COPYRIGHT
OFFICE

October 1, 1997

Re: Wrapped Reichstag, Berlin, 1971-1995
Control No. 60-504-9973(D)

Dear Mr. Drescher:

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CONGRESS

In response to your request of December 13, 1996, [second appeal], the Copyright Office Appeals Board reviewed the work of your clients, Christo Javacheff and Jeanne-Claude Christo-Javacheff, titled "Wrapped Reichstag, Berlin, 1971-1995" (Wrapped Reichstag). After examining the claim and all associated correspondence, the Board affirms the Examining Division's decision to refuse registration on the grounds that the Wrapped Reichstag does not embody sufficient original authorship to support a copyright registration.

Washington
D.C.
20559

The Administrative Record

The Office received an application for a three-dimensional sculptural work, WRAPPED REICHSTAG, BERLIN, 1971-95, on September 14, 1995. The Office notified you March 13, 1996, explaining that the work could not be registered because the work did not display sufficient copyrightable sculptural authorship. The work at issue was the wrapped-in-fabric German Reichstag building. Deposited photographs showed several views of the building draped in fabric. The Copyright Office examiner who first examined the claim noted that "[s]ince the wrapping follows the lines and contours of the underlying edifice, the work cannot be deemed to present original three dimensional authorship." He also noted that copyright law protects the expression of an artist or author, but not ideas, themes or concepts reflected in an author's work.

On May 7, 1996, you requested reexamination of the claim [first appeal] because you believed that the work is copyrightable. You asserted that the determination of originality in a work was "not within the purview of the Register", and wrote that the Office exceeded its discretion by refusing to register the Christo work for lack of originality. You also asserted that the originality standard was improperly applied in this case, noting that "originality" applies to a work's source, not its novelty. You claimed that the examiner improperly relied on his personal opinion as to the originality of the work in regard to its novelty. Also, you noted that rejection because expression of

themes or ideas is not copyrightable was inapplicable here; no application had been submitted for registration of these aspects of the work.

The Special Assistant to the Chief of the Examining Division responded to your comments in a letter dated October 2, 1996. She reviewed the application, the deposit, and the points you made in your appeal, and determined that the Wrapped Reichstag could not be registered.

She noted that section 410 of title 17, supported by case law, gives the Register the authority to make determinations about copyrightability and to refuse registration where proper. She pointed out that the legal standard of copyrightability is whether a work contains a sufficient amount of original expression, "originality" referring to a work's origin with an author and to the embodiment of more than trivial variations from works in the public domain.

Regarding "originality" versus "novelty," the Special Assistant wrote that the information you cited regarding the Office's authority to judge whether a work was original was correct. However, she explained that the question in this case was not whether the Wrapped Reichstag had been copied or taken from another source; instead, the question was whether the authors created any sculptural authorship which evidenced the necessary modicum of originality necessary to sustain a copyright registration. She found that form of the Wrapped Reichstag followed the form of the building beneath the wrapping and, thus, was determined in its contours by an external guideline.

She further noted that examining personnel do not make personal, aesthetic judgements about submitted works as they examine works for registration and apologized for the unnecessary and ill-considered Michelangelo remark of the examiner. Examiners do, however, determine whether works contain copyrightable elements, in accordance with the copyright statute, regulations, and the practices of the Copyright Office.

On December 13, 1996, you sent the Office a detailed and documented second request for reexamination of the Wrapped Reichstag with a request for registration [second appeal], based on the assertion that the work expressed sufficient original creative authorship to support a copyright registration. You claimed that case law shows the threshold amount of creativity required to support a claim to copyright in a work is very low. You added that works created by "wrapping" have been recognized as sculptural artworks for centuries, and quoted art experts who had addressed this point. You disputed the Special Assistant's observation that anyone who "wrapped" the Reichstag building would produce essentially the same result, emphasizing the authors' fabric choices and their specific work in attaching the fabric to the walls and surfaces.

You claimed that the Wrapped Reichstag was the result of a "formulated aesthetic" that transformed the building from an architectural structure into sculpture.

The Appeals Board's Decision

Subject Matter of Copyright

The Appeals Board examined the Wrapped Reichstag file de novo to determine whether the work embodied copyrightable elements, as defined in 17 U.S.C. §102. According to the statute:

> Copyright protection subsists...in original works of authorship fixed in any tangible medium of expression... from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

17 U.S.C. §102(a).

The Board found that the deposit material provided to the Office consisted of photographs and drawings that could themselves be registered as pictorial works. However, the Board did not find that the subject of the deposit material, i.e., the wrapped building, embodied original sculptural authorship that could be registered for copyright. The Reichstag draped or wrapped in fabric does not constitute three-dimensional authorship sufficiently different from the underlying building such that it rises to the level of copyrightable authorship.

The Wrapped Reichstag Did Not Embody Sufficient Original Authorship to Support Copyright Registration

In your second appeal, December 13, 1996, you cited Feist Publications v. Rural Telephone Service Co., 499 U.S. 340 (1991), for the proposition that "[t]he threshold amount of creativity required to support copyright registration is 'extremely low'." The Appeals Board, of course, agrees that this formulation of copyrightability put forward by the 1991 Feist decision by the Supreme Court is the standard which the Copyright Office must follow in its statutorily-required [17 U.S.C. §410(a)] examining function. We further note that although the threshold is low, a minimum threshold must be met; de minimis additions to existing works cannot be copyrighted. L. Batlin & Son, Inc. v.

Snyder, 536 F.2d 486 (2d Cir. 1976). Elements within a work must, alone or in their entirety, embody original authorship sufficient to rise above a de minimis level. Such a standard of copyrightability has been used by the Office to examine works under the copyright law both before and after issuance of the Feist decision.

Regarding requisite originality, you also reference the Second Circuit's decision in Alfred Bell v. Catalda, 191 F.2d 99 (2d Cir. 1951), in which the court stressed that "[n]o large measure of novelty is necessary" to support copyright registration. The Office has used the principle enunciated in Alfred Bell v. Catalda as a guidepost for determining copyrightability for a number of years prior to Feist and continues to apply Catalda's standard to all categories of subject matter. The Office does not use a novelty or uniqueness standard (essential to patent protection) in examination of claims to copyright registration.

The Board disagrees with your assertion that your clients "translated" the Reichstag building into a sculptural work which embodied copyrightable authorship. The shape of the wrapped work followed the shape of the building beneath the draping material, varying in appearance only with changes in external light and wind as those elements affect the surface of the wrapping fabric. These variations of how the sheet material sways or moves in the wind and how natural or artificial light affects the color and shading appearance of the wrapping material do not constitute copyrightable elements of original, i.e., sufficiently protectible authorship. The Wrapped Reichstag's shape follows the form of the Reichstag building, and contains no copyrightable sculptural authorship which was added to the building by your clients.

Further, although it can be argued that your clients made choices and selections as to where and at what location on the surface of the building the fabric was to be attached to the building, such choices are by necessity limited to the actual shape and contour of the underlying building and, thus, the "wrapped" version of the building is predetermined, to a great extent, by the foundation on which the fabric hangs or to which it is attached. Although the Office does not here make the determination that the idea of wrapping the Reichstag and the expression of the resultant wrapped Reichstag building merge, we point out that where only one or a few ways of expressing an idea are possible, courts have been unwilling to extend copyright protection to such expression on the premise that to do so would extend protection to the idea embodied in that expression. See, e.g., Morrissey v. Procter & Gamble Co., 379 F. 2d 675 (1st Cir. 1967); Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F. 2d 738 (9th Cir. 1971); Apple Computer, Inc. v. Franklin Computer Corp., 714 F. 2d 1240 (3d Cir. 1983).

Although Wrapping May Be A Recognized Artistic Technique, Techniques, Methods and Processes Are Not Copyrightable

The Appeals Board does not dispute your declaration that wrapping an object "is a well-established tradition in Western art...." Second Appeal at 3. The Board appreciates the comments and observations made by art experts that you provided the Office. Second Appeal at 5-7. However, as you pointed out, "'Wrapping' is a means...of transforming the underlying object, in this case the Reichstag" into a "distinct" work. Second Appeal at 4. The qualities of distinction and uniqueness are not necessarily equivalent to the element of original and copyrightable authorship. Importantly, methods and processes are not protected by United States copyright law. See 17 U.S.C. §102(b); 37 C.F.R. § 202.1(b). Again, the method producing the visual effect of light falling on your clients' wrapping material during the course of the day and under various weather conditions cannot be copyrighted or in any way be implied as protected by a registration.[1]

The Contribution of the Authors

The Appeals Board does not dispute your assertion that the Wrapped Reichstag was the result of a great deal of effort on the part of your clients. The Office has never stated or implied that the work was the result of "random" activity, or acts of nature. Second Appeal, [December 13, 1996], at 4, 5. However, preparation, labor, and energy that go into the creation of a work are not the subject of copyright protection. This was made clear by the Supreme Court in Feist Publications v. Rural Telephone Service Co., 499 U.S. 340 (1991), when it decisively disavowed the "sweat of the brow" doctrine, which some courts had used in the past to provide copyright protection as a reward for the effort that was expended in creating a work. See, e.g., Alva Studios, Inc. v. Winninger, 177 F. Supp. 363 (S.D.N.Y. 1959); Hutchinson Tel. Co. v. Fronteer Dir. Co., 770 F.2d 128 (8th Cir. 1985). The extensive planning and attention to detail involved in creating the Wrapped Reichstag does not, of itself, make the work copyrightable.

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[1] Section 102(b) of the Copyright Act of 1976 provides:

> In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

Courts have confirmed this principle concerning the lack of copyright protection for methods and procedures. See, e.g., the hallmark case of Baker v. Selden, 101 U.S. 99 (1879).

Conclusion

Even aesthetically pleasing and artistically interesting works may not be registrable if they lack the sufficient modicum of expression of original authorship. The Appeals Board did not find such copyrightable authorship in Wrapped Reichstag, and therefore cannot register the work. This letter constitutes final agency action.

Sincerely,

Nanette Petruzzelli

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