August 7, 2002

Amended August 23, 2002

Thomas A. Adams, Esq.
Baker & Daniels
111 East Wayne Street
Suite 800
Fort Wayne, IN 46802

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101 Independence
Avenue, S.E.

Washington, D.C.
20559-6000

RE: TECUMSEH DESIGN
Control Number: *60-701-638-5(B)*

Dear Mr. Adams:

On behalf of the Copyright Office Appeals Board, I am responding to your letter of August 8, 2000 seeking a second appeal of the refusal to register the TECUMSEH DESIGN. I apologize for the delay in responding. For the reasons stated below, the Copyright Office Appeals Board affirms the Examining Division's refusal to register.

Administrative Record

On March 9, 1999, the Copyright Office received a registration application from your client, Tecumseh Products Company, for a graphic design identified as TECUMSEH DESIGN. The design features the word "Tecumseh" with a half semi-circle border on top of the word containing six straight lines in increasing length, and another half semi-circle border on the bottom of the word containing six straight lines in increasing length followed by a long straight line underlining the word "Tecumseh" from the first "e" in the word to the second "e" in the word.

Visual Arts Examiner John Martin refused registration on August 3, 1999 on the grounds that TECUMSEH DESIGN lacked sufficient copyrightable authorship. On November 30, 1999, you filed a first appeal of the rejection wherein you submitted that TECUMSEH DESIGN was a creative work of authorship that consisted of more than simple words or familiar designs. You submitted a series of prototype drawings of the design to demonstrate that the final product was an "inventive graphical design embodying an artistic vision of whirling lawn-mower blades or engine fan blades that resulted from considerable creative effort." First Appeal letter at 3. You concluded that the TECUMSEH DESIGN was not a familiar design or symbol but was "a fanciful symbol thoughtfully and painstakingly developed to convey an impression of blades in motion." *Id.*

Attorney Advisor Virginia Giroux responded to your appeal by maintaining the refusal to register TECUMSEH DESIGN. She noted that while the standard of creativity that must be present is minimal, *see* Feist Publications v. Rural Telephone Service Co., 499 U.S. 340 (1991),

a work must nonetheless contain a sufficient amount of original or graphic authorship upon which to support a copyright registration. Ms. Giroux analyzed the TECUMSEH DESIGN and found that it consisted of two arcs and a series of parallel lines that are common geometric shapes and therefore not subject to copyright protection. She also found the word "Tecumseh" to be uncopyrightable, citing 37 C.F.R. 202.1. Ms. Giroux acknowledged that TECUMSEH DESIGN must be considered in its entirety, citing Atari Games Corp. v. Oman, 888 F.2d 878 (D.C. Cir. 1989), but concluded that "the arrangement and combination of the few design elements in this work fail to rise to the level of copyrightability necessary to support a copyright claim." Letter of Virginia Giroux to Thomas Adams, April 11, 2000 at 2.

Ms. Giroux distinguished the cases that you cited: Parfum Givenchy, Inc. v. C&C Beauty Sales, Inc., 832 F. Supp. 1378 (C.D. Cal. 1993); Soptra Fabrics Corp. v. Stafford Knitting Mills, Inc., 490 F.2d 1092 (2d Cir. 1974); Tennessee Fabricating Co. v. Moultrie Mfg. Co., 421 F.2d 279 (5th Cir. 1970); Concord Fabrics, Inc. v. Marcus Bros. Textile Corp., 409 F.2d 1315 (2d Cir. 1969); and In Design v. Lynch Knitting Mills, Inc., 689 F. Supp. 176 (S.D.N.Y. 1988). Ms. Giroux stated that each of the designs involved in these cases "was more than a trivial variation of a theme - either by selecting a variety of shapes or by arranging them in a creative manner or both. We do not find that to be the case with the present work." April 11, 2000 letter at 3. Ms. Giroux also distinguished Drop Dead Co. v. S.C. Johnson & Son, Inc., 326 F.2d 89 (9th Cir. 1964), which involved a product label, on the grounds that the Court in that case found the text of the label to be copyrightable as opposed to any graphic designs appearing on the label.

On August 8, 2000, you submitted a second appeal for TECUMSEH DESIGN. You argue in your second appeal that while the arc and parallel lines of the TECUMSEH DESIGN may be familiar, the combination of these lines create a "whirling blade design" that is creative and by no means familiar. You submit that many hours were invested in the difficult task of capturing the concept of motion in the static medium of line art, and that TECUMSEH DESIGN is the successful product of depicting whirling lawnmower blades or whirling engine fan blades in this abstract medium.

De Minimis Authorship

The Appeals Board agrees that only a "modicum of creativity" is necessary for copyrightable expression under the Feist standard. 499 U.S. at 345, 347 (1991). However, the Board has determined that either taken as a whole or viewed as discrete elements, the design elements of TECUMSEH DESIGN do not exhibit copyrightable authorship.

It is evident that neither the word "Tecumseh" nor the styling of the print is subject to copyright protection. Individual words or names are not copyrightable 37 C.F.R. 202.1(a). Furthermore, lettering is not copyrightable, even though it might be distinctive or stylized. Compendium of Copyright Office Practices, Compendium II, §202.02(j) (1984).

The whirling blade design, as you describe it, is a combination of two arced lines and a series of parallel designs. Common shapes or designs, or simple arrangements of such common elements do not embody copyrightable authorship. 37 C.F.R. §202.1(a). You submit that the whirling blade design is the product of considerable time and effort to create the impression of motion in a static line drawing. The amount of time and effort exerted to create a work does not satisfy the creativity requirement. Feist, 499 U.S. at 364 (rejecting the "sweat of the brow" doctrine). Further, the impression created by the design or its artistic merit or commercial appeal is not relevant to a copyright analysis. Compendium II, §503.02(a). As you admit, the "effect on the 'mind of the viewer' is not a determiner of copyright."

You argue that the while the arcs and parallel lines of TECUMSEH DESIGN may be commonplace, their arrangement to create the whirling blade design is far from familiar and constitutes a creative choice. In theory, an author creating any work has an unlimited choice of alternatives. The fact remains, however, that what was selected in this case – the two arcs and series of parallel lines – are too modest to qualify for copyright protection. The arc appearing above the word "Tecumseh" is a simple half-arced line sloping backward. The parallel lines beneath it are of increasing length to create the impression of motion. The use of sloped lines to depict motion is a commonplace technique in graphic design. While you may be right that it is sometimes difficult to depict motion in a static line drawing, the manner in which it is depicted in TECUMSEH DESIGN is nevertheless simple and commonplace. Likewise, the bottom half of the whirling blade design is the same combination of elements as the top, except that arc is slightly longer in length and the top parallel line underlines most of the word "Tecumseh." These differences between the top and bottom portions are trivial. Viewed as a whole, the combination of the top and bottom designs are not sufficiently creative to warrant registration.

Although you argue that John Muller & Co., Inc. v. New York Arrows Soccer Team, Inc., 802 F.2d 989 (8th Cir. 1986) is distinguishable from this case, the Board finds it particularly apposite. The logo in John Muller consisted of angled lines bordering the word "arrows" that, not unlike TECUMSEH DESIGN, were suggestive of an object (an arrow) in motion. The Board disagrees that the concept of a fan blade in motion is any more original such as to merit copyright protection than the concept of an arrow in motion as presented in the John Muller case.

For the reasons stated above, the Board affirms the Examining Division's refusal to register TECUMSEH DESIGN.

Sincerely,

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

August 23, 2002

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Fort Wayne, IN 46802

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RE: TECUMSEH DESIGN
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Dear Mr. Adams:

The August 7, 2002 decision letter of the Copyright Office Appeals Board regarding the above-referenced appeal has been amended. A copy of the amended letter is enclosed.

101 Independence
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The only substantive change appears in the paragraph commencing, "Ms Giroux distinguished the cases that you cited." In that paragraph, describing the decision on the first appeal, the following sentence has been removed: "Each of the cases deals with the copyrightability of fabric designs."

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common elements do not embody copyrightable authorship. 37 C.F.R. §20.1(a). You submit that the whiling blade design is the product of considerable time and effort to create the impression of motion in a static line drawing. The amount of time and effort exerted to create a work does not satisfy the creativity requirement. Feist, 499 U.S. 340 (1991)(rejecting the "sweat of the brow" doctrine). Further, the impression created by the design or its artistic merit or commercial appeal is not relevant to a copyright analysis. Compendium II, §503.02(a). As you admit, the "effect on the 'mind of the viewer' is not a determiner of copyright."

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