August 11, 1999

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Re: Learning Curve Toys
Copyright Control Number: 60-511-4113(A)

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OFFICE

Dear Mr. Alter:

The Copyright Office Board of Appeals has reviewed your request for reconsideration of the Office's refusal to register nine works submitted by your client, Learning Curve Toys, L.L.C. The Appeals Board reviewed LINKING SOFT SHAPES, STACKING RINGS, FILL & SPILL CUP, FIRST MIRROR, MUSIC BOX, PUZZLE BALL, GRIP & GRAB RATTLE, INFLATABLE DRUM, and CLUTCH CUBE.

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The Board has determined that six of the nine works, STACKING RINGS, FIRST MIRROR, PUZZLE BALL, GRIB & GRAB RATTLE, INFLATABLE DRUM, and CLUTCH CUBE, may be registered if applications for those works are resubmitted limiting the claims to copyrightable elements in those works. You will receive information about resubmission of these works and the scope of claims in authorship in these works from the Office's Examining Division, under separate cover in the near future.

The Board has determined that three of the above-referenced works, LINKING SOFT SHAPES, FILL & SPILL CUP, and MUSIC BOX, cannot be registered because they lack sufficient original authorship to support claims to copyright registration.

**Administrative Record**

On April 26, 1996, the Copyright Office received applications, deposits and fees for 23 works by Learning Curve Toys, L.L.C.; the works were described as toys.

In a letter dated August 8, 1996, the Office notified you that registrations for LINKING SOFT SHAPES, PUZZLE BALL, STACKING RINGS, GRIP & GRAB RATTLE, and INFLATABLE DRUM were denied because the works consisted of "minor

variations of familiar shapes and designs" that could not support a claim. The works did not appear to embody sufficient original authorship to be registered. Also, copyright examiner Wayne Crist noted that copyright does not protect ideas or concepts embodied in works.

Regarding WRIST RATTLES - LADYBUG & BUTTERFLY, FOOT-FINDERS - LADYBUG & BUTTERFLY, WRIST RATTLES - CAT & DOG, FOOT FINDERS - CAT & DOG, CRIB-SIDE GRAPHIC PANELS and PLAY QUILT, Mr. Crist wrote that each of these works contained "exactly the same copyrightable artwork or soft sculpture." Therefore, only one work could be registered, and that preference must be made by the applicant. Registration of the selected work would cover the copyrightable content of the work as it appears in any accompanying or subsequent versions or editions.

Regarding FILL & SPILL CUP, FIRST MIRROR, MUSIC BOX, and CLUTCH CUBE, Mr. Crist observed that there was no copyrightable sculpture in the works. He also stated that useful aspects of the designs were not copyrightable. He wrote that any two dimensional copyrightable work on these toys was also embodied on other registrable works and would be covered by those claims.

The works SIGHTS & SOUNDS MOBILE, DISCOVERY BOOK, FARM BLOCK, and JUNGLE BLOCK, were determined to lack copyrightable sculpture. However, Mr. Crist found two dimensional artwork embodied in these works that could be registered, and asked you to change the authorship portions of these four claims from "3-dimensional toy" to "2-dimensional artwork."

The works MOON TEETHER, FARM RATTLE RING, INCHWORM, and FARM ACTIVITY CENTER were registered.

**First Appeal**

In a letter dated September 30, 1996 addressed to Mr. Crist, you sought reconsideration of the refusal to register LINKING SOFT SHAPES, PUZZLE BALL, STACKING RINGS, GRIP & GRAB RATTLE, and INFLATABLE DRUM, based on combinations of graphics and colors that were original and unique. You also asked that space 2 be amended to read "3-dimensional graphic elements" rather than "3-dimensional toy."

You also sought reconsideration of the refusal to register FILL & SPILL CUP, FIRST MIRROR, MUSIC BOX, and CLUTCH CUBE, claiming that these works created their own distinctive visual effects as 3-dimensional graphic works.

In response to the Office's conclusion that WRIST RATTLES - LADYBUG & BUTTERFLY, FOOT-FINDERS - LADYBUG & BUTTERFLY, WRIST RATTLES - CAT & DOG, FOOT FINDERS - CAT & DOG, CRIB-SIDE GRAPHIC PANELS and PLAY QUILT contained "exactly the same copyrightable artwork or soft sculpture" and that an election must be made as to which would be registered, you advised that you had elected to seek registration of FOOT-FINDERS - LADYBUG & BUTTERFLY, FOOT FINDERS - CAT & DOG and CRIB-SIDE GRAPHIC PANELS, with the addition of "2-dimensional artwork" in space 2 of the application for the latter work. This same amendment of description was requested for SIGHTS & SOUNDS MOBILE, DISCOVERY BOOK, FARM BLOCK, and JUNGLE BLOCK.

**Second Refusal to Register**

On September 19, 1997, in a letter from Attorney-Advisor David Levy, the Examining Division responded to your request for reconsideration of the refusal to register LINKING SOFT SHAPES, PUZZLE BALL, STACKING RINGS, GRIP & GRAB RATTLE, INFLATABLE DRUM, FILL & SPILL CUP, FIRST MIRROR, MUSIC BOX, and CLUTCH CUBE.

Mr. Levy explained that to register a claim to copyright protection, a work must not only be original, but also must contain copyrightable authorship. He also explained that uniqueness is not a copyrightable property. He noted that LINKING SOFT SHAPES, PUZZLE BALL, STACKING RINGS, and GRIP & GRAB RATTLE consisted of public domain materials, such as "rattles, soft shapes, stacking rings, or balls." As such, these works could not be registered for individual elements or the combination of public domain elements.

He wrote that the works FILL & SPILL CUP, FIRST MIRROR, MUSIC BOX, and CLUTCH CUBE consisted of familiar symbols and designs and simple color variations, none of which were copyrightable. He did not specifically refer to INFLATABLE DRUM, except in the caption of the letter.

Mr. Levy cited Forstmann Woolen Co. v. J.W. Mays, Inc., 89 F. Supp. 964 (E.D.N.Y. 1950) (label containing the words "Forstmann 100% Virgin Wool"

interwoven with three fleurs de lis held not copyrightable), and John Muller & Co., Inc. v. N.Y. Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986) (logo consisting of four angled lines forming an arrow, with the word "arrows" in cursive script below, held not A copyrightable work of art) in support of his assertion that simple familiar designs are not copyrightable.

He also explained that the "effect" of looking at interesting items submitted was not a copyrightable quality.

**Second Appeal**

You replied in a letter dated October 14, 1997, requesting reconsideration of the Office's refusal to register GRIP & GRAB RATTLE, STACKING RINGS, PUZZLE BALL, LINKING SOFT SHAPES, INFLATABLE DRUM, FILL & SPILL CUP, FIRST MIRROR, MUSIC BOX and CLUTCH CUBE.

You disagreed that the works contained pre-existing or public domain materials, and asserted that "significant artistic decisions" were made by the claimant which resulted in original creative works which contained copyrightable authorship, particularly in the arrangement and manner of presentation of the elements found in the toys. You cited Feist Publications v. Rural Telephone Service Co., 499 U.S. 340 (1991), to say that only a minimal amount of creativity is needed for registration, and Atari Games Corp. v. Oman, 979 F.2d 242 (D.C. Cir. 1992), and Folio Impressions Inc. v. Byer California, 937 F.2d 759 (2d Cir. 1991), for the assertion that distinguishable variations of public domain elements could be registered. You argued that the creativity in these works was confirmed by the successful sale of the toys in the United States and around the world.

**De Minimis Authorship**

The Board of Appeals has determined that the design elements in LINKING SOFT SHAPES, FILL & SPILL CUP and MUSIC BOX do not exhibit copyrightable authorship.

The Board agrees with you that under the Feist decision, only a modicum of creativity is necessary for copyrightable expression. Although the threshold level of original authorship required for registration is low, some works do not meet that standard.

The Supreme Court held that the originality required for copyright protection consists of "independent creation plus a modicum of creativity." Feist at 346. The Court observed that "[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity," *id.* at 363, and that there can be no copyright in works in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359. Even before Feist, the Copyright Office followed this standard, refusing to register "works that lack even a certain minimum amount of original authorship." Compendium of Copyright Office Practices, Compendium II, § 202.02(a)(1984).

Common shapes or designs, or simple arrangements of comment elements such as letters or colors do not embody copyrightable authorship. Copyright Office regulations at 37 C.F.R. § 202.1(a) codify a longstanding application of these principles. Section 202.1 provides:

> The following are examples of works not subject to copyright and applications for registration of such works cannot be entertained:
>
> (a) Words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents...

Further guidance may be found in the Compendium II, which states in § 503.02(a) that with respect to pictorial, graphic & sculptural works, the class within which the subject works fall, a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." The Compendium recognizes that it is not aesthetic merit, but the presence of creative expression that is determinative of copyrightability, *id.*, and that

> registration cannot be based upon the simplicity of standard ornamentation such as chevron stripes, the attractiveness of a conventional fleur-de-lys design, or the religious significance of a plain, ordinary cross. Similarly, it is not possible to copyright common geometric figures or shapes such as the hexagon or the ellipse, a standard symbol such as an arrow or a five-pointed star. Likewise, mere coloration cannot support a copyright even though it may enhance the aesthetic appeal

> or commercial value of a work. For example, it is not possible to copyright a new version of a textile design merely because the colors of red and blue appearing in the design have been replaced by green and yellow, respectively. The same is true of a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations.

*Id.*

The design elements in LINKING SOFT SHAPES, FILL & SPILL CUP and MUSIC BOX are not copyrightable under this standard. In each case, the work consists of a very limited number of simple geometric shapes, and any arguable authorship aside from those shapes is either in the form of mere coloration or previously registered matter. *See also* the discussion of individual works below.

The Board has also considered whether any of the works at issue contained compilation authorship, *i.e.*, originality in the selection, coordination or arrangement of public domain or previously registered matter. The Copyright Act defines a compilation, in part, as follows:

> A "compilation" is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.

17 U.S.C. § 101.

If originally combined to create a new work, an arrangement of pre-existing elements may be copyrightable; however, the requirement of embodiment of at least a minimum amount of original authorship remains in order for registration to issue.

The Compendium II explains that:

> A compilation is registrable if its selection, coordination, or arrangement as a whole constitutes an original work of authorship. The greater the amount of material from which to select, coordinate, or order, the more likely it is that the compilation will be registrable. Where the compilation

> lacks a certain minimum amount of original authorship, registration will be refused. Any compilation consisting of less than four selections is considered to lack the requisite original authorship.

*Id.*, § 307.01.

The Board did not find LINKING SOFT SHAPES, FILL & SPILL CUP or MUSIC BOX registrable as compilations. In each case, the number of public domain or previously registered elements was too small, and the arrangement too slight, to support registration on this basis. *See also* the discussion of individual works below.

**The Three Works Denied Registration by the Board of Appeals**

LINKING SOFT SHAPES

This work was twice refused registration by the Copyright Office because it did not contain sufficient original authorship to support a copyright registration. See first rejection letter at 1-2, second rejection letter at 1-2. What exists in the non-registered LINKING SOFT SHAPES is a simple combination of three common shapes (a triangle, a circle, and a square), tied together with a simple red ribbon and arranged in a straight row. Nor does the selection and arrangement of public domain colors embody sufficient original authorship to constitute copyrightable expression. The authorship in LINKING SOFT SHAPES is de minimis. The Board could not find grounds for registering this work.

FILL & SPILL CUP

This work contains previously registered authorship, which is the two-dimensional artwork (depicting a ladybug, a butterfly, and a caterpillar, registered as part of SIGHTS AND SOUNDS MOBILE) in the balls held in the cup. The shape of this work, a clear plastic cylinder with what appear to be rubber stoppers at each end and containing three clear plastic spheres (each of which, in turn, contains one of the previously-registered two-dimensional works of art), does not embody original authorship; it cannot support a registration because the shape is that of a common design. The color arrangement is, likewise, not copyrightable because it is a simple arrangement of public domain colors; indeed, there is virtually no color apart from the color in the previously existing artwork. The Appeals Board could not find a basis for registering this claim.

MUSIC BOX

As with the FILL & SPILL CUP, this work contains previously registered two-dimensional work (graphics depicting a ladybug and a butterfly). The shape of this work is that of a common geometric shape or design (a square). The arrangement of colors is simple (apart from the already-registered artwork, one side is white and the other is yellow), and does not embody sufficient original authorship to support a claim to copyright registration. The Board cannot register a claim to the MUSIC BOX.

## SUMMARY

The following summarizes the disposition of the 23 Learning Curve works you submitted for registration April 26, 1996:

***Registered Without Correspondence Aug. 7, 1996:***

INCHWORM
FARM RATTLE RING
MOON TEETHER
FARM ACTIVITY CENTER

***Registered Nov. 1, 1996, After Correspondence:***

CRIB SIDE GRAPHIC PANELS
FOOT FINDERS - CAT & DOG
FOOT FINDERS - LADY BUG & BUTTERFLY

***Applications Rejected After Correspondence and Registration of the Above Three Works:***

PLAY QUILT
WRIST RATTLES - CAT & DOG
WRIST RATTLES - LADY BUG & BUTTERFLY

***Registered Nov. 11, 1996, After Further Correspondence:***

SIGHTS & SOUNDS MOBILE
DISCOVERY BOOK

FARM BLOCK
JUNGLE BLOCK

***May Be Registered - Correspondence From Examining Division Regarding Limiting Scope of Claims to Follow This Letter:***

STACKING RINGS
FIRST MIRROR
PUZZLE BALL
CLUTCH CUBE
INFLATABLE DRUM
GRIB & GRAB RATTLE

***Final Denial of Registration by Board of Appeals As of This Date:***

LINKING SOFT SHAPES
FILL & SPILL CUP
MUSIC BOX

**CONCLUSION**

For the reasons stated above, the Copyright Office Board of Appeals concludes that LINKING SOFT SHAPES, FILL & SPILL CUP, and MUSIC BOX cannot be registered for copyright protection. This decision constitutes final agency action.

Sincerely,

David O. Carson
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for Appeals Board
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