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Washington, D.C.
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July 9, 1999

Re: SQUARE 12-2H BUILDING STRUCTURE
Control No. 60-605-5428(E)

Dear Mr. Hill:

I am writing on behalf of the Copyright Office Board of Appeals in response to your letter dated December 1, 1998, appealing a refusal to register a structure consisting of a roofed outdoor picnic table. The letter was addressed to Virginia Giroux, Attorney Adviser in the Visual Arts Section of the Copyright Office and was forwarded to the Copyright Office Board of Appeals.

The Board of Appeals has examined the copyright claim and considered all the points raised by your appeal. After reviewing the claim, the Board of Appeals affirms the Examining Division's decision to refuse registration because the work does not contain original copyrightable authorship.

Administrative Record

On May 1, 1997, the Copyright Office received twelve applications from you on behalf of your client, W.H. Porter, Inc. ("Porter"), for registration of outdoor structures. Porter claimed copyright in the structures as architectural works.

On September 17, 1997, Examiner Joy Mansfield sent a letter to you informing you that registrations could not be made because the submitted works were not architectural works within the meaning of the Copyright Act and the Copyright Office regulations. Citing the section 101 definition of an architectural work as being the "design of a building," Ms. Mansfield asserted that Copyright Office regulations defined a building as "humanly habitable structures that are intended to be both permanent and stationary, such as houses and office buildings, and other permanent and stationery structures designed for human occupancy." 37 C.F.R. 202.11(b)(2). She went on to note that "structures other than buildings, such as bridges, cloverleafs, dams, walkways, tents, recreational vehicles, mobile homes, and boats" were works excluded from the definition of an architectural work.

On October 13, 1997, you appealed the registration refusal on behalf of Porter. In a brief letter, you argued that section 202.11(b)(2) expressly permitted registration of the structures. The section defines a "building" as:

> . . . humanly habitable structures that are intended to be both permanent and stationary, such as houses and office buildings, and other permanent and stationary structures designed for human occupancy, including but not limited to churches, museums, gazebos and garden pavilions.

37 C.F.R. 202.11(b)(2). You submitted that the Porter structures are manufactured from steel and are typically mounted in a concrete base or slab, thereby making them permanent structures. You concluded that the structures were "gazebos and garden pavilions" within the meaning of the regulations, and consequently should be registered.

On March 18, 1998, Attorney Advisor Virginia Giroux reversed in part the decision of Examiner Mansfield. She acknowledged that Porter's building structures did meet the definition of a building, and that registrations could be made for five of the twelve applications: GIW 20 IRONWOOD GAZEBO, GOC 44 CARMEL GAZEBO, GOX 16 OXFORD GAZEBO, PAV 60 BUILDING STRUCTURE, and PAV 60 CL BUILDING STRUCTURE. She refused registration, however, for the remaining seven applications on the grounds that they lacked sufficient creative authorship. Ms. Giroux stated that the law requires a two-step analysis for determining originality of architectural works. First, a determination must be made as to whether a work possesses original design elements, including the overall shape and interior structure. Second, it must determined whether such design elements were functionally required. If they are functionally required, then no registration can be made.

Ms. Giroux concluded that the seven Porter structures did not contain any original design elements that were not functionally required or that were more than standard features.

You filed this second appeal on behalf of Porter on December 1, 1998, but limited it to one structure: SQUARE 12-2H BUILDING STRUCTURE ("12-2H").

Copyrightability of Architectural Works

The Architectural Works Copyright Protection Act of 1990 amended the Copyright Act to create a new category of copyrightable authorship: architectural works. An architectural work is defined as follows:

> [T]he design of a building, as embodied in any tangible medium of expression, including a building, architectural plans or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.

17 U.S.C. § 101.

Although the question is not free from doubt, the Board accepts your assertion, which was accepted by the Examining Division on your first appeal, that SQUARE 12-2H BUILDING STRUCTURE is a "building" for purposes of 37 C.F.R. 202.11(b)(2).

The Board observes that the application recites that the work was created in 1988 but never published. In light of the deposit, consisting of a photograph labeled "Square 12 M 2 Column with Owner Supplied Seating, Merced Irrigation District, California," which depicts a number of constructed copies of the work that appear to be used in Merced California, and a second photograph in a parklike setting, labeled 'SQ 12-2 H, Holland, MI," there appears to be some question whether there has in fact been publication. Moreover, architectural works constructed before December 1, 1990, the date of enactment of the Architectural Works Copyright Protection Act, Pub. L. 101-650, 104 Stat. 5089, 5133, are ineligible for protection under that act. *Id.*, § 706. However, in light of the disposition of this appeal on grounds of lack of originality and/or *de minimis* authorship, the Board considers it unnecessary to inquire further on these matters.

In order to determine whether a particular architectural work is copyrightable, a two step analysis is applied:

> First, an architectural work should be examined to determine whether there are original design elements present, including overall shape and interior architecture. If such elements are

> present, a second step is reached to examine whether the design elements are functionally required. If the design elements are not functionally required, the work is protectible without regard to physical or conceptual separability.

H.R. Rep. No. 735, 101st Cong., 2d Sess. 20-21 (1990). Determinations of originality of design elements are the same for architectural works as they are for other works -- *i.e.*, the work must be minimally creative. Feist Publications, Inc. v. Rural Telephone Serv., Inc., 499 U.S. 340 (1991).

The question before the Board is whether SQUARE 12-2H BUILDING STRUCTURE satisfies the requirements for being a copyrightable architectural work. The Board concludes that it does not, because the designs elements are not sufficiently creative to warrant copyright registration. Although the threshold of creativity required is low, *see* Feist Publications, the design of *SQUARE 12-2H BUILDING STRUCTURE* contains nothing more than the most basic geometric configurations.

As the Supreme Court recognized in Feist, although there is a low standard for determining the copyrightability of a work, some works fail to meet that standard. The Court held in Feist that the originality required for copyright protection consists of "independent creation plus a modicum of creativity." 499 U.S. 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. The Court also recognized that some works, such as a "garden-variety white pages directory devoid of even the slightest trace of creativity," are not copyrightable. *Id.* at 362.

The Compendium of Copyright Office Practices, Compendium II (1984) ("Compendium II") has long recognized this principle, stating that "[w]orks that lack even a certain minimum amount of original authorship are not copyrightable. Such works are often described as 'de minimis,' in reference to the principle embodied in the Latim maxim 'de minimis non curat lex.'" Compendium II, § 202.02(a). The Compendium elaborates that a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." Compendium II, § 503.02(b)(1984). 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 standard designs which lack originality, such as common architectural moldings, or the volute used to decorate the capitals of Ionic and Corinthian columns. Similarly, it is not possible to copyright common geometric figures or shapes in three-dimensional form, such as the cone, cube, or sphere. ... [T]he creative expression capable of supporting copyright must consist of something more than the mere bringing together of two or three standard forms or shapes with minor linear or spatial variations." *Id.* See also Compendium II, § 503.02(a) and section 202.1(a) of the Copyright Office regulations, 37 C.F.R. § 202.1(a) ("familiar symbols or designs" are "not subject to copyright and applications for registration of such works cannot be entertained").[1]

The structure involved in your appeal appears to be such a work, consisting of a simple combination of conventional picnic table with attached benches, two posts to support a roof, and a simple rectangular roof composed of four joined triangular segments.

In your letter of December 1, 1998, you list four design elements that you submit are original and not governed by functional considerations. They are:

> (1) the roof pitch (or the ratio of height to width) which provides an original silhouette profile;

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[1] The report of the House Judiciary Committee on the Architectural Works Copyright Protection Act sheds further light on this issue in the context of architectural works:

> Architect Michael Graves, a witness before the Subcommittee, provided further guidance in an essay entitled "A Case for Figurative Architecture." Mr. Graves explained his design efforts by describing two types of architectural language, "internal" and 'poetic." Internal language is "intrinsic to building in its most basic form — determined by pragmatic, constructional, and technical requirements." Poetic language is "responsive to issues external to the building, and incorporates the three-dimensional expression of the myths and rituals of society." The intent of the legislation is to protect only what Mr. Graves calls "poetic language."

H.R. Rep. No. 735, 101st Cong., 2d Sess. 18-19 (1990) (footnote omitted).

(2) the extent of the roof overhang outside of or beyond the pair of vertical support columns;
(3) the two-column support arrangement for the roof and the location of the two support columns relative to the roof; and
(4) the roof edge and the roof corner trim.

None of the elements you describe reach the level of copyrightable authorship. There is no originality in the selection of the degree of pitch of the roof, or the number of inches of overhang. The roof appears to be commonplace, and appears to be an "individual standard feature" excluded from the definition of a "architectural work." See 17 U.S.C. § 101.

Likewise, there is nothing original about the configuration or location of the roof supports to warrant copyright protection. Again, the design elements are commonplace, and the roof supports appear to be an "individual standard feature."

Finally, there is no copyright protection for the roof edge and the roof corner trim. The design of these elements — and indeed of all the elements for which protection is claimed — consists of nothing more than basic geometric figures that are not sufficiently original to warrant copyright registration. Compendium II, § 503.02 (1984). Again, they appear to be "individual standard features" as well.

Moreover, although it is not the basis for the decision of the Board, these elements appear to be functionally required. The pitch of the roof allows it to shed water, and the overhang governs the size of the area of protection. The configuration and location of the roof supports appear to be functionally required, in order to support the roof. The roof edge and corner trim also appear to be functional.

The Board recognizes that all elements of a work must be considered as a whole when determining whether copyrightable authorship is present. However, the simple combination of very few commonplace elements present in SQUARE 12-2(H) BUILDING STRUCTURE simply does not rise to the level of copyrightable authorship. An "aggregation of well known components [that] comprise an unoriginal whole" cannot support a claim to copyright. Florabelle Flowers, Inc. v. Joseph Markovits, Inc., 296 F. Supp 304 (S.D.N.Y. 1968).

For the reasons stated in this letter, the Board of Appeals affirms the refusal to register the claim to SQUARE 12-2(H) BUILDING STRUCTURE and is closing the file in this case. This decision constitutes final agency action on this matter.

Sincerely,

David O. Carson
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for the Appeals Board
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