LIBRARY
OF
CONGRESS

COPYRIGHT
OFFICE

101 Independence
Avenue, S.E.

Washington, D.C.
20559-6000

September 29, 2000

Anthony L. Tommaso, Esq.
Meyer, Unkovic & Scott
1300 Oliver Building
Pittsburgh, PA 15222

RE: CRYSTAL RIBBON, CASCADE, and SUNBURST
Control No. 60-619-9268(M)

Dear Mr. Tommaso:

On behalf of the Copyright Office Appeals Board, I am responding to your October 12, 1999 letter appealing a refusal to register three glassware designs entitled: CRYSTAL RIBBON; CASCADE; and SUNBURST for your client, Betty Baugh. 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 July 6, 1998, the Copyright Office received three forms VA, deposits iln the form of identifying material (photographs), and fees, covering copyright claims in CRYSTAL RIBBON; CASCADE; and SUNBURST. In each case, the "nature of this work" was identified as "textural and graphic design for use on glass and glass molds," and the works in question appear to be glassware. By letter dated November 23, 1998, Visual Arts examiner Joy Mansfield refused registration on the ground that all elements of the glassware either related to the utilitarian aspects or function, or are subsumed within the overall shape, contour, or configuration of the articles. Furthermore, Ms. Mansfield concluded there was no physically or conceptually separable authorship.

The refusal to register the three glassware designs was appealed on March 16, 1999, by Anne Salsman Kurzweg, of your firm. Ms. Kurzweg cited Brandir Int'l v. Cascade, 834 F.2d 1142 (2nd Cir. 1987), which ruled that a work was conceptually separable "where design elements can be identified as reflecting the designer's artistic judgement exercised independently of functional influences." She argued that your client's work met that test by containing elements "capable of being identified separately from, and of existing independently of, the utilitarian nature of any article to which they might be applied. The works are comprised of independent pictorial, graphic, and sculptural qualities that exist wholly independently from any object to which they may ultimately be applied."

Examining Division Attorney Adviser Virginia Giroux responded by maintaining the refusal to register, While Ms. Giroux found that there were conceptually separable features in the three designs, she also concluded that those features could not support a copyright, and the three designs were therefore uncopyrightable. The Brandir case did not support registration because the subject matter of the case was an uncopyrightable bicycle rack in which the design had been adapted to accommodate a utilitarian purpose. Ms. Giroux cited John Muller v. N.Y. Arrows, 802 F.2d 989 (8th Cir. 1986) and Jon Woods Fashions v. Curran, 8 USPQ2d 1879 (S.D.N.Y. 1988) to support her conclusions.

On October 18, 1999, a second appeal was received in this Office. You assert that the combined graphic and sculptural works as a whole reflect sufficient creativity and originality to support copyright registration. You cite Feist Publications v. Rural Tel. Ser. Co., 499 U.S. 340 (1991) and Atari Games v. Oman, 888 F.2d 878 (D.C. Cir. 1989), among others, as supporting a finding of copyrightable expression. You conclude that your client's works are products of original and creative use and combination of graphic and sculptural elements, and cannot fairly be characterized as the simple combination or arrangement of simple geometric shapes.

De Minimis Authorship

The Board of Appeals has determined that the design elements in CRYSTAL RIBBON, CASCADE, and SUNBURST do not exhibit copyrightable authorship. While the design elements are arguably separable from the overall shape of the useful articles, neither the elements alone nor in combination meet the creativity and originality standards of the copyright law.

The Board agrees with you that under Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340 (1991), only a modicum of creativity is necessary to support a copyright. However, the Supreme Court ruled that some works (such as the work at issue in Feist) fail to meet that standard. The Court observed that "as 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 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 of Copyright Office Practices, Compendium II, §202.02(a)(1984).

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...

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... 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.

In addition to Feist, you cite Atari Games Corp. v. Oman, 888 F.2d 878 (D.C. Cir. 1989) for the proposition that a work must be viewed as a whole, including arrangement and layout, and not just the individual component parts. While this general rule is true, in the three works involved in this appeal, the arrangement and layout of the elements is insufficient to support a claim to copyright. CRYSTAL RIBBON is a glass plate with 5 sets of four straight lines cutting across the plate, the surface of which is bumpy and textured. CASCADE is glassware with a

series of parallel lines decorating most of the surface. SUNBURST is glassware with concentric circles with straight lines emanating from the center of the circles to the outer circumference. In none of the works above, is the layout or arrangement sufficiently creative or original to support a claim to copyright. 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. (S.D.N.Y. 1968); DBC of New York, Inc. v. Merit Diamond Corp., 768 F.Supp. 414, 415 (S.D.N.Y. 1991)("DBC's gestalt theory that the whole is greater than the sum of its parts is rejected by the great weight of evidence indicating that these two rings are, on the whole, not exceptional, original, or unique").

Cases involving variations of standard designs and simple arrangements

In its letter refusing your first appeal, the Examining Division cited John Muller & Co., Inc. v. N.Y. Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986), and Jon Woods Fashions v. Curran, 8 USPQ2d 1879 (S.D.N.Y. 1988) as supporting a refusal to register the three glassware designs. You asserted these cases did not apply to your client's works because your client's works contained more depth and textural elements and greater visual variations. The Board disagrees, and finds these cases, *inter alia,* as supporting a refusal to register.

In John Muller, *supra*, the work was a logo consisting of four angled lines forming an arrow, with the word "arrows" in cursive script below. In Jon Woods, *supra*, the design consisted of two inch stripes with small grid squares superimposed upon the stripes. In both these cases, the number of elements and simple arrangement is roughly equivalent to what is found in the three designs involved in this appeal. Other cases involving similar designs found not copyrightable include Magic Market, 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"), and Forstmann Woolen Co. v. J.W. Mays, Inc., 89 F.Supp 964 (E.D.N.Y. 1950)(reproduction of standard fleur-de-lis).

Applying these principles in Homer Laughlin China v. Oman, 22 USPQ2d 1074 (D. D.C. 1991), the court affirmed the Copyright Office's refusal to register a commercially successful chinaware design where the Office had concluded that the work was not copyrightable because "familiar shapes and symbols are not copyright nor are simple variations or combinations of basic geometric designs capable of supporting a copyright registration." 22 USPQ2d at 1075 (brackets omitted). As the Court observed,

> "[w]hether a particular work reflects a sufficient quantum of creativity to satisfy the copyright laws is not susceptible to bright line rules or broad principles," but "in determining creativity, such a decision necessarily requires the exercise of informed discretion,

> and the Register, in part due to having to make such determinations on a daily basis, is generally recognized to possess considerable expertise over such matters." *Id.*

Because these three works do not possess the required creativity and originality to support copyright registration, we must affirm the Examining Division's decision to refuse registration.

The Board's decision constitutes final agency action.

Sincerely,

David O. Carson
General Counsel
for the Appeals Board
U.S. Copyright Office