United States Copyright Office
Library of Congress · 101 Independence Avenue SE · Washington, DC 20559-6000 · www.copyright.gov

February 23, 2009

Irving Keschner
21535 Hawthorne Boulevard, Suite 385
Torrence, California 90503

RE: Control No. 61-415-7591(K)
Mantra Series of Glass Tile Arrangements

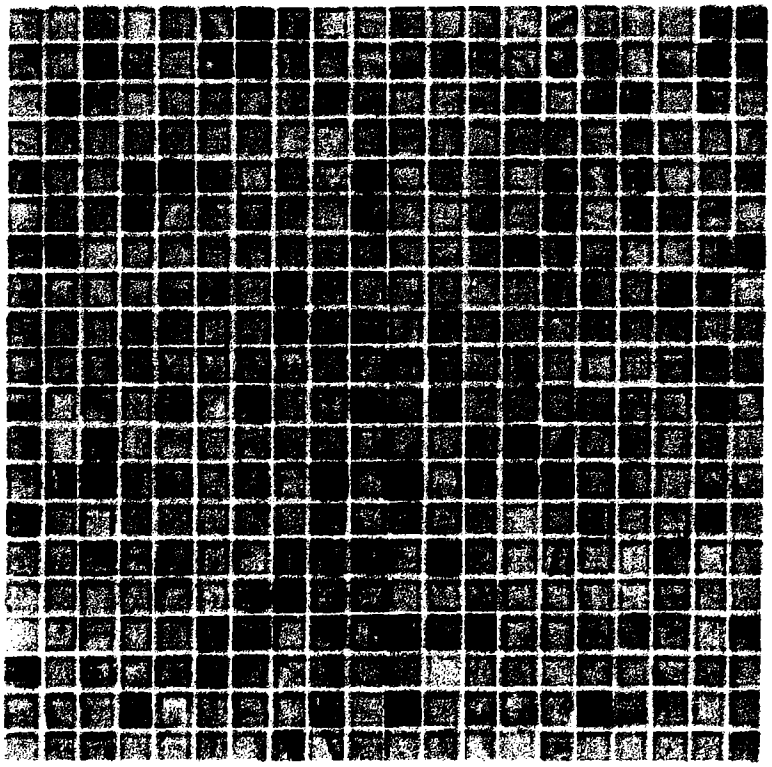
Consisting of the individual works:
Indigo Glass, Mantra Series
Indigo Matte, Mantra Series
Silver Glass, Mantra Series
Silver Matte, Mantra Series
Tortoshell Glass, Mantra Series
Tortoshell Matte, Mantra Series
Olive Glass, Mantra Series
Olive Matte, Mantra Series
Fennel Glass, Mantra Series
Fennel Matte, Mantra Series
Henna Glass, Mantra Series
Henna Matte, Mantra Series
Lotus Glass, Mantra Series
Lotus Matte, Mantra Series
Saffron Glass, Mantra Series
Saffron Matte, Mantra Series
Sandlewood Glass, Mantra Series
Sandlewood Matte, Mantra Series
Sari Blue Glass, Mantra Series
Sari Blue Matte, Mantra Series

Dear Mr. Keschner:

The Copyright Office Review Board has reviewed your request to reconsider the Examining Division's refusal to issue copyright registrations for the works collectively referred to as "The Mantra Series of Glass Tile Arrangements" ("the Works") on behalf of your client, Carl Steadly. After considering the materials submitted in support of the claims, the Board has determined that the Works are useful articles that do contain conceptually separable features, but that the Works cannot be registered because those conceptually separable aspects do not contain sufficient creative authorship.

DESCRIPTION OF THE WORKS

The Works, collectively referred to as "The Mantra Series of Glass Tile Arrangements," are twenty individual works which consist of an arrangement of twenty rows and twenty columns of square glass tiles. The glass tiles included in each individual work are generally the same predominant color. The predominant color in each arrangement of tiles is dispersed throughout the individual tiles in a unique manner. The patterns of swirls and various shapes in each tile is a result of the individual cooling patterns of the three to four veins of molten glass which is mixed and then poured into a press to make tiles. The selection and arrangement of individual tiles within each square of rows and columns is random and is meant to form a "mosaic" look. A photographic image of "Sari Blue Gloss, Mantra Series," which is representative of "The Mantra Series of Glass Tile Arrangements" appears below:



ADMINISTRATIVE RECORD

On February 3, 2006, the Copyright Office received the applications for registration of the Works, submitted by you on behalf of your client, Carl Steadly. In a letter dated August 25, 2004, Examiner Wilbur King cited the standards for original authorship as expressed in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903) and *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 358 (1991). He then advised you that the claim could not be registered because the Works are not sufficiently original to support copyright registration. *Letter from King to Keschner* of 8/10/2006.

In a letter dated August 22, 2006, you requested reconsideration of the Office's refusal to issue a copyright registration. The appeal cited *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.* pointing out that the required level of originality to obtain registration is minimal. *Feist*, 499 U.S. 340, 358 (1991). You then pointed toward *Atari Games Corp. v. Oman* noting that "simple shapes when selected or combined in a distinctive manner indicating some ingenuity, have been accorded copyright protection by the Register and in court." *Atari Games Corp. v. Oman* 888 F.2d 878, 883 (1989). Additionally you submitted that similar works had previously been approved for copyright registration. *Letter from Keschner to Examining Division* of 8/22/2006.

In a letter dated March 6, 2007, you followed up on a number of questions raised to you by Attorney-Advisor Virginia Giroux-Rollow. In this letter you indicated the manner in which the glass tiles that comprise the arrangements are produced. You stated that two molten streams of glass are placed in a burner to re-melt and then another powder stream of glass is mixed in, glass is twirled around a gaffer rod and then poured into a press, cooled, mixed to get a good range of all the mosaics throughout the batch, laid onto mounting boards, mounting paper is placed on top (with glue, dried, and packed). You then noted that the "selection and arrangement of glass tile pieces is random." *Letter from Keschner to Attorney-Advisor Virginia Giroux* of 3/6/2007.

After receiving your letters from August 22, 2006 and March 3, 2007, Attorney Advisor, Virginia Giroux-Rollow, of the Examining Division reexamined the application and the deposit. In a letter dated March 19, 2007, Ms. Virginia Giroux-Rollow upheld the refusal to register the Works because the tiles are useful articles that do not contain any authorship that is both separable and copyrightable. *Letter Giroux-Rollow to Keschner* of 8/19/2007 at 1.

Ms. Giroux-Rollow noted that it is not the material of which a work is made that determines copyrightability and the fact that the Works are made of glass does not contribute to the Works eligibility for registration. *Id.* She also pointed out that Section 102(b) of the copyright law makes it clear that copyright protection does not extend to an idea, process, technique, method, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in a work. 17 U.S.C. 102(b). She explained that it is therefore not the process or technique of melting and mixing streams of

glass to achieve a "mosaic" look. Instead, the actual resulting expression on the surface of each work is examined for original and creative authorship. *Id.* at 2.

Ms. Giroux-Rollow noted that an article that is part of a "useful articles" is a useful article under the definition of useful article in section 101 of the copyright law. She explained that copyright protection could be extended if, and to the extent that, a work has any pictorial, graphic, or sculptural authorship that is either physically or conceptually separable from the utilitarian aspects of the article without destroying its basic shape. She added that in making this determination examiners do not make aesthetic judgments nor are they influenced by the attractiveness of a design, its visual effect or appearance, its uniqueness, its symbolism, the amount of time and effort it took to create, or its commercial success in the marketplace. She then clarified that the question of whether the Works contain a sufficient amount of original and creative authorship that is both separable and copyrightable is to be determined within the meaning of the copyright law and settled case law. *Id.*

The Office's test for conceptual separability, as pointed out by Ms. Giroux-Rollow, is enunciated in *Compendium of Copyright Office Practices*, *Compendium II*, 505.03 (1984), which generally follows the separability principle set forth in Esquire v. Ringer, 591 F.2d 796 (D.C. Cir. 1978). *Compendium II*, she noted, provides that conceptual separability occurs when 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 a free-standing sculpture, as another example, independent of the shape of the article, without destroying the basic shape of the article. *Id.*

Ms. Giroux-Rollow stated that conceptual separability could not be met by analogizing the general shape of a useful article to modern sculpture, or by arguing that certain features are non-functional, or could have been designed differently. She further contended that Esquire upheld the Office's position of not registering useful articles on the basis of the overall shape or configuration of a utilitarian article, no matter how aesthetically pleasing that shape might be. *Id.* at 2-3.

She determined that while the Works are useful articles, the design on each work can be viewed as conceptually separable from the utilitarian aspects of the tiles. However, she also concluded that the designs coupled with their variation in coloring, are not copyrightable. *Id.* at 3.

Citing *Feist*, Ms. Giroux-Rollow stated that a work must not only be original, but must possess more than a *de minimis* quantum of creativity. And, in the case of a design, a certain amount of pictorial, graphic or sculptural material must originate with the author. *Id.* She elaborated that originality, as interpreted by the courts, means that the authorship must constitute more than a trivial variation of public domain elements, citing *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951). *Id.*

Ms. Giroux-Rollow described the Works in question. She then made note of the fact that the selection and arrangement of the glass tile piece is random. Further she observed that the design on the surface of each work is the result of a process or technique, and therefore does not contain a sufficient amount of original and creative human artistic authorship upon which to support copyright registration. Citing, Copyright Office regulation 37 C.F.R. § 202.1, she noted that color *per se* is not a copyrightable element, and that therefore the selection of three or four colors used on the surface of each work is insufficient variation to support registration. *Id.* Finally, she noted that even if the "mosaic" look coupled with the choice of coloring, the design of each work does not rise to the level of human copyrightable authorship necessary to support registration. *Id.* Citing *Compendium of Copyright Office Practices II*, § 503.02(a).

She stated that the above principles are confirmed by several judicial decisions, including *John Muller & Co. v. New York Arrows Soccer Team, Inc.*, 802 F.2d 989 (8th Cir. 1986)(a logo consisting of four angled lines forming an arrow, with the word "arrows" in cursive script below lacked the minimal required creativity to support registration); *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); *Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q.2d 1074 (D.D.C. 1991) (upholding refusal to register "gothic" pattern composed of simple variations and combinations of geometric designs due to insufficient creative authorship to merit copyright protection); *Jon Woods Fashions, Inc. v. Curran*, 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988)(upholding refusal to register a design consisting of two inch stripes, with small grid squares superimposed upon the stripes). *Id.* at 3-4.

Ms. Giroux-Rollow conceded that it is true that even a slight amount of creativity will suffice to obtain copyright protection. However, she went on to cite *Nimmer* § 2.01(B), which states that "there remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright." *Id.* at 4. She also cited *Feist* for its confirmation that some works fail to meet this admittedly low standard. She then concluded that the Works at issue fell within this narrow area. In explaining this conclusion, she stated that the Copyright Office believes that the "mosaics" on the surface of the tiles, combined with variation in coloring, as well as the arrangement of the elements fail to meet even the low requisite level of creativity required by *Feist*. *Id.*

She explained that the fact that a design is aesthetically pleasing or could have been designed differently are not relevant considerations in determining copyrightability. She explained that the possibility of choices does not determine copyrightability, but what is dispositive is whether the resulting product contains copyrightable authorship. Finally, she explained that the Office does not compare works under consideration with works that have already been registered or refused for registration. *Id.* at 4-5.

In a letter dated May 11, 2007, you submitted a second appeal for reconsideration. You began by reiterating the process by which each unique tile is produced. You pointed

out that the Works are an arrangement of tiles, each having a particular ornamental look. You then asserted that the Office has previously held that such works are subject to copyright registration. You acknowledged that the Works may be viewed as functional. However, citing *Custom Chrome, Inc. v. Ringer*, you asserted that the unique appearance of the tiles are physically or conceptually separable from the utilitarian functions aspects of the tile and can therefore be considered copyrightable. *Letter from Keschner to Examining Division* of 5/11/2007 at 1. Citing *Custom Chrome, Inc. v. Ringer*, 35 U.S.P.Q. 2d 1714 (D.C. Dist. Ct., 1995).

You pointed to *Feist* for the principle that the required level of originality to obtain registration is minimal. *Id.* Citing *Feist*, 499 U.S. 340, 358 (1991). You then noted that "simple shapes when selected or combined in a distinctive manner indicating some ingenuity, have been accorded copyright protection by the Register and in court." *Id.* Citing *Atari Games Corp. v. Oman* 888 F.2d 878, 883 (1989). Finally you asserted that the Works meet the required minimum standard of originality to support registration. *Id.*

DISCUSSION

After reviewing the application and deposit submitted for registration as well as the arguments that you have presented, the Copyright Office Review Board affirms the Examining Division's refusal to register the Works, collectively referred to as "The Mantra Series of Glass Tile Arrangements." The Board concludes that the Office is not able to register copyright claims in the Works because they are useful articles that do not contain sufficient authorship that is both separable and copyrightable.

A. Analysis of the Works

1. Separability

As indicated in the Office's previous communications, we agree that the Works can be viewed as conceptually separable. (Letter from Giroux-Rollow to Keschner of 3/19/07, at 3). We therefore move on to the considering whether the separable elements of each work, the "mosaic" design on the surface of each work, coupled with the individual tiles' variation in coloring, meet the Originality threshold.

2. The Originality Threshold

The Office does not dispute the fact that the Works were independently created by the author. However, the Supreme Court made clear in *Feist* that originality as used in copyright means not only that the work must be independently created by the author (original to the author), but it must also possess at least some minimal degree of creativity. In determining whether a work embodies a sufficient amount of creativity to sustain a copyright claim, the Board adheres to the previously referenced standard set forth in *Feist,*

which notes that the "requisite level of creativity is extremely low; even a slight amount will suffice." 499 U.S. at 369. As previously stated, the Office does not compare works under consideration with works that have already been registered or refused for registration.

While you correctly point out this low requirement level, the *Feist* Court clearly stated that some works (such as the work at issue in that case) fail to meet the standard. 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 a work in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359; *see also*, 37 C.F.R. § 202.1(a). ("In order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form."); *Nimmer* § 2.01(B) ("[T]here remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support copyright.").

Even prior to the *Feist* Court's decision, the Office recognized the modest, but existent, requisite level of creativity necessary to sustain a copyright claim. *Compendium II* states, "[w]orks that lack even a certain minimum amount of original authorship are not copyrightable." *Compendium II*, § 202.02(a). With respect to pictorial, graphic and sculptural works, *Compendium II* states 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(a).

The Office notes the fact that there may have been other ways in which the elements of the design, their shape, size, positioning, orientation, configuration and number could have been chosen is not determinative. Rather, it is whether the resulting expression contains copyrightable authorship.

The Office acknowledges that there are variations such as swirls and various shapes on the surface appearance of the individual tiles. However, the Office understands that these variations are merely the result of the individual cooling patterns of the three to four veins of mixed molten glass from which the tiles were poured. The Office understands that the pouring and cooling patterns are random and do not pass the creativity threshold, which requires that a work must embody "some modest amount of intellectual labor." *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 668 n. 6 (7th Cir. 1986). Therefore, the Office determines that the surface appearance of the individual tiles, while unique, does not contain any copyrightable authorship.

The Office acknowledges that "simple shapes when selected or combined in a distinctive manner indicating some ingenuity, have been accorded copyright protection by the Register and in court." *Id.* Citing *Atari Games Corp. v. Oman* 888 F.2d 878, 883 (1989). However, the random arrangement of square glass tiles in twenty rows and twenty columns does not satisfy this requirement. In the Office's judgement, such a design is neither distinctive nor does it indicate the required level of copyrightability.

CONCLUSION

For the reasons stated above, the Copyright Office Review Board concludes that "The Mantra Series of Glass Tile Arrangements" cannot be registered. This decision constitutes final agency action in this matter.

Sincerely,

/s/

Maria Pallante
Associate Register for Policy and
International Affairs
for the Review Board
United States Copyright Office