United States Copyright Office
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August 31, 2007

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RE: CINCH DESIGN
Control No.: 61-406-4956(B)

Dear Mr. Beiser:

I am writing on behalf of the Copyright Office Review Board in response to your second request for reconsideration dated November 8, 2006. After reviewing the application from your client, Deesh Designs, Inc., and the arguments you presented on the Applicant's behalf, the Board upholds the Examining Division's refusal to register the Applicant's design for clothing entitled "CINCH Design."

ADMINISTRATIVE RECORD

On October 26, 2005, the Copyright Office received an application from Deesh Designs, Inc., to register a design for clothing, entitled CINCH Design, that included a cover letter in which you cited several cases in support of its registration. In a letter dated February 8, 2006, Visual Arts Examiner Joanna Corwin refused to register CINCH because it does not have any features separable from the functional aspects of the garment.

In a letter dated April 12, 2006, you submitted a first request for reconsideration on behalf of the Applicant in which you argued that CINCH is copyrightable. You allege that *Cosmopolitan* magazine believes CINCH is original and creative, providing Exhibit A which consists of copies of pages from *Cosmopolitan's* June 2003 issue depicting clothing. You argued that CINCH is separable from the utilitarian function of the clothing.

In a letter dated August 8, 2006, Attorney Advisor Virginia Giroux-Rollow stated that CINCH is not copyrightable because it is not separable from the utilitarian function of the clothing and, further, even if it were separable, it is not copyrightable because it is a common shape or design for clothing. Ms. Giroux-Rollow reviewed the legal basis for the separability analysis used by the Copyright Office. She discussed cases that you cited in support of registering CINCH, arguing that they are distinguishable from the facts in this case.

In a letter dated November 8, 2006, you submitted a second request for reconsideration on behalf of the Applicant in which you again argued that CINCH is copyrightable,

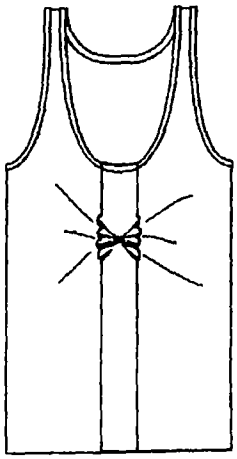
incorporating your previous arguments. In addition, you rejected Ms. Corwin's and Ms. Giroux-Rollow's comments, alleging that their arguments are subjective opinions reflecting a bias against the work. You also criticized their arguments against registration for not taking into consideration or commenting on the precedent in *Express, LLC v. Fetish Group, Inc.*, 424 F.Supp.2d 1211 (C.D. Cal. 2006), which you had previously cited. You argued, based on *Express* and Copyright Office publication, *Copyright Registration for Works of the Visual Arts*, Circular 40, that elements separable from the utilitarian functions of useful articles may be copyrightable. You argued that CINCH is entitled to be registered because of similarities between it and the work at issue in *Express* which the Copyright Office registered.

DECISION

After reviewing the application and your arguments in favor of registering the Applicant's work, CINCH Design, the Copyright Office Review Board upholds the Examining Division's decision to refuse registration.

ANALYSIS

The work at issue here, CINCH, is a feature of clothing. Although you have described it on the application for registration as a 'fanciful fabric design,' you have also checked the authorship description box on the application for "3-dimensional sculpture." The work CINCH is essentially a feature appearing on or within a piece of clothing which consists of a few folds or pleats sewed together into a small fan-, or cluster-like feature. CINCH is not a 2-dimensional design appearing on the surface of a piece of fabric. We have reproduced below the drawing originally submitted with the application for registration.



The Board's analysis of CINCH Design and the legal basis for the Board's conclusions are discussed below. In the analysis for determining whether a work is copyrightable, a threshold determination is made about whether a work is a useful article or not. If it is not a useful article, the analysis proceeds immediately to the question of whether the work is sufficiently original to be copyrightable. However, if the work is a useful article, the second step is to determine whether it has any elements that are separable from its utilitarian function because Congress has decreed that there is no copyright protection for any element that is not separable. If there are no separable elements, that ends the analysis and the work is not copyrightable. If there are separable elements, the Office examines them to determine whether they have sufficient originality (which requires both independent creation and sufficient creativity) to be copyrightable. The separability analysis is independent of, and precedes, any [if necessary] creativity analysis.

1. Useful Article Analysis

Based on the statutory definition and evidence in the application, the Board concludes that CINCH is a useful article. The Board is not persuaded that the Applicant's work is a "fabric design" as indicated on the application for registration; as we have indicated above, a fabric design is understood, for registration purposes, to be a 2-dimensional design or graphic appearing on the surface of a piece of fabric. As such, this design– really, artwork– is not a useful article under copyright law.

The Applicant's work, rather, is created by manipulating fabric or, as the name suggests, by cinching folds of fabric together using a sewing technique that causes the material to look as though it is being pinched. As it appears in the deposit material drawing, CINCH Design is incorporated into a blouse or the bodice of a dress, positioned in the middle of the chest area. It is a symmetrical cluster of a few gatherings of fabric.

The sewing technique used to create CINCH is widely known by its French name as "ruching." Ruching means to plait or, in connection with fabric, to gather, ruffle or pleat. It is a traditional sewing technique that is well documented. On the Internet, rouching is explained and illustrated at many websites, including these:

http://www.quiltersfancy.com/ruching.htm
http://www.wisegeek.com/what-is-ruching.htm
http://www.roserushbrooke.com/how-to-ruche.html and
http://www.essortment.com/hobbies/sewingtipsruch_shiv.html.

Ruching is analogous to design elements for apparel that are used to construct clothing, such as gathering fabric at the waistline of a skirt, attaching elastic ribbon to fabric or sewing darts into fabric. Similar to those clothing design elements, ruching is applied to fabric after it is manufactured, when it is being made into pieces of clothing. In the administrative record for

this claim, there are several instances in which it is stated or implied that CINCH is a fabric design. Again, the application describes CINCH as a "fabric design." Also, in your cover letter for the Applicant's registration application, you cite, without discussion, the following cases in support of registering CINCH: *Folio Impressions, Inc. v. Byer California*, 937 F.2d 759 (2d Cir. 1991) (plaintiff's Folio Rose and arrangement of it in fabric design is copyrightable but not the background of the fabric design); *Sherry Manufacturing Co. v. Towel King of Florida, Inc.*, 753 F.2d 1565 (11th Cir. 1985) (plaintiff's variation on a fabric design is not substantial enough to be entitled to copyright protection as a derivative work); *Spectravest, Inc. v. Mervyn's, Inc.*, 673 F. Supp.1486 (N.D.Cal. 1987) (plaintiff alleged infringement of copyright for registered puzzle teddy bear fabric design); *Cameron Industries, Inc. v. Albert Nipon Co.*, 630 F. Supp. 1293 (S.D.N.Y. 1986) (court ruled that plaintiff's registered copyright for bow tie fabric design was not infringed); *Peter Pan Fabrics, Inc. v. Candy Frocks, Inc.*, 187 F. Supp. 334 (S.D.N.Y. 1960) (plaintiff's floral design on fabric is copyrightable); *Peter Pan Fabrics, Inc. v. Brenda Fabrics, Inc.*, 169 F. Supp. 142 (S.D.N.Y. 1959) (plaintiff's intricate Byzantium fabric design is copyrightable) and *Peter Pan Fabrics, Inc. v. Acadia Co.*, 173 F. Supp. 292 (S.D.N.Y. 1959) (plaintiff's highly intricate and detailed fabric designs are copyrightable).

Later, to support your arguments in the first request for reconsideration, you relied on *Soptra Fabrics Corp. V. Stafford Knitting Mills, Inc.*, 490 F.2d 1092 (2d Cir. 1974). In that case, the court found sufficient creativity for copyright protection in plaintiff's few rearrangements of a floral fabric pattern so that the pattern's layout was more attractive when cut for dress patterns. In addition, the Board takes note of your reliance on *Express*, which you discuss for the first time in your second request for reconsideration, for the principle that fabric patterns and sculptural elements placed on or embedded in utilitarian articles may be copyrightable. Letter from Beiser of 11/8/06, at 3.

The Board acknowledges that fabric designs, patterns, or pictorial arrangements, embodied on the surface of fabric itself, may be copyrightable if they represent sufficiently creative 2-dimensional artwork or graphics, regardless of how the fabric in which the design or pattern is embodied may be used. A claim in fabric design, thus, for registration purposes, is necessarily limited to the surface appearance of the fabric, *i.e.*, the conceptually separable artwork decorating a piece of cloth. Sculptural or aesthetic elements that are added to, or perhaps embedded within, fabric as part of the process of constructing or manufacturing clothing designs may also be copyrightable. The Board finds that CINCH is more akin to the latter, *i.e.*, elements that are added to or embedded within fabric as part of the configuration and construction of wearing apparel, not as a 2-dimensional design on the fabric itself.

The statute defines a useful article as having "an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." 17 U.S.C. § 101 (definition of "useful article"). The second sentence of that definition states, "An article that is normally a part of a useful article is considered a 'useful article.'" *Id.* Ruching is normally part of clothing, a useful article. Therefore, we consider CINCH a useful article as well.

Because it is a useful article, the separability analysis must be applied to it to determine whether there are any separable elements.

2. Separability Analysis

The Copyright Office's policies and procedures for the separability analysis are based on statutory and legislative considerations. The purpose of the separability analysis is to ensure that utilitarian aspects of useful articles are not registered since they are not copyrightable subject matter. Written guidelines for the separability analysis are found in *Compendium of Copyright Office Practices II*, § 505.02 (1984), which states that:

> Registration of claims to copyright in three-dimensional useful articles can be considered only on the basis of separately identifiable pictorial, graphic, or sculptural features which are capable of independent existence apart from the shape of the useful article. Determination of separability may be made on either a conceptual or physical basis. (emphasis added)

These guidelines are based on the legislative history of the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 254, quoted below, in which Congress clarified that utilitarian aspects of useful articles are not copyrightable. Only elements that are physically or conceptually separable from the utilitarian purpose of a useful article may be copyrighted.

> [A]lthough the shape of an industrial product may be aesthetically satisfying and valuable, the Committee's intention is not to offer it 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 of an article is determined by esthetic (as opposed to functional) considerations, only elements, if any, which can be identified separately from the useful article as such are copyrightable. And, even if the three-dimensional design contains some such element (for example, a carving on the back of a chair or a floral relief design on silver flatware), copyright protection would extend only to that element, and would not cover the over-all configuration of the utilitarian article as such.

H.R. Rep. No. 94-1476, at 55 (1976). (emphasis added)

In the case of physical separability, *Compendium II*, § 505.04, states:

> The physical separability test derives from the principle that a copyrightable work of sculpture which is later incorporated into a useful article retains its copyright protection. ... However, since the overall shape of a useful article is not copyrightable, the test of physical separability is not met by the mere fact that the housing of a useful article is detachable from the working parts of the article.

In the case of conceptual separability, *Compendium II*, § 505.03, states:

> Conceptual separability means that the pictorial, graphic or sculptural features, while physically inseparable by ordinary means from the utilitarian item, are nevertheless clearly recognizable as a pictorial, graphic, or sculptural work which can be visualized on paper, for example, or as free-standing sculpture, as another example, 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. The artistic features and the useful article could both exist side by side and be perceived as fully realized, separate works– one an artistic work and the other a useful article. (Emphasis added.)

Section 505 of *Compendium II*, as quoted above, is a valid interpretation of copyright law because it is a direct successor to the Copyright Office regulation that was affirmed in *Esquire, Inc. v. Ringer*, 591 F.2d.796 (D.C. Cir. 1978), *cert. denied* 440 U.S. 908 (1979). The Office relies on the authority of *Esquire* for the analysis it follows to determine whether pictorial, graphic or sculptural works are separable from the utilitarian objects in which they are incorporated.

Relying on explicit statements in legislative history, the *Esquire* court found that the Office's regulation was an authoritative construction of the copyright law. *Id.* at 802-803. *Esquire* and later cases held that, despite an aesthetically pleasing, novel or unique shape, the overall design or configuration of a utilitarian object may not be copyrighted if it is not "capable of existing as a work of art independent of the utilitarian article into which [it is] incorporated." *Id.* at 803-804. In *Esquire*, the court held that the Copyright Office properly refused registration for a useful article, in that case a light fixture, notwithstanding how aesthetically pleasing the

useful article's shape or configuration may have been. *Id.* at 800. As noted above, the legislative history states that:

> 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 of an article is determined by esthetic (as opposed to functional) considerations, only elements, if any, which can be identified separately from the useful article as such are copyrightable.

H.R. Rep. No. 94-1476, at 55 (1976).

Based on the foregoing considerations, the Board has determined that the work CINCH is not separable, either physically or conceptually. CINCH is part of the particular configuration or the shape of the clothing in which it is incorporated. CINCH serves the function of gathering the fabric together so that it appears gathered, bunched, or softly pleated.

If CINCH were literally physically removed, the overall shape of the useful article, the blouse, would be altered. The same is true if CINCH were conceptually imagined as being removed. The gathering of the material is part of the overall shape of the useful article, the shape which, in your client's opinion, is aesthetically enhanced by the adding of CINCH to the clothing design. CINCH is analogous to the shaping of pants by adding a dart or shaping of a skirt by adding pleats. Therefore, CINCH Design is part of the very piece of apparel and, under *Compendium II's* test, is not separable from the utilitarian object, in this case, clothing, in which it is incorporated without, in the words of *Compendium II*, § 505.03, destroying– or essentially altering– the basic shape of the useful article, *i.e.*, the particular shape of the piece of apparel.

3. Originality Analysis

Although the Board has ruled that CINCH is not separable from the overall shape of the clothing or fabric in which it is embodied, it has evaluated the work, nevertheless, to determine whether it would be sufficiently creative to be copyrightable, on the basis of assuming *arguendo* that CINCH is separable. However, the Board concludes that, even assuming separability, CINCH is not sufficiently creative to be copyrightable and thus registrable.

The statute mandates that copyright protection is available only for "original works of authorship." 17 U.S.C. §102(a). The Supreme Court has stated that originality consists of two elements, "independent creation plus a modicum of creativity." *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 346 (1991). *See also Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d Cir. 1951) ("'Original' in reference to a copyrighted work means that the particular work 'owes its origin' to the 'author.' No large measure of novelty is necessary."); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 59 (1884) (court defined

"author" to mean the originator or original maker and described copyright as being limited to the creative or "intellectual conception of its author"). The Review Board accepts that CINCH Design satisfies *Feist's* independent creation prong for originality. However, although the level of creativity required by law is very modest, as discussed below, the *de minimis* level of creativity found in CINCH is not sufficient to satisfy the second *Feist* prong– the modicum of creativity.

In *Feist*, the Supreme Court's holding that a very minimal level is necessary to satisfy the creativity aspect of "original" was consistent with previous jurisprudence. Any "distinguishable variation" of a work constitutes sufficient originality as long as it is the product of an author's independent efforts, and is "more than a 'merely trivial' variation." *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903) ("... a very modest grade of art has in it something irreducible, which is one man's alone.")

At the same time that the Supreme Court reaffirmed in *Feist* the precedent that only a modicum of originality is required for a work to be copyrightable, it also emphasized that there are works in which the "creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Feist*, 340 U.S. at 359. Such works are incapable of sustaining copyright protection. *Id.*, citing 1 M. Nimmer & D. Nimmer, *Nimmer on Copyright*, § 2.01[B]. 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," *Feist* 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. A work that reflects an obvious arrangement fails to meet the low standard of minimum creativity required for copyrightability. *Id.* at 362-363. An example would be alphabetical listings in white pages of telephone directories, the type of work at issue in *Feist*, which the Supreme Court characterized as "garden-variety...devoid of even the slightest trace of creativity." *Id.* at 362.

a. Office registration practices

Copyright Office registration practices have long recognized that some works of authorship exhibit only a *de minimis* amount of authorship and, thus, are not copyrightable and not registrable. *See Compendium II,* § 202.02(a) (1984). With respect to pictorial, graphic and sculptural works, which are Class VA [visual arts] works, § 503.02(a) of *Compendium II* states that a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." Further, there is no protection for familiar symbols, designs or shapes such as standard geometric shapes. 37 C.F.R. § 202.1 (2006). *Compendium II* essentially provides detailed instructions for Copyright Office registration procedures and reflects the principle that creative expression is the basis for determining whether a work is copyrightable, not an assessment of aesthetic merit. Section 503.02(a) of *Compendium II* states that:

> Copyrightability depends upon the presence of creative expression in a work, and not upon aesthetic merit, commercial appeal, or symbolic value. Thus, 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. ... 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.

Section 503.02(a) reflects one of the most fundamental principles of copyright law: common and ordinary shapes and designs, and minor variations of those, may not be copyrighted because that could limit their availability to the general populace. Common and ordinary shapes and symbols are in the public domain for use by all since they form the building blocks for creative works.

b. CINCH's creativity is *de minimis*.

The Review Board finds that the level of creativity in CINCH would be *de minimis* if the Board would assume the necessary separability– which it does not. Again, for the sake of argument, however, we have analyzed the work as if it had met the separability requirement and find that the work CINCH consists merely of the gathering or bunching together of fabric; this is a commonplace and ordinary feature found in clothing that results in an unprotectible shape or design. As discussed above, the technique to create CINCH's design is commonly referred to as ruching. Although a ruching element may appear in different types of configurations, such as in circles and long or short rows, it is fundamentally limited because, in itself, it consists of simple gathers [pleats or ruffles] that result, by means of sewing, in a fan-like or cluster-like element within the clothing. While the underlying technique to create the ruching may be simple or complex, done by hand or machine, the resulting appearance or design is a common and minimal shape or structural appearance within the garment. The technique or process for creating the ruching is, of course, not copyrightable. 17 U.S.C. § 102(b): procedures, processes, methods, and concepts are not subject to copyright protection. The deposit drawing submitted for registration visualizes the CINCH Design and shows that its appearance consists of a few gatherings, ruffles, or pleats of material sewn together into a small cluster of the material folds. Its few elements that are created by repeating a single shape, which is a pleat of fabric, are arranged in a common, centrally gathered, and simplistic manner. Its creativity is *de minimis*.

There is substantial support in case law for the Board's conclusion that a few basic shapes or a simple arrangement of a few basic shapes are not copyrightable: in *Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q.2d 1074 (D. D.C. 1991), upholding refusal to register chinaware design pattern composed of simple variations or combinations of geometric designs due to insufficient creative authorship to merit copyright protection; in *Jon Woods Fashions, Inc. v. Curran*, 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988), upholding refusal to register fabric design consisting of striped cloth with small grid squares superimposed on the stripes where Register concluded design did not meet minimal level of creative authorship necessary for copyright; in *John Muller & Co. v. New York Arrows Soccer Team, Inc.*, 802 F.2d 989 (8th Cir. 1986), upholding a refusal to register a logo consisting of four angled lines forming an arrow, with the word "arrows" in cursive script below, noting that the design lacked the minimal creativity necessary to support a copyright and that a "work of art" or a "pictorial, graphic or sculptural work ... must embody some creative authorship in its delineation of form." *See also Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc.*, 634 F. Supp. 769 (W.D. Pa. 1986), envelopes with black lines and words "gift check" or "priority message" did not contain minimal degree of creativity necessary for copyright protection; *Bailie v. Fisher*, 103 U.S. App. D.C. 331, 258 F.2d 425 (D.C. Cir. 1958), cardboard star with two folding flaps allowing star to stand for retail display not copyrightable work of art; and *Forstmann Woolen Co. v. J.W. Mays, Inc.*, 89 F. Supp. 964 (E.D.N.Y. 1950), label with words "Forstmann 100% Virgin Wool" interwoven with three *fleur-de-lis* held not copyrightable.

The Board finds that CINCH is too simple to result in an overall work that rises to the level of copyrightable authorship. Like the alphabetical arrangement in *Feist,* a simple arrangement of ruching falls within the category of simple, minimal authorship which *Feist* referred to as "entirely typical"or "garden variety" authorship. The Board is unable to recognize in CINCH Design any contribution that is "more than merely trivial."

In support of your arguments for registering CINCH, you have also alleged that *Cosmopolitan* magazine believes that it is creative and original which you argue is evidence that CINCH is copyrightable. Letter from Beiser of 11/8/2006, at 3. However, the Copyright Office has the statutory duty of examining all works submitted for registration and evaluating the works under its own independent review to determine whether the "material deposited constitutes copyrightable subject matter." 17 U.S.C. § 410(a). We have cited, *above at 8*, the principle that the Office does not evaluate the aesthetic or the commercial qualities of works. A work may be highly valued for its aesthetic appeal and, yet, not be copyrightable. The Copyright Office cannot, then, in its administrative duty regarding registration of claims to copyright, accept the conclusion of a third-party, in this case, *Cosmopolitan Magazine*, that a given work meets *Feist's* standard of sufficient creativity. Rather, as we have already emphasized, copyright law requires evidence of more than a *de minimis* quantum of authorship. Such authorship may consist of a selection, coordination and arrangement of preexisting elements or features that are in the public domain. *See, e.g., Satava v. Lowry*, 323 F.3d 805 (9th Cir. 2003). Works based on public domain elements may be copyrightable if there is some distinguishable element in their

selection, arrangement or modification that reflects choice and authorial discretion and that is not so obvious or so minor that the "creative spark is utterly lacking or so trivial as to be nonexistent." *Feist*, 499 U.S. at 359. CINCH consists of a few, simple folds or pleats of fabric brought together at a center point, resulting in a simple, obvious feature.

Finally, you have also made the argument that CINCH is entitled to be registered on the basis that it is as creative as the work at issue in *Express* which the Office registered. In its analysis to determine whether there is sufficient creativity for copyright protection, the Copyright Office does not compare works. *Compendium II*, § 108.03. Rather, the analysis for registration involves considering the merits of each work, by itself, without comparison to other works. We also point out, however, that the embroidery design, original with the defendant in *Express*, Fetish Group, appearing on the camisole piece of women's clothing in question was determined by the Court to be covered by the registration and that the embroidery design formed the basis of a 'thin copyright' which the Court held was infringed. *Express*, 424 F. Supp.2d at 1227-1229. The work at issue here, CINCH, cannot be analogized to the *Express* embroidery design: CINCH is not a pictorial work such as "patterns or other artistic features imprinted onto fabric," *id.* at 1224, which exist independently of the overall shape or configuration of the clothing. Rather, CINCH, as we have explained, is a part of the structure of the fabric itself, created as an identifiable part by a simple gathering or pleating of that fabric which is then secured by a centering stitching. Such a feature within a piece of apparel cannot be said to be similar to an embroidered pattern or to a design within a piece of lace.

For the reasons stated in this letter, the Review Board affirms the Examining Division's refusal to register CINCH Design. This decision constitutes final agency action.

Sincerely,

N. Petruzzelli

Nanette Petruzzelli
Associate Register for
Registration and Recordation
for the Review Board
United States Copyright Office