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September 29, 2000

Gregory S. Gewirtz, Esq.
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Re: TWISTED ROPE FINIAL AND TWISTED ROPE CURTAIN ROD AND FINIALS
Control No. 60-611-3160(L)

Dear Mr. Gewirtz:

On behalf of the Copyright Office Appeals Board, I am responding to your October 12, 1999 letter appealing a refusal to register two designs entitled: TWISTED ROPE: FINIAL; and TWISTED ROPE CURTAIN ROD AND FINIALS for your client, Springs Window Fashions Division, Inc. The letter constituted a second appeal of the refusal to register these works. The Copyright Office Board of Appeals affirms the Examining Division's refusal to register.

Administrative Record

On September 8, 1998, the Copyright Office received copyright applications, fees, and identifying reproductions covering two finials, one with an accompanying curtain rod. The two works were entitled TWISTED ROPE FINIAL, and TWISTED ROPE CURTAIN ROD AND FINIALS.

Visual Arts examiner James L. Shapleigh refused registration on the dual grounds that the works lacked original artistic material, and that familiar symbols and designs can not support a copyright claim.

A first letter of appeal was received in the Office on May 28, 1999. Applicant argued that Twisted Rope Finial was "a highly distinctive and creative finial", and Twisted Rope Curtain and finials was "a highly distinctive and creative curtain rod with finials on both ends." Cases cited in support of registration included Feist Publications v. Rural Tel.Ser. Co., 499 U.S. 340 (1991); CMM Cable Rep., Inc. v. Ocean Coast Properties, Inc., 97 F.3d 1504 (1st Cir. 1996)(dispute over a contest); Gaste v. Kaiserman, 863 F.2d 1061 (2nd Cir. 1988)(dispute over a song); and West Publishing Co. v. Mead Data Central, Inc., 799 F.2d 1219 (8th Cir. 1986).

Examining Division Attorney Advisor Virginia Giroux responded by maintaining the refusal to register, but changed the ground for refusal, concluding that the finials are useful articles lacking separable authorship. Ms. Giroux's letter detailed the history of the separability test, and cited Esquire v. Ringer, 591 F.2d 796 (D.C. Cir. 1978) and Norris Industries v. International Tel. & Tel. Corp., 696 F.2d 918 (11th Cir. 1983).

On October 18, 1999, a second appeal was received in this Office. Applicant acknowledges that the two works are useful articles, but asserts the twisted rope sculptural look of both designs meets the test of conceptual separability. You assert a number of cases support registration, including Mazer v. Stein, 247 U.S. 201 (1954); Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989 (2nd Cir. 1980); Sunset Lamp Corp. v. Alsy Corp., 698 F.Supp. 1146 (S.D.N.Y. 1988)(banana leaf design); Hart v. Dan Chase Taxidermy Supply Co., 86 F.3d 320 (2nd Cir. 1996) (animal mannequins); Animal Fair, Inc. v. Amfesco Indus., Inc., 620 F.Supp. 175 (D.Minn 1985) aff'd 794 F.2d 678 (8th Cir. 1986); and National Theme Productions, Inc. v. Jerry B. Beck Inc., 696 F.Supp. 1348 (S.D. Cal. 1988) (costumes).

Useful Articles

In drawing a clear line between copyrightable works of applied art and uncopyrighted works of industrial design, Congress withheld protection from the shape of an industrial product - even though it might be aesthetically satisfying and valuable - unless the shape contains some elements that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article. Specifically, the House Report accompanying the current copyright law states that:[1]

> In adopting this amendatory language, the Committee is seeking to draw as clear a line as possible between copyrightable works of applied art and uncopyrightable works of industrial design ... [A]lthough the shape of an industrial product may be aesthetically satisfying and valuable, the Committee's intention is not to offer it

[1]. H.R. Rep. No. 1476, 94th Cong. 2d Sess. 55 (1976)(emphasis added).

> copyright protection under the bill. Unless the shape of an automobile, airplane, ladies' dress, food processor, television set, or any other industrial product, 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. The test of separability and independence from "the utilitarian aspects of the article" does not depend upon the nature of the design - that is, even if the appearance is determined by aesthetic (as opposed to functional) considerations, only elements, if any, which can be identified separably from the useful article as such are copyrightable.

In your second appeal letter, you acknowledge that the two designs are useful articles. You assert, however, that the twisted rope design meets the conceptual separability test. The Board concludes, however, that even if the twisted rope design could be regarded as separable, it is de minimis, and therefore can not support a copyright claim.

Conceptual Separability

Conceptual separability exists when "artistic or sculptural features ... can be visualized as free-standing sculpture independent of the shape of the useful article, i.e., the artistic features can be imagined separately and independently from the useful article without destroying the basic shape of the useful article." Compendium of Copyright Office Practices II, § 505.03(1984). If the artistic features can be imagined separately and independently from the useful articles without destroying its basic shape, those features may be conceptually separable. *Id.* Section 505.03 provides a useful example:

> Thus, carving on the back of a chair, or pictorial matter engraved on a glass vase, could be considered for registration.

The cases that you cite as supporting registration all involved works which were distinguishable from the simple twisted rope design of the two works involved in the appeal. In Mazer, supra, the copyrightable work as an easily recognizable work of sculpture involving Balinese dancing figures. In Kieselstein-Cord, supra, the work was a highly ornamental belt buckel. In Sunset Lamp, supra, the work was a representational banana leaf design. In Hart v. Dan Chase Taxidermy, supra, the works were representational animal mannequins. Finally, in Animal Fair, supra, and National Theme Productions, supra, the works were representational masks and costumes. None of the works involved in these cases closely resemble the two designs involved in this appeal.

Designs bearing a closer resemblance to the works involved in this appeal were the works

in Norris Industries, Inc. v. International Tel. & Tel. Corp., 696 F.2d 918 (11th Cir. 1983), and Custom Chrome, Inc. v. Ringer, 35 USPQ2d 1714 (D. D.C. 1995). In Norris Industries, supra, the work was a wire-spoked wheel cover, and in Custom Chrome, supra, the works were 23 ornamental motor cycle parts. In both cases, the courts affirmed the refusal of the Copyright Office to register the designs.

The features of the works in this appeal that you contend are conceptually separable are the "'twisted rope' sculptural look" and the "highly distinctive contoured collar design arranged at the base of the oval-shaped and twisted rope finial." The Board has difficulty envisioning these features as being separable from the basic shape of each useful article on which they appear. The collar design clearly is part of the basic shape of each useful article. The "twisted rope" aspect of the articles most likely should also be considered an aspect of the articles' shapes, but the Board acknowledges that this aspect of the designs might arguably be analogous to the "carving on the back of a chair, or pictorial matter engraved on a glass vase" set forth in the Compendium as examples of conceptual separability. The case, therefore, is a close one, and without definitively resolving this question in this case, the Board shall address whether the "twisted rope" design exhibits sufficient creativity to support copyright registration.

De Minimis Authorship

In determining whether a useful article is entitled to registration, the Examining Division follows a two part analysis. First, it looks at whether or not there are any design elements that are separable from the function of the useful article, which was discussed above. If there is any separable work, then he Examining Division considers whether such work rises to the level of authorship required by law. 17 U.S.C. § 102(a). You have asserted that the twisted rope design contained in both works you are seeking to register meets the separability test for useful articles. However, even if this twisted rope design is considered separable, it lacks sufficient originality and creavity to support a copyright claim.

Admittedly, the required level of authorship is modest. See, Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340 (1991). However, some works fail to meet that standard. The Court observed in Feist that "as a constitutional matter, copyright protects only those constituent elements of a work that possess more than a de minimus quantum of creativity," *id.* at 363, and that there can be no copyright in work 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. Even before Feist, the Copyright Office followed this standard, refusing to register "works that lack even a certain minimum amount of original authorship." Compendium II, §202.02(a).

Common shapes or designs, or simple arrangements of common elements such as letters

or colors do not embody copyrightable authorship. Copyright regulations at 37 C.F.R. §202.1(a) codify a longstanding application of these principles. Section 202.1 provides:

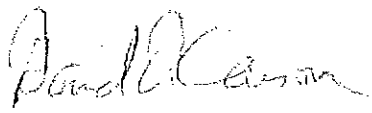
> The following are examples of works not subject to copyright and applications for registration of such works cannot be entertained:
>
> (a) Words and short phrases such as names, titles, and slogans, familiar symbols or designs, mere variations of typographic ornamentation, lettering, or coloring,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

The case law confirms these principles. See, Forstmann Woolen Co. v. J.W. Mays, Inc., 89 F.Supp. 964 (E.D.N.Y. 1950)(reproduction of standard fleur-de-lis could not support a copyright claim); Jon Woods Fashions, Inc. v. Curran, 8 USPQ2d 1870 (S.D.N.Y. 1988)(upholding Copyright Office's refusal to register a design consisting of striped cloth over which was superimposed a grid of 3/16" squares); John Muller & Co., Inc. v. New York 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, found not copyrightable); Magic Marker, Inc. v. Mailing Services of Pittsburgh, Inc., 634 F.Supp. 769 (W.D. Pa. 1986)(envelopes printed with solid black stripes and a few words such as "priority message" or "gift check" did not exhibit minimal level of creativity necessary for copyright protection); and Homer Laughin China v. Oman, 22 USPQ 2d 1074 (D.D.C. 1991)(affirmed Copyright Office's refusal to register a commercially successful chinaware design consisting of a combination of familiar shapes and designs).

The Board does not consider the "twisted rope" design to meet the minimal requirements of creativity required for copyright. Rather, this feature appears to be a fairly standard form of ornamentation or embellishment, ineligible for copyright. See Compendium II, §503.02(b).

For the reasons stated in this letter, the Copyright Office Board of Appeals affirms the refusal to register the submitted claims and is closing the file in this case. This decision constitutes final agency action on this matter.

Sincerely,



David O. Carson
General Counsel
for the Appeals Board
United States Copyright Office Gregory

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