven H. Schwartz of the firm Brown and James, confirmed a telephone conversation of October 18, 1993, with Examiner Shapleigh wherein the latter had agreed to grant an additional 120 days to respond to his June 17, 1993 letter.

In a letter dated February 14, 1994, applicant, through his attorney, explained that he seeks copyright protection in the snowglobes as three-dimensional sculptures, or, alternatively, two-dimensional art work. "It is our contention that the visual effect of the floating pieces under the globe, together with the two-dimensional and three-dimensional art work in the globe (as the case may be) does create a copyrightable work of authorship which is fixed in a tangible medium of expression.... The glass portion of the sculpture is what makes it a fixed medium of expression." (Your letter of 2/14/94 to Examiner Shapeleigh). Mr. Harroff "is claiming protection for the overall visual effect" Id. at 4. In support you cite statutory and decisional law. You advanced an argument of the analogy to copyrightable video games: "these works of art are fixed in a tangible medium of expression in the same way that video games are fixed in that it requires a device (the glass attached to the base) to show them, and it requires user intervention which sometimes slightly changes the display." Id. at 4.

In a letter dated August 11, 1994, David Levy, Attorney Advisor, Examining Division, rejected the claim on review and reconsideration. He explained that a claim cannot be based on mere visual effects, since effects are in the nature of uncopyrightable ideas. He likewise disagreed with the analogy to video games and the cases cited in support thereof as inapplicable since a video game involves more than "picking up a globe, shaking it, putting it on a flat surface, and having the images inside to fall from the top of the globe to the bottom." (Letter of 8/11/94 from Levy to Schwartz at 2).

In the letters dated January 3 and September 10, 1996, you have requested a second review before the Copyright Office Appeals Board. In your letter of January 10, you have underscored and further developed the theory of your appeal. Once again you have delineated the work your client seeks to protect: "[T]he expressions of ideas that are illustrated when the snowglobes are shaken and the designs or words float from the top of the globe to the bottom of the globe, in front

of, or on top of, other shapes, designs, or drawings." In your view, "[t]his unique combination of designs and shapes creates a visual effect which is an expression of ideas fixed in a tangible medium", analogous to fixation of a video game, warranting copyright protection. (Emphasis added). We respectfully disagree for the following reasons.

I. Fixation in Tangible Form.

Under the current copyright law, to be copyrightable a work must satisfy two basic requirements: (a) it must reflect a certain amount of creative authorship, and (b) it must be fixed in copies or phonorecords. 17 U.S.C. 102. These two essential elements must be present so that original works of authorship are sufficiently fixed in any tangible medium of expression in order to be copyrightable under the statute. The statute defines "fixation" in clear, unambiguous terms: "A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." Id. at 101. The legislative history has confirmed that the definition of "fixation" excludes purely evanescent or transitory representations. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 53 (1976).

Your analogy to video games does not reflect the essential distinction between video games and the snowglobe works in question. It is now well settled that video games meet the statutory requirement of fixation in a tangible medium of expression for two reasons: (1) The audiovisual work is permanently embodied in a material object, the memory device-attract mode-from which it can be perceived and reproduced with the aid of other components of the game, and (2) Although as displayed on the video screen in the course of play, a video game may initially seem too ephemeral to meet the statutory requirement of fixation, there is, however, always a repetitive sequence of a substantial portion of the sights or images and sounds of the game. Further, many aspects of the game remain constant from game to game regardless of how the player operates the controls or plays the game. Stern Electronics, Inc. v. Kaufman. 669 F. 2d 852 (2d Cir. 1982); Williams Electronics, Inc. v. Artic International Inc., 685 F. 2d 870 (3d Cir. 1982); Midway Mfg. Co. v. Dirkschneider, 543 F. Supp. 466 (D. Neb. 1981). These two essential aspects of fixation for audiovisual works are missing from your works; there is no fixed and initial (or underlying) fixation of the basic authorship which embodies the essentials

of the snowglobe content in the same manner as the essentials of a videogame's sights and sounds are fixed; and there is nothing that fixes or guarantees a repetitive sequence of a substantial portion of the images or placement of the items within the globe which could occur when someone shakes the globe.

There is no "attract mode" in a tangibly or materially fixed form that would repeat itself in a "play mode" for more than a transitory period. 685 F. 2d at 874. The three - and two-dimensional objects within the globe cannot be considered a part of any "attract mode;" they are individual, preexisting components, many not representing your original authorship. The enclosure in a globe of certain three - and two-dimensional material objects may be the means of fixation of **the work** which you described as "**the visual effect** of the floating pieces inside the globe, together with two-dimensional and three-dimensional art work in the globes...." (Emphasis added). (Your letter of 1/3/96 to Frank Vitalos at 2). However, your contention that different "shakers" will create "substantially the same art work" is only true in the sense that the resultant work is within the same enclosure and not necessarily of substantially the same expression.

II. De Minimis Authorship.

Our explanation does not mean that snowglobes are uncopyrightable per se. Indeed, in Merton Co. Ltd. v. Tony Trading of Hong Kong, 6 U.S.P.Q. 2d 1156 (S.D.N.Y. 1987), a case you cited in your letter in January 3, 1996, the Court found copyrightable "a musical snow globe depicting a Christmas scene around 'Santa Workshop'." Fixation was not an issue in that case as the portion of the musical snow globe for which copyright protection was sought was a small, sculptured scene copyrightable in itself and permanently fixed within the globe.

The applicant/claimant in the instant case is basing his claim on the authorship reflected in the unique combination of designs and shapes which create a visual effect. The applicant has described his authorship as "the overall visual effect which is shown when words or designs.... fall from the top to the base...." The applicant further states that "[t]his visual effect is.... a unique artistic expression which meets the requirements of the copyright statute...." (Your letter of 2/14/94 at 4 to Examiner Shapleigh.) As explained in our previous correspondence, a visual effect or appearance is not necessarily copyrightable: its protectibility under copyright rests upon the particular nature of the "effect" or "appearance." In this case, the effect consists of individual cut-out words/symbols/simple outline shapes falling

randomly as they come to rest after a person has shaken the glass globe. The resultant expression of a limited number of individual, cut-out words or multiple, identical cut-out shapes falling and coming to rest, either scattered or in a heap, does not reflect sufficient copyrightable authorship to sustain a claim to registration. Authorship must be more than minimal to sustain copyright protection. Feist Publications, Inc. v. Rural Telephone Service Co. Inc., 499 U.S. 340 (1991).

For the foregoing reasons, the Copyright Office must again refuse registration. This constitutes final agency action in this case.

Sincerely,

Nanette Petruzzelli

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

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