United States Copyright Office
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February 27, 2012

Via First Class Mail and Fax

Monster Cable Products, Inc.
Attn: F. David LaRiviere, Esq.
P.O. Box 3140
Monterey, California 93942-3140

Re: FLAT EARPHONE CABLE
SR 1-472301491
SR 1-537533394
SR 1- 633484452

Dear Mr. LaRiviere:

On behalf of the Copyright Office Review Board, I am responding to your request for reconsideration of the Copyright Office Registration Program's refusal to register a copyright claim in the asserted sculptural elements in the design of a flat earphone cable. You have submitted this claim for your client, Monster Cable Products, and have entitled the work, FLAT EARPHONE CABLE. The Review Board has carefully examined the online submission, the identifying reproduction, and all the correspondence in this case. After careful consideration of the arguments in your letter, the Board affirms the denial of registration of this copyright claim because the work consists solely of the shape of an earphone cable lacking any separable sculptural authorship.

I. ADMINISTRATIVE RECORD

A. Initial Submission

On August 16, 2010, the Copyright Office received from you an eService application covering sculptural authorship and an uploaded deposit of digital images of cables attached to a set of earphones. One of the images clarified that there was no claim in the shape of the earphones. The claim was submitted on behalf of Monster Cable Products. By letter mailed September 14, 2010, the registration specialist, Guy Messier, refused registration of this work stating that it is a "useful article" which does not contain any separable authorship needed to sustain a claim to copyright. Citing 17 U.S.C. §101, Mr. Messier stated that the design of a useful article is considered a pictorial, graphic, or sculptural work only if the design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article. He stated that the legislative history confirms that separability may be physical or conceptual, and that the *Compendium II of Copyright Office Practices II ("Compendium II")*, Ch. 500 (1984) clarifies that conceptual separability means that the artistic features can be imagined separately and independently from the useful article without destroying the basic shape of the useful article. Mr. Messier concluded that because all of the elements of the work are related to the utilitarian aspects or function, or are subsumed within the overall shape, there is no physically or conceptually separable authorship. Consequently, registration was not possible. Letter from Messier to Passarelli of 9/14/2010.

B. First Reconsideration

In a letter dated December 13, 2010, Christopher Passareilli requested reconsideration of the Office's refusal to register the flat cable design. Mr. Passareilli began the letter by restating the provisions from the statute and *Compendium II* which had been cited in the initial refusal to register the work. Letter from Passareilli to Copyright RAC Division of 12/13/2010. He asserted that the flat cable design is a prominent feature of the underlying earphones, which is "identifiably separate and independent from the useful article." He claimed further that the flat cable design was nonfunctional because there were other design alternatives, and the cable design was not an integral part of the earphones.

After reviewing your first request for reconsideration, Examining Division Attorney Advisor Virginia Giroux responded in a letter dated April 6, 2011. She upheld the refusal to register the earphone cable because, even if decorative, it is part of a useful article, an earphone, and does not contain any authorship that is both separable and copyrightable. Letter from Giroux to Passareilli of 4/6/2010 at 1. Ms. Giroux cited the definition of "useful article" in section 101 of the copyright law providing that a useful article is an "article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is part of a useful article is considered a 'useful article.'" Moreover, she stated that the statute further provides that the "design of a useful article shall be considered a pictorial, graphic, or sculptural work only if and to the extent that such design incorporates pictorial, graphic, or sculptural features that can be identified separately from and are capable of existing independently of the utilitarian aspects of the article." *Id.* at 1

Ms. Giroux clarified that in examining a work within the useful article category, the Copyright Office must first determine whether the work has any pictorial, graphic, or sculptural authorship that is either physically or conceptually separable from the utilitarian aspects of the article. *Id.* at 1. In applying this standard, the Copyright Office examines the work to determine if it contains physically or conceptually separable elements that can be regarded as a work of art apart from the shape, styling, or design of the article. She stated that 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. Instead, she asserted that the question is whether there is a sufficient amount of original and creative separable authorship within the meaning of the copyright law and settled case law. *Id.* at 1.

Ms. Giroux stated that your letter did not dispute that the cable is a component of the earphone. She contended that your argument was that it could be conceptually separable. She stated that the Copyright Office does not agree with such a position. *Id.* at 2.

She asserted that the physical separability test derives from the principle that a copyrightable work of art that is later incorporated into a useful article retains its copyright protection. She stated that examples include a sculptural lamp base of a Balinese dancer or a pencil sharpener shaped like an antique car. However, she clarified that the test was not met by the mere fact that the housing or

other component of a useful article is detachable from the working parts of an article. *Id.* at 2.

She stated that the Copyright Office's test for conceptual separability was enunciated in *Compendium II*, § 505.03, which generally follows the separability principle set forth in *Esquire v. Ringer*, 591 F.2d 796 (D.C. Cir. 1978). *Compendium II* 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. Examples include the carving on the back of a chair, or pictorial matter engraved on a glass vase.

Ms. Giroux explained that the "test for conceptual separability, however, is not met by merely analogizing the general shape of a useful article to works of modern sculpture since, in this case, the alleged 'artistic or decorative features' and the useful article cannot be perceived as having separate, independent existences." Further, she explained that although certain features could have been designed differently, if the features are an integral part of the overall shape or contour of the useful article, no registration is possible. She cited *Esquire v. Ringer, Inc.*, 591 F.2d 796 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 908 (1979) for the proposition that copyright could not be secured for a useful article based on the overall shape or configuration of the article, no matter how aesthetically pleasing that shape or configuration might be. *Id.* at 2.

Ms. Giroux-Rollow stated that the fact that a work consists of a unique or distinctive shape for purposes of aesthetic appeal or signature identification does not mean that the work, as a whole, constitutes a copyrightable work of art. Citing Section 505.05 of *Compendium II*, she asserted that the fact a design is aesthetically pleasing or could have been designed differently is not relevant in determining copyrightability.

Ms. Giroux-Rollow described the work at issue as a flat earphone cable which, even if considered decorative, was made specifically to be attached to an earphone. As a part of the earphone, it is therefore considered as part of the overall shape of the earphone, and, as such, not copyrightable. Moreover, even if it was not treated as a useful article, the common and familiar flat ribbon shape would not support registration as a standalone sculptural work.

Ms. Giroux-Rollow observed that all works involve choices. The fact that other shapes, material used, contours and textures could have been selected or chosen for this cable does not mean that it is copyright. She determined that the flat cable, a component of a useful article, individually, and in its particular configuration, does not contain any authorship that is both separable and copyrightable. *Id.* at 3.

In closing her letter, Ms Grioux-Rollow cited the House Report, H.R. Rep. 94-1476, 55 (1976), explaining the need for separable authorship to stand on its own and that the design of a useful article is not to be protected. *Id.*at 3. Because all of the elements in this cable were either related to the utilitarian aspects of the earphone, or are subsumed within the overall shape of the useful article, she concluded that there was no separable authorship that is copyrightable. *Id.* at 4.

C. Second Reconsideration

In a letter dated July 8, 2011, you requested a second reconsideration of the refusal to register FLAT EARPHONE CABLE. Letter of LaRiviere to Copyright RAC Division of 7/8/2011 at 1. You begin by stating that the threshold is low, citing *Thomas Wilson & Co. v. Irving J. Dorfman Co.*, 433 F.2d 409 (2nd Cir. 1970). You cited several provisions of *Compendium II*, particularly, section 505.03 requiring that "the artistic features can be imagined separately and independently from the useful article without destroying the basic shape of the useful article."

You cite three cases discussing issues relating to conceptual separability which you believe supports registration of the earphone cable. *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980), extended copyright protection to a belt buckle because the artistic features were separable from the utilitarian features of the item. *Brandir Int'l, Inc. v. Cascade Pacific Lumber Co.*, 834 F.2d 1142 (2d Cir. 1987), a case involving a bicycle rack, found that if design elements reflect a merger of aesthetic and functional considerations, the artistic aspects of a work cannot be said to be conceptually separable from the utilitarian elements. *Carol Barnhart Inc. v. Economy Cover Corp.*, 773 F.2d 411, 419 (2nd Cir. 1985) held that four human torso forms were not copyrightable because the features were "inextricably intertwined with the utilitarian feature, the display of clothes." Letter of LaRiviere at 1-2.

You assert that the cable meets the conceptual separability test for the following reason:

> The cable jacket design is used on a variety of earphone products that differ from one another in overall appearance, but each including the distinctive and unique cable jacket design, which is the subject work. In this case, the fact that the cable appears "flat" with curved outside contours has no bearing on the useful aspects of the subject work, namely, for containing the conductors of sound from the source to the earphones. Thus, the subject work is distinguishable from the human torso forms in *Carol Barnhart.* To clarify, ANY shape of a cable jacket could have been used or selected by the author. And that cable jacket shape is completely independent of the cable function. All that is needed for a cable to function is for it to contain a sound conductor, which is usually comprised of a thin copper wire. As outlined in *Brandir*, protection for the design features of a useful article is appropriate where such features are nonfunctional or could have been designed differently or reflect the applicant designer's artistic judgment exercised independently of functional influences. Letter of LaRiviere at 2-3.

II. DECISION

A. Description of the Work

Before proceeding with our discussion of the Review Board's determination, we will briefly describe the work reflected in the identifying material you submitted.

The work is a cable jacket for use on a variety of earphone products. The shape is a flattened rectangle with rounded corners. Two of the images submitted for the deposit are reproduced below:



B. Copyrightability of Useful Articles

In your second request for reconsideration, you acknowledge that an earphone cable is a useful article which must meet the separability test set forth in the copyright law in order to secure copyright protection. In opposition to the position taken by the Registration Program, you assert that the work meets this test. While there is no dispute that the copyright standards for useful articles apply to this work, as a starting point the Review Board believes it would be useful to review the provisions of the statute and *Compendium II.*

1. The statute

The copyright law sets forth the guiding principle regarding the extent of copyright protection for a useful article. The statute defines this protection in the following terms: "the design of a useful article ... shall be considered a pictorial, graphic or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." 17. U.S.C. §101 (2011). Additionally, section 101 provides in the definition of useful article that: "[a}n article that is normally a part of a useful article is considered a 'useful article.'"

The legislative history accompanying the 1976 Copyright Act clarifies Congress's intent with respect to copyright protection for useful articles: "to draw as clear a line as possible between copyrightable works of applied art and uncopyrighted works of industrial design." H.R. Rep. No. 1476, at 55 (1976). The House Report further explains Congress's intention that "although the shape of an industrial product may be aesthetically satisfying and valuable, [Congress's] intention is not to

offer it copyright protection..." *Id.* Specifically addressing the issue of the "shape" of an industrial product, the House Report goes on to state that:

> 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.

Id.

2. Copyright Office Compendium

Chapter 500 of *Compendium II*, the Copyright Office's manual of practices with respect to examination of claims to copyright registration, addresses registration of the works of the visual arts which include the "pictorial, graphic and sculptural works" to which the statute refers. Chapter 500's treatment of separability provides guidelines which explain how the Copyright Office approaches the examination of useful articles in order to determine whether such articles incorporate the statutorily-required "pictorial, graphic or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the articles." In the case of conceptual separability, §505.03 states:

> Conceptual separability means that the pictorial, graphic and sculptural features, while physically inseparable by ordinary means from the utilitarian item, are nevertheless clearly recognizable as pictorial, graphic or sculptural work which can be visualized on paper, for example, or as free-standing sculpture, an 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.

In the case of physical separability, *Compendium II*, Ch. 500, §505.04 (1984), 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.

The Office's position and its *Compendium* articulation of that position is consistent with the statutory grounds for protectibility of pictorial, graphic and sculptural works which are incorporated within useful articles. The statute's definitional guideline for determining whether protectible features exist apart from the **utilitarian aspects** of the useful article does not explicitly delineate the meaning, *i.e.*, the scope and range, of utilitarian aspects which must be taken into account in performing such separability judgment. Although "utilitarian aspects" might appear, on first consideration, to be language which is plain on its face, Congress saw fit to include the explanatory discussion of the subject within the legislative history which has been cited above.

The House Report also specifically refers to Copyright Office regulations, promulgated in the 1940's, on the subject of separability with respect to useful articles and industrial design. The House Report [at 54] notes that the 1976 statutory language is "drawn from" those Office regulations and that part of the language is "an adaptation" of subsequent Office regulatory language which implemented *Mazer v. Stein*, 347 U.S. 201 (1954) [works of art incorporated into useful articles, such as mass-produced articles of commerce, may retain their copyright protection]. Courts, under both the 1909 and the 1976 Acts, have considered the appropriate extent of protection for works of art incorporated into useful articles and have consistently recognized the expertise of the Copyright Office in its administration of the registration activity, including confirming Office registration decisions concerning works of art incorporated into useful articles. *See Norris Industries, Inc. v. International Telephone and Telegraph Corp.*, 696 F.2d 918 (11th Cir. 1983), *cert. denied*, 464 U.S. 818 (1983); *Esquire, Inc. v. Ringer*, 591 F.2d 796 (D.C. Cir. 1978) *cert. denied*, 340 U.S. 908 (1979); *Vacheron and Constantin - Le Coultre Watches, Inc. v. Benrus Watch Company, Inc.* 260 F.2d 637 (2d Cir. 1958); *SCOA Industries, Inc. v. Famolare, Inc.*, 192 U.S.P.Q. 216 (S.D.N.Y. 1976).

Concerning the Office's *Compendium* tests for separability, the relevant *Compendium* sections essentially confirm the case law which supports the long history of the Office's interpretation. In *Esquire v. Ringer*, referring to the useful article passage from the 1976 House Report, *supra,* the United States Court of Appeals for the District of Columbia Circuit stated that the passage "indicate[s] unequivocally that the overall design or configuration of a utilitarian object, even if it is determined by aesthetic as well as functional considerations, is not eligible for copyright." *Esquire, Inc. v. Ringer*, 591 F.2d 796, 804 (D.C. Cir. 1978). Although *Esquire* was decided under the 1909 Act, the Court made clear that its references to the provisions of the 1976 Act were appropriate because "the new Act was designed in part to codify and clarify many of the [Copyright Office] regulations promulgated under the 1909 Act, including those governing 'works of art.'" *Id.* at 803. The Office's position with respect to the interpretation of the separability issue was also confirmed by the 11th Circuit in *Norris Industries, supra,* in which the Court noted Congress's intention concerning the statutory language on separability and additionally noted that other federal circuit courts have relied upon the Office for "expertise in the interpretation of the law and its application to the facts presented by the copyright application," based upon the Office's having "been concerned with the distinction between copyrightable and noncopyrightable works of art since the Copyright Act of 1870." *Norris,* 696 F.2d at 922. *See also Custom Chrome, Inc. v. Ringer,* 35 U.S.P.Q.2d 1714 (D.C.D.C. 1995), (decision under Administrative Procedure Act upholding the Office's refusal– premised on the *Compendium* tests– to register motorcycle parts).

3. Application of the conceptual separability test to the cable jacket

Your second request for reconsideration cites three precedents concerning the concept of conceptual separability which you assert support registration of the cable jacket. The three cases are *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980); *Brandir Int'l, Inc. v. Cascade Pacific Lumber Co.*, 834 F.2d 1142 (2d Cir. 1987); and *Carol Barnhart Inc. v. Economy Cover Corp.*, 773 F.2d 411, 419 (2nd Cir. 1985). The Review Board finds these three cases squarely support the decision to refuse registration of the cable jacket. Before we begin discussing these decisions in detail, however, the Board thinks it would be useful to address a number of faulty assumptions made in your second request for reconsideration.

Most prominent of your faulty assumptions is your belief that the cable jacket is nonfunctional. This assumption is revealed in several passages of your letter. For example, you state: "In this case, the fact that the cable appears "flat" with curved outside contours has no bearing on the useful aspects of the subject work, namely, for containing the conductors of sound from the source to the earphones." Letter of LaRiviere at 2. Under the statutory definition of useful article, the jacket cable is regarded as useful by virtue of being "a part" of the useful article, *i.e.*, the earphone cable. Additionally, it appears that the jacket serves several obvious functions which are necessary for a properly functioning earphone cable. If that is so, then without the jacket, the bare conducting wires would quickly short-out, thus failing to accomplish the useful purpose for which the cable was designed. The jacket substantially strengthens the cable, so that it possesses of function of durability. Finally, the jacket protects the user from fraying wires, which could cause injury. For all these reasons, the cable jacket is clearly functional.

Another assumption is your apparent belief that there are a wide variety of design options for a cable jacket operating apart from the functional considerations. For example, you state: "The 'flat' appearance of the cable jacket design is one such aesthetic feature. It is arbitrary in shape. This feature is not an integral part of the sound conductor." Letter of LaRiviere at 3. In reality, the shape of the earphone cable jacket is constrained by many functional considerations. The dimensions of the jacket must be big enough to protect the conducting wire against the danger of shorts, and provide strength, and must be small enough to avoid being regarded as cumbersome. Possibilities for shape seem to be two, either round, or rectangular with rounded sides. If rectangular, the sides have to be rounded in order to reduce fraying of the plastic, and eliminate a sharp feel to the touch.

Turning to the cases you cite as supporting registration, the ornamental belt buckles in *Kieselstein-Cord* bear no resemblance to the cable jacket of your client. The belt buckles were registered by the Copyright Office due to the incorporation of ornamental features consisting of geometric shapes with "several surface levels"and wavy lines. 632 F.2d at 990. These identifiable ornamental features were found to be conceptually separable from the utilitarian function of the belt buckles. We further note that the court concluded that the Winchester and Vaquero belt buckles "rise to the level of creative art," in contrast to "the vast majority of belt buckles," 632 F.2d at 994, and described them as "solid sculptured designs" that had "rounded corners, a sculpted surface, a rectangular cut-out at one end from the belt attachment, and several surface levels." *Id* at 990 (internal quotation marks omitted). Comparing the *Kieselstein-Cord* belt buckles to your client's cable jacket reveals a sharp contrast since the jacket contains no ornamentation whatsoever. Your

separability assertion is based solely on your mistaken notion that the jacket serves no useful purpose. As explained above, this notion is wrong.

You cite *Brandir International* for its holding that where the design elements can be identified as reflecting the designer's artistic judgment exercised independently of functional influences, conceptual separability exists. This test confirms the noncopyrightability of the cable jacket because functional considerations predominant in the design of the jacket. In fact, in this particular instance, it is difficult to see that any purely artistic judgments have been made by the designer. In any event whatever arguable artistic judgment may have been exercised in designing the earphone cable certainly was not "exercised independently of functional (conductors) influences."

In *Carol Barnhart*, the Second Circuit held that where aesthetic and artistic features of a work are "inseparable" from the work's use as a utilitarian article, the work is not copyrightable. *Carol Barnhart* at 418. As regarding the earphone cable jacket, virtually all the design features of the jacket assist the utilitarian article in accomplishing the functions for which the work was created. For this reason, *Carol Barnhart* squarely supports the decision of the Registration Program not to register the earphone cable jacket.

C. Shape of the Cable Jacket Is a Standard Geometric Shape Which Would Not Be Registrable Even in the Absence of Utilitarian Concerns

While the primary basis of the Review Board's refusal to register the cable jacket is its failure to meet the test of conceptual separability, the Board believes it is useful to point out that the basic shape of cable jacket, a rectangle with rounded corners, could not be copyrighted even in the absence of utilitarian concerns. The Copyright Office and courts have consistently found that standard designs, figures and geometric shapes, such as a rectangle with rounded corners, are not sufficiently creative to sustain a copyright claim. *Compendium II*, § 503.02(a) ("[R]egistration cannot be based upon the simplicity of standard ornamentation . . . . Similarly, it is not possible to copyright common geometric figures or shapes . . . ."); *id.* § 202.02(j) ("Familiar symbols or designs . . . or coloring, are not copyrightable."). *See also id.* § 503.03(b) and 37 C.F.R. § 202.1(a). The shape is simply commonplace and mundane.

Numerous cases take a similar position. In *Bailie v. Fisher,* 258 F.2d 425 (D.C. Cir. 1958) the Court of Appeals for the District of Columbia held that a cardboard star with two flaps which, when folded back, enabled it to serve as a stand for a display was not copyrightable. Similarly, in *John Muller & Co. v. New York Arrows Soccer Team,* 802 F.2d 989 (8th Cir. 1986), the Eighth Circuit upheld the Register's refusal to register a simple logo consisting of four angled lines which formed an arrow and the word "Arrows" in cursive script below the arrow. The District Court of Eastern Pennsylvania held in *Tompkins Graphics, Inc. v. Zipatone, Inc.,* 222 U.S.P.Q. 49 (E.D. Pa. 1983) that "basic geometric shapes have long been in the public domain and therefore cannot be regulated by copyrights." The District Court of the District of Columbia upheld the Register of Copyrights' refusal to register a chinaware "gothic" pattern of simple variations and combinations of geometric designs in *Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q. 2d 1074(D.D.C. 1991). The court in *Coach, Inc. v. Peters*, 386 F.Supp.2d 495 (S.D.N.Y. 2005) upheld the Register of Copyrights' decision to refuse registration of a handbag designer's fabric pattern consisting of

variations and arrangements of the letter "C." Other cases involving similar features found not copyrightable include *Magic Market, Inc. v. Mailing Services of Pittsburgh, Inc.*, 634 F.Supp. 769 (W.D.Pa. 1986)(envelopes printed with solid black stripes and a few words such as "priority message" or "gift check"), and *Forstmann Woolen Co. v. J.W. Mays, Inc.*, 89 F.Supp 964 (E.D.N.Y. 1950)(reproduction of standard fleur-de-lis).

III. CONCLUSION

For the reasons stated above, the Copyright Office Review Board concludes that the earphone cable jacket cannot be registered for copyright protection. This decision constitutes final agency action.

Sincerely,

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