United States Copyright Office
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September 13, 2012

Via First Class Mail and Fax

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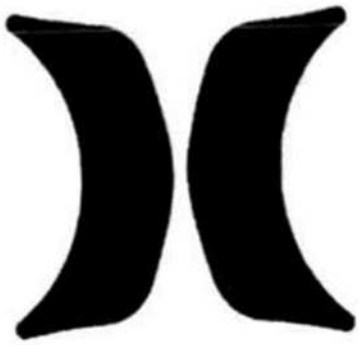
Re: REFLECTIONS OF A CURVE: SYMMETRY
Control Number: 61-310-1026(K)

Dear Mr. Simpson:

On behalf of the Copyright Office Review Board, I am responding to your December 15, 2004, letter requesting a second review of the Copyright Office's refusal to register a work entitled REFLECTIONS OF A CURVE: SYMMETRY. The Board has determined that the above-referenced work cannot be registered. The design elements and arrangement contain *de minimis* amounts of originality and do not rise to the level of copyrightability.

I. REPRESENTATION OF THE WORK

The work involved in this reconsideration is a drawing and graphic design. The identifying material deposited with the application consisted of the following image:



II. ADMINISTRATIVE RECORD

A. Initial Application and Office's Refusal to Register

On December 29, 2003, the Copyright Office received an application, deposit and fees for registration of a design entitled REFLECTIONS OF A CURVE: SYMMETRY for your client, Hurley International LLC. In a letter dated March 7, 2004, Marjorie Kress, Copyright Examiner, refused registration of the design because she found that the work lacked the authorship necessary to support a copyright claim. (Letter from Kress to Natland of 3/7/04 at 1.)

She stated that copyright protects original works of authorship that are fixed in some form, citing 17 U.S.C. § 102(a). *Id.* at 1. Citing *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340, 345 (1991), Ms. Kress clarified that the term "original" meant that the work was independently created by the author and that it possessed at least a minimal degree of creativity. *Id.* at 1.

Ms. Kress stated that to satisfy the creativity requirements, a work of the visual arts must contain a minimum amount of pictorial, graphic, or sculptural authorship. She clarified further that copyright does not protect familiar symbols or designs; basic geometric shapes; words and short phrases, such as names, titles, and slogans; or mere variations of typographic ornamentation, lettering, or coloring, citing regulation 202.1. Additionally, she stated that under section 102(b) of the copyright law, copyright does not extend to any idea, concept, system, or process which may be embodied in a work. *Id.* at 1. Citing *Bleistein v. Donaldson*, 188 U.S. 239 (1903), and *Feist*, Ms. Kress stated that neither the aesthetic appeal or commercial value of a work, nor the amounts of time and effort expended to create a work are factors that are considered under the copyright law. The question, she asserted, is whether there is sufficient creative authorship within the meaning to the copyright statute and settled case law. Applying those standards, Ms. Kress concluded the work could not support a claim to copyright. *Id.* at 1.

B. First Request for Reconsideration

In a letter dated July 2, 2004, you requested reconsideration of the initial refusal to register. After summarizing the position taken by Ms. Kress, you disputed her conclusions by arguing that the work does contain at least the minimal degree of creativity required to support a copyright claim. (Letter from Simpson to the Examining Division of 7/2/04 at 2.) Moreover, you argued that the work is not a familiar symbol or design, is not a basic geometric shape, is not a word or short phrase and is not a mere variation of typographic ornamentation, lettering or coloring. *Id.* at 2.

Citing section 503.02 of the *Compendium II, Copyright Office Practices*, (1984) ("*Compendium II*") you asserted that "a claim to copyright in a work of the traditional fine arts will be registrable if the work contains at least a certain minimum amount of pictorial, graphic, or sculptural expression owing its origin to the author."

You argued that a work need not be particularly detailed or complicated to be protected by copyright. You stated that even very simple designs may be copyrighted, and that simple shapes, when selected and combined in a distinctive manner indicating some ingenuity, have been accorded copyright protection by both the Register and the courts. You contended further that even a combination of otherwise unprotectible elements may be copyrighted if it displays originality in its selection and arrangement. Finally, you argued that while the author's independent contribution must be more than merely trivial, only a very modest degree of originality may suffice. You cited a number of cases supporting these contentions, including *Atari Games Corp. v. Oman*, 888 F.2d 878 (D.C. Cir.1989); *Soptra Fabric Corp. v. Stafford Knitting Mills, Inc.*, 490 F.2d 1092 (2d Cir. 1974); *Tennessee Fabricating Co. v. Moultrie Mfg. Co.*, 421 F2d 279 (5th Cir. 1970); *Concord Fabric Inc. v. Marcus Brothers Textile Corp.* 409 F.2d 1315 (2d Cir 1969); and *In Design v. Lynch*, 689 F. Supp. 176 (S.D.N.Y.), aff'd mem., 863 F.2d 45 (2d Cir. 1988).

You described your work as an original graphic design and drawing comprising two distinctive components presented as mirror images of one another along both horizontal and vertical planes. You asserted that the author made decisions with respect to the selection, arrangement and combinations of lines, angles, widths, edges, colors, symmetry, and figures that were highly creative, original, and unusual. You claimed that the graphic design comprised two components that are mirror images of one another and have unique symmetry through both horizontal and vertical planes across the middle of the work. Moreover, you stated that while the overall graphic design inclines towards symmetry, it is not perfectly regular. For example, you claimed that each figure is shaped such that the curvature of the inner edge is not perfectly smooth, but rather contains an inflection directly in the middle of the figure. *Id.* at 3.

You asserted that the combination of elements, the horizontal and vertical symmetry, and the placement and juxtaposition of the two figures rendered the work as a whole original, citing *Sem-Torq. Inc. v. K Mart Corp.*, 936 F.2d 851, 855 (6th Cir. 1991). *Id.* at 4. You further argued that it was well-settled that virtually any distinguishable variation created by an author in an otherwise unoriginal work of art will constitute sufficient originality to support a copyright, citing *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951).

You stated further that the work clearly contains more that just mere geometric shapes or lettering, familiar symbols or designs, or minor or trivial variations of the same. To the contrary, you argued, the work does not resemble a familiar symbol or design, a

geometric shape or lettering. Moreover, you stated the work contains obviously sufficient distinguishable variations from familiar symbols or design, basic geometric shapes or letting that would otherwise be uncopyrightable.

In closing, you asserted that the Office registered in the past three copyright claims having original shapes or figures and even original lettering. You apparently saw these registrations as supporting registration of your client's work.

After reviewing your first request for reconsideration, Examining Division Attorney Advisor Virginia Giroux responded in a letter dated August 20, 2004. She upheld the refusal to register the work on the grounds that it did not contain a sufficient amount of original artistic or sculptural authorship to support registration. (Letter from Giroux to Simpson of 8/20/04 at 1) Citing *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), she stated that a work must not only be original, but must possess more than a *de minimis* quantum of creativity. *Id.* at 1. 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.* at 1-2. She stated that in applying that standard, the Copyright Office examines a work to determine whether it contains any elements, either alone or in combination, on which a copyright can be based. She added that because the Copyright Office does not make aesthetic judgments, the attractiveness of a design, its uniqueness, its visual effect or appearance, the time, effort, and expense it took to create, or its commercial success in the marketplace, are not factors in the examining process. The question, she said, is whether there is a sufficient amount of original and creative authorship within the meaning of the copyright law and settled case law. *Id.* at 2.

She described the work in question as a logo in black and white coloring, resembling a closed and open parentheses mark, consisting of only two components, namely a curved convex line followed by a curved concave line. She stated that curved convex and concave lines, no matter what their thickness, are common and familiar geometric shapes, in the public domain, and are not copyrightable, citing Copyright Office regulation, 37 C.F.R. §202.1. Moreover, she further noted that the coloring per se is also not copyrightable. She asserted that the fact that these two curved lines are embellished in size, shape, thickness, and coloring does not mean that the work is copyrightable. She elaborated that the combination and arrangement of the two curved shapes coupled with their black coloring are not sufficiently creative to constitute a copyrightable work of art. *Id.* at 1. Finally, she noted that the design is *de minimis*, consisting of a minor variation of a public domain element arranged in a rather simple configuration, citing *Compendium II,* sec. 503.02(a). *Id.* at 2.

Ms. Giroux stated that the above principles are confirmed by several judicial decisions. The authorities included *John Muller & Co., Inc. v. N.Y. Arrows Soccer Team*, 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); *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)(a design consisting of two inch stripes, with small grid squares superimposed upon the stripes); and *Tompkins Graphics, Inc. v. Zipatone, Inc.*, 222 U.S.P.Q. 49 (E.D. Pa. 1983)(a collection of various geometric shapes held not copyrightable). *Id.* at 2.

She conceded that while it is true that even a slight amount of creativity will suffice to obtain copyright protection, "there remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright" (quoting the Nimmer treatise, 1 M. Nimmer & D. Nimmer, Nimmer on Copyright, §2.01(b)(1998). Likewise, she stated that the Copyright Office believes even the low requisite level of creativity required by *Feist, supra*, was not met by the simple designs involved in these works. *Id.* at 2. Moreover, she stated that the Copyright Office accepted the principle enunciated in *Atari Games Corp. v. Oman*, 888 F.2d 878 (D.C. Cir. 1989) that a work should be viewed in its entirety. However, she stated that even under the *Atari* standard of review, the arrangement and combination of the two curved lines with their minor variation in coloring, do not rise to the level of copyrightability necessary to support a copyright registration. *Id.* at 2.

She distinguished the cases cited in the first request for reconsideration as supporting registration. She said the work found copyrightable in *Soptra Fabric Corp. v. Stafford Knitting Mills, Inc.*, consisted of a strip of crescents, scalloping or ribbons between that strip, and then rows of semicircles in a distinct pattern. She said *Tennessee Fabricating Co. v. Moultrie Mfg. Co.* concerned a room divider design consisting of a filigree pattern formed entirely of intercepting straight lines and arc lines. Likewise, the work in *Concord Fabric Inc. v. Marcus Brothers Textile Corp.* involved intricate designs of circles with squares and frames around the border running in opposite directions and figures around the outer part of the circles. Finally, she said that in *In Design v. Lynch*, 863 F.2d 45, the work consisted of a design of a background superimposed parallelograms of different sizes, orientation, and color, and which took the court three paragraphs to describe. She concluded that all those cases dealt with designs which were more than a trivial variation of selecting a variety of shapes or arranging them in a creative manner, while with respect to the work in issue, such complexity did not exist. *Id.* at 3.

Ms. Giroux stated that while the elements in this work involved choices, it was not the possibility of choices that determined copyrightability, but rather whether the work contained copyrightable expression. In this case, she concluded that the graphic design, curved lines coupled with their coloring as well as their arrangement, could not support a copyright claim. She elaborated that a work may be unique, distinctive, and pleasing in appearance, but that did not mean it was copyrightable. Likewise, she stated that the time, effort, and expense that may go into the creation of a work does not make it copyrightable. *Id.* at 3.

In closing, Ms. Giroux declined to reverse the decision to refuse registration on the basis of three other works you asserted were registered by the Office. She stated that the Copyright Office does not compare works under consideration with works that have already been registered or refused registration. Each work, she asserted, is examined on its own merits.

C. Second Request for Reconsideration

In a letter dated December 15, 2004, you filed a second request for reconsideration. Your letter begins by summarizing the position taken by Ms. Giroux, and her conclusion that your client's work lacks the minimal amount of original and creative artistic expression required. (Letter from Simpson to the Review Board of 12/15/04 at 2.). It then summarized the arguments in your first request for reconsideration, beginning with the statement that the subject work, when viewed in its entirety, contains at least a minimal degree of artistic creativity and original artistic material to be copyrightable. *Id.* at 2. Moreover, you argue that your client's design does not fall among the exclusions for familiar symbols and the like, and it is more than a mere trivial variation of a familiar shape. Additionally, you assert that a work need not be complex or detailed in order to be registered, and your client's work is more than a trivial variation of a theme. You close your introduction by asserting that registration would further the Constitutional goal of providing incentives "to promote and progress of science and useful arts." *Id.* at 2.

You begin your argument by stating that your client's work contains the minimal degree of artistic creativity required by section 503.02 of the *Compendium II* (1984). *Id.* at 2. Paraphrasing Ms. Giroux's citation to *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340, 362 (1991), you state that "even a slight amount of creativity will suffice to obtain copyright protection" and "the requisite level of creativity is very low; even a slight amount of original authorship will suffice." Turning to *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 103 (2d Cir. 1951), you state that while the author's independent contribution of originality must be more that merely trivial, only a very modest degree of originality may suffice. You conclude that your client's work meets both tests. *Id.* at 2.

You also cite to the Examiner's statement that a work must be viewed in its entirety, with individual noncopyrightable elements judged not separately, but rather in their overall inter-relatedness within the work as a whole. You conclude that your client's work meets this test because it is the result of the author's selection, arrangement, and combination of lines, angles, widths, edges, colors, symmetry, and figures that are creative, original, and unusual. *Id.* at 3.

You state that REFLECTIONS OF A CURVE: SYMMETRY is more than just mere geometric shapes or lettering, familiar symbols or designs, or trivial variations of the same because it contains obviously sufficient distinguishable variations from such public material. You note that the artist has selected particular features of irregular shape in the work that contribute to remove it from common shapes. In summary, you state that the combination of lines, angles, widths, edges, colors, as well as the horizontal and vertical symmetry, and the placement and juxtaposition of the two figures in the subject work are uniquely defined by artistic decisions that render the work as a whole original. Moreover, you argue that case law establishes that a combination's whole must be greater that the sum of its parts, citing *Sem-Torq, Inc. v. K Mart Corp.*, 936 F.2d 851, 855 (6th Cir. 1991).

You contest the statement that the work in issue consists of only two components, "namely a curved convex line followed by a curved concave line." (Letter from Giroux to Simpson of 8/20/04 at 1). You contend that the work is not composed of lines at all, but rather consists of thick, angled figures that reflect each other, creating a variety of connotations for viewers through the use of mirror imagery and unique shapes, which conjure other images and associations. You also disagree with Ms. Giroux's analogy of your client's work to a closed and open parentheses mark. You contend that it resembles no familiar shape or design, and therefore should not have that exclusion applied to your client's work. *Id* at 5.

You contest the applicability of five cases cited by Ms. Giroux (*John Muller, Forstmann Woolen, Homer Laughlin China, Jon Woods Fashions*, and *Tompkins Graphics*) because they all involved works that were less creative than REFLECTIONS OF A CURVE: SYMMETRY. These cases all concerned familiar geometric shapes, while you contend that your client's work does not. *Id.* at 5.

You cite a number of cases you previously cited in your first request for reconsideration in arguing that REFLECTIONS OF A CURVE: SYMMETRY should be registered: *Atari Games Corp.; Soptra Fabric Corp.*; *Tennessee Fabricating Co.*; *Concord Fabric Inc.*; and *In Design*. You also cite to *Nimmer on Copyright* § 2.08[B], which states that the degree of creativity "may be of a most humble and minimal nature."

You state that REFLECTIONS OF A CURVE: SYMMETRY represents an original work that is more than a trivial variation of a theme because it embodies distinctive shapes,

in a mirror design, that is arranged in a creative manner. Moreover, you state that registration of this work would promote the progress of science and useful arts pursuant to the copyright clause of the U.S. Constitution.

III. DECISION

After reviewing the application and deposit submitted for registration and the arguments that you have presented, the Copyright Office Review Board affirms the Examining Division's refusal to register REFLECTIONS OF A CURVE: SYMMETRY. The Board concludes that the work does not contain sufficient creative authorship to support registration.

Feist's principle and Office practice

Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991), straightforwardly articulated the principle that only a modest level of creativity is needed to sustain copyright protection. However, the Supreme Court nevertheless 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 II*, § 202.02(a)(1984).

The *Compendium of Copyright Office Practices, Compendium II* (1984) ("*Compendium II*") has long recognized this principle: "[w]orks that lack even a certain minimum amount of original authorship are not copyrightable." *Compendium II*, sec. 202.02(a)(1984). With respect to pictorial, graphic, and sculptural works, the class within which REFLECTIONS OF A CURVE: SYMMETRY falls [enumerated at 17 U.S.C. 102(a)(5)], *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*, sec. 503.02(a). *Compendium II* recognizes that it is the presence of creative expression that determines the copyrightability of a work, and that registration cannot be based upon the simplicity of standard ornamentation.

In your second request for reconsideration, you rely heavily on the standard created in *Alfred Bell & Co., Ltd. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951) holding that the distinguishable variation in a work of authorship for which copyright protection is sought,

must be "more than a 'merely trivial' variation." 191 F.2d at 102-103. You contend that your client's work is more than a trivial variation of a familiar shape. For reasons which will be discussed later in this letter, the Review Board believes your client's work is in fact a trivial variation of common shapes and geometric figures.

***De Minimis* Authorship**

The central argument in your second request for reconsideration is that REFLECTIONS OF A CURVE: SYMMETRY is more than just mere geometric shapes or lettering, familiar symbols or designs, or trivial variations of the same because it contains obviously sufficient distinguishable variations from such public material. (Letter from Simpson to the Review Board of 12/15/04 at 3.) Your letter contains several different versions of this same basic argument. You strongly criticize Ms. Giroux's attempt to describe your client's design. On the other hand, your attempts at describing this relatively simple design would likely create an unclear picture for someone who has never viewed the design. Rather than attempt to describe the design in detail, the Review Board has included a copy of the deposit at the beginning of this decision.

In your second request for reconsideration, you argue that your client's work "is a unique creation, an intricate design with carefully conceived angles, curvature, spatial distances, negative space and asymmetries." *Id.* at 4. Such a design, you contend, is more than a trivial variation of common shapes and designs. Under case law, however, there are a number of instances where simple designs which were nevertheless distinctive were found uncopyrightable. While you have attempted to distinguish many of those cases, the Board finds the distinctions unpersuasive.

For example, the court in *Jon Woods Fashions, Inc. v. Donald C. Curran, supra,* reiterated that common shapes are not copyrightable. The work at issue was a fabric design called "Awning Grids" that superimposed a grid of squares over cloth with two inch stripes. The plaintiff claimed that the combination of the stripes and grids created a design that was "enough" of the author's to be both original and creative. The court responded to this argument by restating the Register's position that works lacking the minimal amount of creative authorship include those which consist of "familiar designs or symbols" or a "simple combination of two or three standard symbols such as a circle, a star, or a triangle with minor linear variations. *Id.* at 1872. Therefore, the design elements at issue were not proper subjects for copyright protection even when they are "distinctively arranged or printed."

In *Bailie v. Fisher*, 258 F.2d 425 (D.C. Cir. 1958), the work was a cardboard star with a circular center allowing the design to hold a photograph of an entertainer, upon which

is superimposed a transparent phonorecord record from which the voice of the pictured person may be heard. While a five pointed star is a familiar symbol, using such a symbol to create a stand for a phonorecord was undoubtedly unusual, and most would likely say, created a distinctive design. Yet, the U.S. Court of Appeals for the D.C. Circuit affirmed the Register's refusal to register, concluding that a cardboard star which stands because of folded flaps did not fall within the meaning of "work of art" in the copyright law.

In your second request for reconsideration, you try to distinguish *Jon Woods Fashions, Inc.; Homer Laughlin China Co.*; *John Muller & Co.*; *Forstmann Woolen Co.*; *Tompkins Graphics, Inc. v. Zipatone, Inc.*, asserting that these cases all involved familiar shapes and geometric designs, while your client's work does not. The Review Board disagrees. Your client's work is a trivial variation of familiar convex and concave shapes, and as such, is outside of the ambit of copyright protection. The Review Board likewise finds the selected quotations from Nimmer On Copyright relating to the modest nature of the creativity required for copyright to be unpersuasive because the treatise specifically goes on to acknowledge that "there remains a narrow area where admittedly independent efforts are deemed too trivial." Nimmer, at § 2.01(b).

Section 503.02(a) of Compendium II states the applicable standard for pictorial or graphic material:

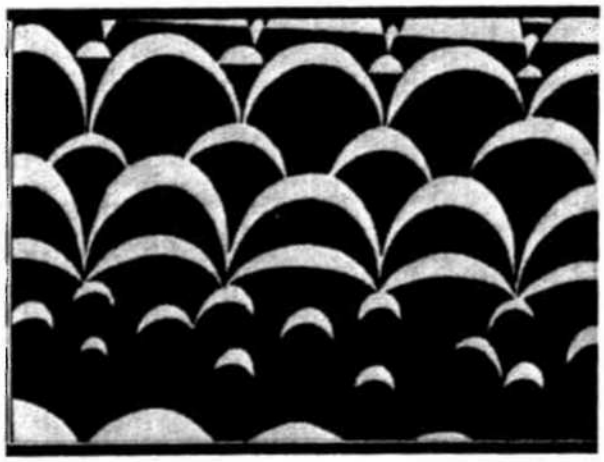
> Minimal standards pictorial or graphic material. A certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class. Copyrightability depends upon the presence of creative expression in a work, and not upon aesthetic merit, commercial appeal, or 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. For example, it is not possible to copyright a new version of a textile design merely because the colors of red and blue appearing in the design have been replaced by green and yellow, respectively. 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.

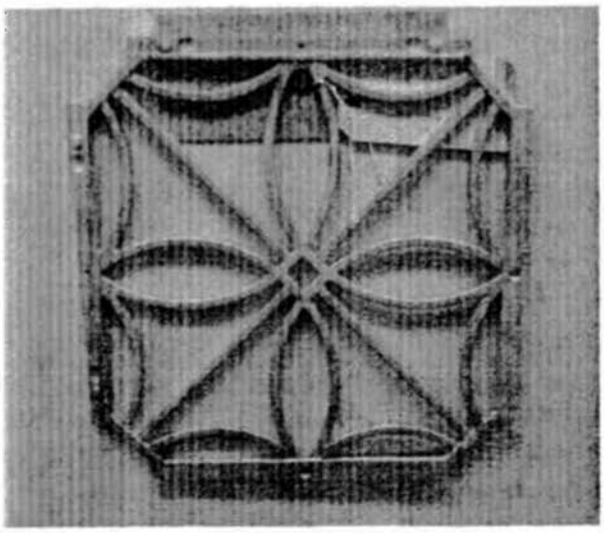
REFLECTIONS OF A CURVE: SYMMETRY consists of two simple, and identical, geometric figures that could be described, alternatively, as variations on the standard shape of a crescent, or on the shape of a chevron, or as thickened parentheses. The first figure is open to the left, and the second figure is open to the right. Such a simple geometric figure, either alone or in the simply, symmetrical configuration in which it appears in the identifying material submitted with the application for registration, does not rise to the level of the "minimal amount of original creative authorship [that] is essential for registration."

In applying the above standards, it is important to keep in mind that the determination of whether a work contains a sufficient amount of original artistic authorship cannot be made in accordance with bright-line rules. As the court in *Homer Laughlin China Co.* stated, "[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." *Homer Laughlin China Co.* 22 U.S.P.Q.2d at 1075. The court went on to observe: "However, 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., citing Norris Industries, Inc. v. International Tel. & Tel. Corp.*, 696 F.2d 918, 922 (11th Cir.), *cert. denied*, 464 U.S. 818 (1983).

The Review Board agrees with Ms. Giroux's conclusion that the cases cited by you as supporting registration in this instance are not applicable because the works were far more complex. The work in *Soptra Fabric Corp. v. Stafford Knitting Mills, Inc,, supra*, was a complex pattern consisting of a strip of crescents, scalloping or ribbons between that strip, and then rows of semicircles. The actual work at issue in that case appears below:



The work in *Tennessee Fabricating Co. v. Moultrie Mfg. Co., supra*, concerned a room divider design consisting of a filigree pattern formed entirely of intercepting straight lines and arc lines. A copy of that work appears below:



The work in *Concord Fabric Inc., supra*, involved intricate designs of circles with squares and frames around the border running in opposite directions and figures around the outer part of the circles. Finally, in *In Design v. Lynch, supra*, the work consisted of a design of background superimposed parallelograms of different sizes, orientation, and color, which took the court three paragraphs to describe.

In each of those cases, the works in question exhibited greater creativity and complexity than can be found in REFLECTIONS OF A CURVE: SYMMETRY.

Combination of elements too simple to support a copyright claim

In your second request for reconsideration, you identify as artistic expression "the combination of lines, angles, widths, edges, colors, as well as the horizontal and vertical symmetry, and the placement and juxtaposition of the two figures in the subject work ..." Letter from Simpson to the Review Board of 12/15/04 at 3. The Board notes that in theory, an author creating any work has an unlimited choice of alternatives. However, it is not the possibility of choices that determines copyrightability, but whether the resulting expression contains copyrightable authorship. *See Florabelle Flowers, Inc. v. Joseph Markovits, Inc.*, 296 F. Supp. 304, 307 (S.D.N.Y. 1968) (an "aggregation of well known components [that]

comprise an unoriginal whole" cannot support a claim to copyright). The Board finds that the design here, upon examination of its elements individually and as a whole, does not contain a sufficient amount of original and creative authorship to sustain a copyright claim. The fact that an author had many choices does not necessarily mean that the choice the author made meets even the modest creativity requirement of the copyright law.

Two recent appellate cases support the Board's determination that the combination of elements in the work in issue are too simple to support a copyright claim. In *Satava v. Lowry*, 323 F.3d 805 (9th Cir. 2003), an artist brought a copyright infringement action against a competitor over the artist's life-like glass-in-glass sculptures of jellyfish. In that case, the court stated: "it is not true that any combination of unprotectable elements automatically qualifies for copyright protection. Our case law suggests, and we hold today, that a combination of unprotectable elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship. The combination of unprotectable elements in Satava's sculpture fall short of this standard. The selection of the clear glass, oblong shroud, bright colors, proportion, vertical orientation, and stereotyped jellyfish form, considered together, lacks the quantum of originality needed to merit copyright protection." *Id* at 811. Likewise, in *Lamps Plus, Inc. v. Dolan*, 345 F.3d 1140 (9th Cir. 2003), the Ninth Circuit held that the mechanical combination of four preexisting ceiling lamp elements with a preexisting lamp base did not constitute original authorship.

In your second request for reconsideration, you cite *Sem-Torq, Inc. v. K Mart Corp.*, 936 F.2d 851 855 (6th Cir. 1991) to the effect that a combination's whole must be greater than the sum of its parts to be copyrightable. This dicta repeats settled copyright law that a combination of public domain elements may nevertheless rise to the level of copyrightable expression. However, the specific holding in that case was that a set of five double-sided signs with a yellow background and black letters bearing legends such as "For Rent"/"For Sale" could not support a copyright claim. That work, like REFLECTIONS OF A CURVE: SYMMETRY, contained too few elements to meet the creativity standard of the copyright law.

Registration would promote progress of science and the useful arts

Finally, you contend that registration of your client's work would fulfill the purpose of the copyright clause of the Constitution by promoting science and the useful arts. The Copyright Clause of the U.S. Constitution gives Congress the power to enact copyright legislation. The current Copyright Act, and all federal copyright laws which have preceded it, are the result of that grant of authority. In carrying out the responsibilities assigned to the Copyright Office under the current law, the Copyright Office does not look to the

Constitution, but instead looks to the copyright legislation which has been enacted by Congress. It is the decision of this Review Board that under current copyright law, the design in issue has *de minimis* copyrightable authorship, and issuing a copyright registration for such a work would not advance the purpose for which the framers of the Constitution adopted the Copyright Clause.

IV. CONCLUSION

For the reasons stated herein, the Copyright Office Review Board affirms the Examining Division's refusal to register the design entitled REFLECTIONS OF A CURVE: SYMMETRY. This decision constitutes final agency action in this matter.

Sincerely,

/s/

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