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

July 10, 2013

Quarles & Brady LLP
ATTN: Anthony Tomaselli and Martha Jahn Snyder
33 East Main Street
P.O. Box 2113
Madison, Wisconsin 53701-2113

Re: ***Gyroscope Octagonal Shape and Dimples***
Correspondence ID: 1-3E5ZJK

Dear Mr. Tomaselli:

The Review Board ("Board") of the United States Copyright Office ("Office") is in receipt of your second appeal of the decision to refuse registration of the work entitled *Gyroscope Octagonal Shape* and *Dimples* (the "Work"), which was the subject of an application for 3-dimensional authorship, received by the Office on March 12, 2008. (A copy of the application is attached as Exhibit A).

The Board, in its *de novo* review, has carefully examined the application, the deposit, and all correspondence concerning this application and, for the reasons stated below, hereby affirms the denial of registration. This decision constitutes final agency action in this matter. 37 C.F.R. § 202.5(g).

I. DESCRIPTION OF THE WORK

Gyroscope Octagonal Shape and *Dimples*, as depicted in the identifying material deposited with the application (copies of which are attached as Exhibit B), is a gyroscope. The arms of the frame that make up the upper and lower hemisphere of the gyroscope are bronze in color. The inner sides of these arms are rounded so that the upper and lower arms comprise a smooth circular shape. The outer sides of these arms have eight straight sides. At the center of the outer side of each of these eight straight sides are concave dimples. These eight straight sides, along with additional spacing for top and bottom points of the spin axis, create a roughly decagonal shape. The center housing for the propeller (or rotor) of the gyroscope is a light yellow color, and both the inner and outer sides of this housing comprise a smooth circular shape. The propeller is white or cream colored. On its top side is a geared mechanism for initiating the gyroscope via a rip-chord that is centrally located around the spin axis. Also on the top side of the propeller is a spiral black line which begins at the outer edge of the centrally located geared mechanism and ends at the outer edge of the propeller. Imposed over the outer portion of this spiral design is the word "Duncan" bordered by a roughly capsule shape black outline – the shape of the outline is slightly contoured with the round propeller such that the capsule shape is warped slightly, which may accurately be described as a kidney shape. The bottom side of the propeller is not revealed by the identifying material.

II. ADMINISTRATIVE RECORD

On June 16, 2009, the Office notified the applicant's correspondence contact, via a letter, that it could not register the Work because it lacked authorship necessary to support a copyright claim. Letter from Office to Sonja Stauffacher (June 16, 2009).

In a letter dated September 14, 2009, Andrew Norman, an attorney at your firm, requested reconsideration of the Office's refusal to register the Work, which he referred to as *Gyroscope Surface Design*, setting forth reasons why the Work was copyrightable and should be registered, as required by 37 C.F.R. § 202.5(c). Letter from Andrew Norman to Copyright R&P Division (Sept. 14, 2009). Mr. Norman argued that the Office should register claims in both 3-dimensional and 2-dimensional authorship, without acknowledging the fact that the application only included a claim of 3-dimensional authorship. *Id.* at 1-2. Attached to this request were photos, which Mr. Norman indicated were identical to the images included with the application. (Copies of the photos attached to Mr. Norman's letter of September 14, 2009 are attached as Exhibit C). With regard to the claims in 3-dimensional authorship, Mr. Norman asserted that the Work is a toy, and its only use is for play by children and adults, and that it is not a useful article. *Id.* at 1.

In a letter dated January 12, 2010, the Office again refused to register the Work. Letter from Virginia Giroux-Rollow to Andrew Norman (Jan. 12, 2010). Ms. Giroux-Rollow's letter accepted the assertion that the Work's only use is to be played with by both adults and children, and treated it as a model that mimics the original useful device. *Id.* at 1. Analyzing the Work as such, Ms. Giroux-Rollow concluded that there were "no elements or features, embodied in this work, either alone or in combination, upon which a copyright registration is possible . . . " *Id.* at 1-3.

In a letter dated April 9, 2010, you requested that the Office reconsider for a second time its refusal to register the copyright claim in the Work, which you referred to as *Gyroscope Surface Design*. Letter from Anthony Tomaselli to Copyright RAC Division (Apr. 9, 2010). In support of your position that the work should be registered, you first pointed to the Office's acceptance that the Work is not a useful article but is instead a toy model. *Id.* at 1. You cited to case law expressing that the threshold for copyright protection is low and asserted that the Work satisfied this low threshold. *Id.* at 1-2, citing *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991); *Eyal R.D. Corp. v. Jewelex New York, Ltd.*, 576 F. Supp. 2d 626, 634 (S.D.N.Y. 2008); *Weindling Int'l, Corp. v. Kolb Katz, Inc.*, 2000 WL 1458788, at *4 (S.D.N.Y. Sept. 29, 2000); *Kay Berry, Inc. v. Taylor Gifts, Inc.*. 421 F.3d 199, 207 (3d Cir 2005); *Knitwaves, Inc. v. Lollytogs, Ltd.*, 71 F.3d 996, 1003 (2d Cir. 1995). You then referred to photos of *Gyroscope Surface Design*, which you attached to the letter. *Id.* at 2. (Copies of the photos attached to Mr. Tomaselli's letter of April 9, 2010, as "Exhibit A" are attached here as Exhibit D). You then described multiple creative elements of the Work, "including the multicolored frame and the 2-dimensional pattern design on the flywheel/rotor." *Id.* You stated that it is not necessary that a gyroscope frame be of any particular color or texture or that the flywheel/rotor have a particular design. *Id.* You also stated that the flywheel rotor is mounted and moves within gimbals within a frame. *Id.* You then asserted that the design of the Work is unique and compared the Work to several other gyroscope designs. You then cited to, *Boisson v. Banian, Ltd.*, 273 F.3d 262, 271 (2d Cir. 2001), *Nimmer on Copyright*, § 2.14, at 2-178.4, and *Conquico, Inc. v. Rodriquez-Miranda*, 562 F.3d 62, 69 (1st Cir. 2009), for the proposition that original or idiosyncratic combinations of colors on a work are entitled to copyright protection. *Id.* at 2.

In a letter dated February 7, 2013, Martha Jahn Snyder, an attorney at your firm, requested an update on the status of the reconsideration and reiterated the view that the Works should be registered. Letter from Martha Jahn Snyder to Copyright RAC Division (Feb. 7, 2013).

III. DECISION

A. Useful Articles

Copyright does not extend to a useful article, which is defined as 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 normally a part of a useful article is considered a 'useful article.'" 17 U.S.C. § 101. However, works of artistic craftsmanship, which may be useful articles themselves or incorporated into a useful article, can receive protection as pictorial, graphic, or sculptural works pursuant to 17 U.S.C. § 102(a)(5). This protection is limited, though, in that it extends only "insofar as their form but not their mechanical or utilitarian aspects are concerned." *Id.* at § 101. The design of a useful article will be protected "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." *Id.*

To the extent that you have argued that the Work at issue fits into a supposed "toy" exception to the useful article doctrine, such an argument proceeds from an erroneous understanding of the law. There is no "toy" exception to the useful article doctrine. All toys are *not* de facto copyrightable. Instead, toys must fall within the subject matter of copyright as set forth in 17 U.S.C. §§ 101, 102. Toys that fall into the category of pictorial, graphic, or sculptural works are *generally* considered eligible for copyright protection. However, for toys, as well as all items that are alleged to fall within the category of pictorial, graphic, or sculptural works, a finding of copyright protection involves an inquiry as to whether the work is a useful article; and, if so, whether there are features that are separable from the utilitarian aspects of the article; and further, whether such separable features themselves contain sufficient original authorship. *See* 17 U.S.C. §§ 101, 102; *Spinmaster Ltd. v. Overbreak LLC*, 404 F. Supp. 2d 1097, 1103 (N.D. Ill. 2005) ("With respect to toys, *only* those toys which qualify as pictorial, graphic or sculptural works are subject to copyright protection.") (emphasis added); *Lanard Toys Ltd. v. Novelty, Inc.*, 511 F. Supp 2d 1020, 1035 (C.D. Cal. 2007), *aff'd*, No. 08-55795, 2010 WL 1452527 (9th Cir. Apr. 13, 2010) ("*Only* those toys which qualify as pictorial , graphical or sculptural works are subject to copyright protection.") (emphasis added).

The Board recognizes that certain toys are copyrightable and observes the Office has registered toys as varied as model aircraft, dolls, and puppets. For example, in *Gay Toys, Inc v. Buddy L. Corp.*, 703 F.2d 970, 974, the court determined that the only function of the model airplanes at issue was to portray the real item, and they were thus entitled to copyright protection. *Id.* However, the Board also observes that the Work at issue, like the toy motorcycle considered by the court in *Kikker 5150 v. Kikker 5150 USA, LLC.*, not only portrays a real item but is also useful. *Kikker 5150 v. Kikker 5150 USA, LLC*, No. C 03-05515 SI, 2004 U.S. Dist. LEXIS 16859 at *21 (N.D. Cal. Aug. 13, 2004).

In finding that the Work is a useful article, the Board notes that in its review of the record that there is no assertion that the Work is in fact merely a model of a functional toy. Indeed, your request for reconsideration noted that the flywheel rotor "moves" within the gimbals, indicating the work is not a mere model. Letter from Anthony Tomaselli to Copyright RAC Division (Apr. 9, 2010) at 2. The Board also notes that the deposited images for *Gyroscope Octagonal Shape and Dimples* establish that the Work is virtually identical to functional gyroscopes that Flambeau, Inc. markets through its affiliated company Duncan (although they are represented in various different color schemes). *See* "Gyroscope XT :: Duncan Toys" https://www.yo-yo.com/index.php/site/products/3706XT-BY (accessed June 25, 2013). Additionally, the Board notes that the Works are marketed, at least in part, by Flambeau, Inc. through its affiliated company Duncan, as educational tools. *See* "The Amazing Power of Spin: Teaching Science with a Gyroscope" https://www.yo-yo.com/images/forms-catalogs/gyroscopes_big.pdf (accessed June 25, 2013) (stating, in reference to the gyroscope's ability to hold its orientation, at page 14 "This property makes gyroscopes very useful"). The Board also reiterates the Office's earlier observation that gyroscopes were initially invented as measuring instruments. The Board, therefore, adheres to the previous finding by the Office that gyroscopes are useful.

The Board finds that none of the design elements, identified in the description of the Work, are apparently separable, either physically or conceptually, from the Work's function as a gyroscope (or as a teaching tool). Additionally, the Board notes that at no point did the claimant advance arguments asserting authorship that is separable from the functional Work.

B. The Originality Threshold

Copyright protection is available only for "original works of authorship." 17 U.S.C. § 102(a) (2011). Courts have consistently found originality to consist of two elements: "independent creation plus a modicum of creativity." *Feist*, 499 US at 346. The independent creation in question, or put another way "originality," means that the particular work owes its origin to the author. *Alfred Bell v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102. The Office accepts at face value the assertion on the application for registration that Flambeau, Inc. is the author of the Work. The first component of the term "original" being satisfied, the Board's analysis moves onwards to the second prong of originality – that a work must possess sufficient creativity.

In determining whether a work embodies a sufficient amount of creativity to sustain a copyright claim, the Board adheres to the standard set forth in *Feist*, in which the Supreme Court required a modicum of creativity to support a claim for copyright protection. However, the Court also ruled in *Feist* that some works fail to meet that standard. It 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*, 499 US 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. With no separable 3-dimensional authorship to consider, there is no basis to determine that the Work satisfies the originality threshold set forth in *Feist*.

The Board is skeptical that the 2-dimensional design elements on the Work exhibit a sufficient amount of creativity under the *Feist* standard, or under any of the additional case law you have cited. However, the application for the Work did not seek registration of 2-dimensional

Exhibit A

Copyright Office fees are subject to change. For current fees, check the Copyright Office website at www.copyright.gov, write the Copyright Office, or call (202) 707-3000.

Form VA

For a Work of the Visual Arts
UNITED STATES COPYRIGHT OFFICE

REGISTRATION NUMBER

VA VAU

EFFECTIVE DATE OF REGISTRATION

Month Day Year

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.

1

Title of This Work ▼

Gyroscope Octogonal Shape and Dimples

NATURE OF THIS WORK ▼ See instructions

Shape and Surface

Previous or Alternative Titles ▼

Publication as a Contribution If this work was published as a contribution to a periodical, serial, or collection, give information about the collective work in which the contribution appeared. **Title of Collective Work ▼**

If published in a periodical or serial give: **Volume ▼** **Number ▼** **Issue Date ▼** **On Pages ▼**

2

NOTE

Under the law, the "author" of a "work made for hire" is generally the employer, not the employee (see instructions). For any part of this work that was "made for hire" check "Yes" in the space provided, give the employer (or other person for whom the work was prepared) as "Author" of that part, and leave the space for dates of birth and death blank.

NAME OF AUTHOR ▼

a Flambeau, Inc.

DATES OF BIRTH AND DEATH
Year Born ▼ Year Died ▼

Was this contribution to the work a "work made for hire"?
☑ Yes ☐ No

Author's Nationality or Domicile
Name of Country
OR { Citizen of ____ Domiciled in USA

Was This Author's Contribution to the Work
Anonymous? ☐ Yes ☑ No
Pseudonymous? ☐ Yes ☑ No
If the answer to either of these questions is "Yes," see detailed instructions.

Nature of Authorship Check appropriate box(es). **See instructions**

☑ 3-Dimensional sculpture ☐ Map ☐ Technical drawing
☐ 2-Dimensional artwork ☐ Photograph ☐ Text
☐ Reproduction of work of art ☐ Jewelry design ☐ Architectural work

Name of Author ▼

b

Dates of Birth and Death
Year Born ▼ Year Died ▼

Was this contribution to the work a "work made for hire"?
☐ Yes ☐ No

Author's Nationality or Domicile
Name of Country
OR { Citizen of ____ Domiciled in ____

Was This Author's Contribution to the Work
Anonymous? ☐ Yes ☐ No
Pseudonymous? ☐ Yes ☐ No
If the answer to either of these questions is "Yes," see detailed instructions.

Nature of Authorship Check appropriate box(es). **See instructions**

☐ 3-Dimensional sculpture ☐ Map ☐ Technical drawing
☐ 2-Dimensional artwork ☐ Photograph ☐ Text
☐ Reproduction of work of art ☐ Jewelry design ☐ Architectural work

3

a **Year in Which Creation of This Work Was Completed**
2004
This information must be given in all cases. Year

b **Date and Nation of First Publication of This Particular Work**
Complete this information ONLY if this work has been published.
Month November Day 12 Year 2004
USA
Nation

4

See instructions before completing this space.

COPYRIGHT CLAIMANT(S) Name and address must be given even if the claimant is the same as the author given in space 2. ▼

Flambeau, Inc.
801 Lynn Avenue
Baraboo WI 53913

Transfer If the claimant(s) named here in space 4 is (are) different from the author(s) named in space 2, give a brief statement of how the claimant(s) obtained ownership of the copyright. ▼

DO NOT WRITE HERE OFFICE USE ONLY

APPLICATION RECEIVED

ONE DEPOSIT RECEIVED

TWO DEPOSITS RECEIVED

FUNDS RECEIVED

EXAMINED BY | FORM VA

CHECKED BY

☐ CORRESPONDENCE Yes | FOR COPYRIGHT OFFICE USE ONLY

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.

PREVIOUS REGISTRATION Has registration for this work, or for an earlier version of this work, already been made in the Copyright Office? 5

☐ Yes ☑ No If your answer is "Yes," why is another registration being sought? (Check appropriate box.) ▼

a. ☐ This is the first published edition of a work previously registered in unpublished form.

b. ☐ This is the first application submitted by this author as copyright claimant.

c. ☐ This is a changed version of the work, as shown by space 6 on this application.

If your answer is "Yes," give: **Previous Registration Number** ▼ **Year of Registration** ▼

DERIVATIVE WORK OR COMPILATION Complete both space 6a and 6b for a derivative work; complete only 6b for a compilation. 6

a. Preexisting Material Identify any preexisting work or works that this work is based on or incorporates. ▼

a

See instructions before completing this space.

b. Material Added to This Work Give a brief, general statement of the material that has been added to this work and in which copyright is claimed. ▼

b

DEPOSIT ACCOUNT If the registration fee is to be charged to a Deposit Account established in the Copyright Office, give name and number of Account. 7

Name ▼ **Account Number** ▼

a

CORRESPONDENCE Give name and address to which correspondence about this application should be sent. Name/Address/Apt/City/State/Zip ▼

b

Nordic Group of Companies, Ltd. - Attn: Sonja A. Stauffacher
414 Broadway, Suite 200
Baraboo, WI 53913

Area code and daytime telephone number (608) 356-0136 Fax number (608) 355-2280

Email sstauffacher@nordicgroup.com

CERTIFICATION* I, the undersigned, hereby certify that I am the 8

check only one ▶
- ☐ author
- ☐ other copyright claimant
- ☐ owner of exclusive right(s)
- ☑ authorized agent of Flambeau, Inc.

Name of author or other copyright claimant, or owner of exclusive right(s) ▲

of the work identified in this application and that the statements made by me in this application are correct to the best of my knowledge.

Typed or printed name and date ▼ If this application gives a date of publication in space 3, do not sign and submit it before that date.

Dana Roberts, General Counsel Date

Handwritten signature (X) ▼

X

Certificate will be mailed in window envelope to this address: 9

Name ▼
Nordic Group of Companies, Ltd.

Number/Street/Apt ▼
Attn: Sonja A. Stauffacher, 414 Broadway, Suite 200

City/State/ZIP ▼
Baraboo, WI 53913

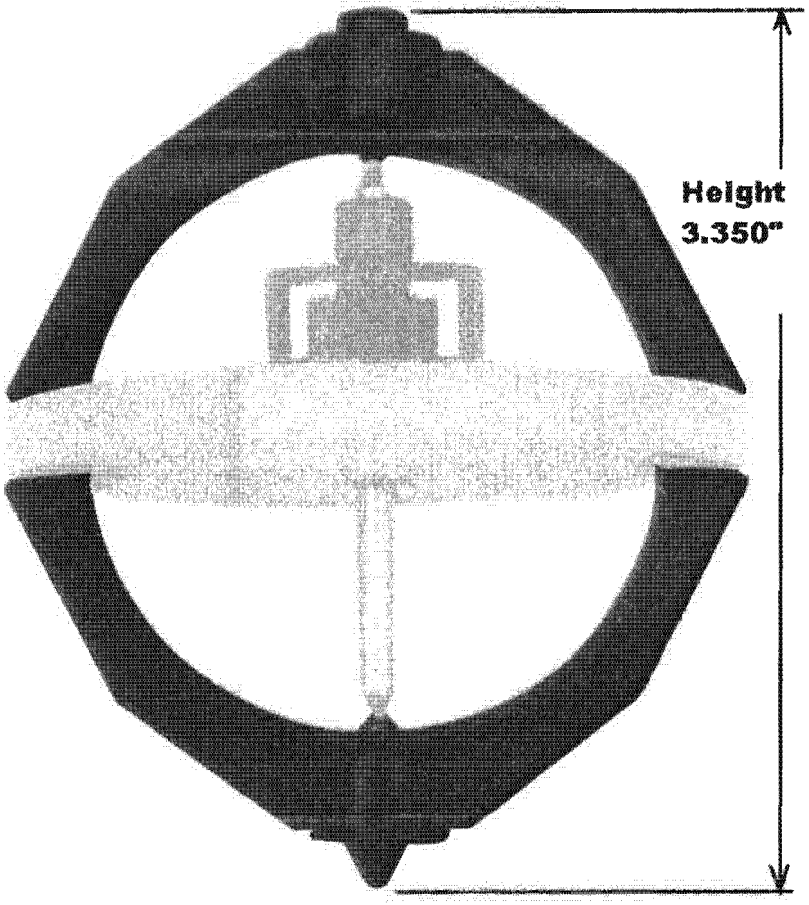
YOU MUST:
- Complete all necessary spaces
- Sign your application in space 8

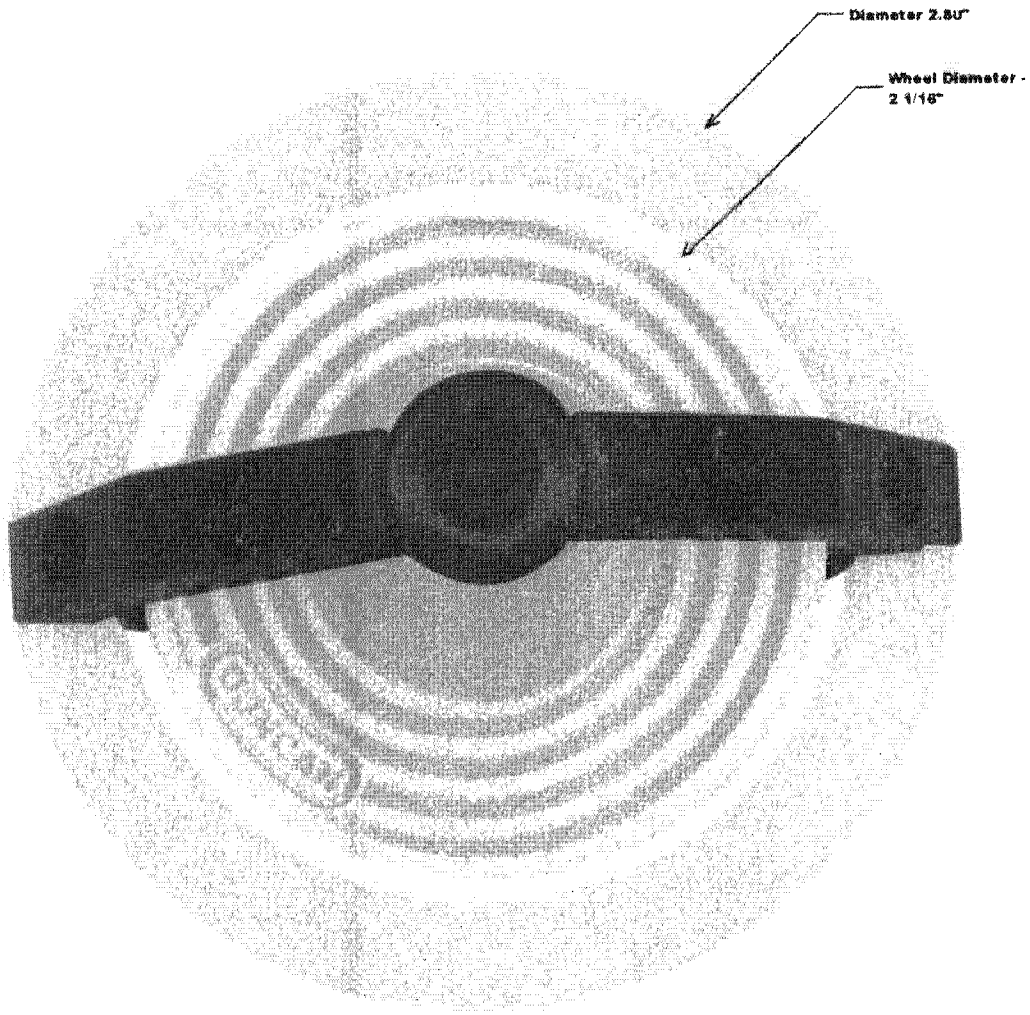
SEND ALL 3 ELEMENTS IN THE SAME PACKAGE
1. Application form
2. Nonrefundable filing fee in check or money order payable to *Register of Copyrights*
3. Deposit material

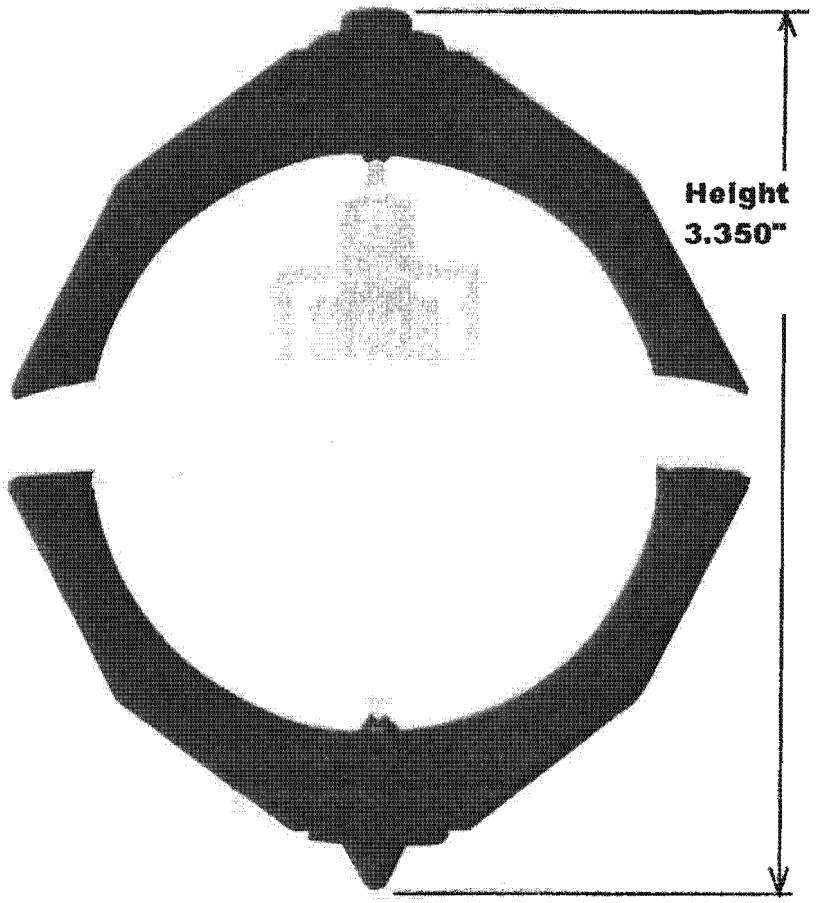
MAIL TO:
Library of Congress
Copyright Office
101 Independence Avenue SE
Washington, DC 20559-6000

*17 *USC* §506(e): Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 409, or in any written statement filed in connection with the application, shall be fined not more than $2,500.

Exhibit B


Height
3.350"


Diameter 2.80"
Wheel Diameter -
2 1/16"


Height
3.350"

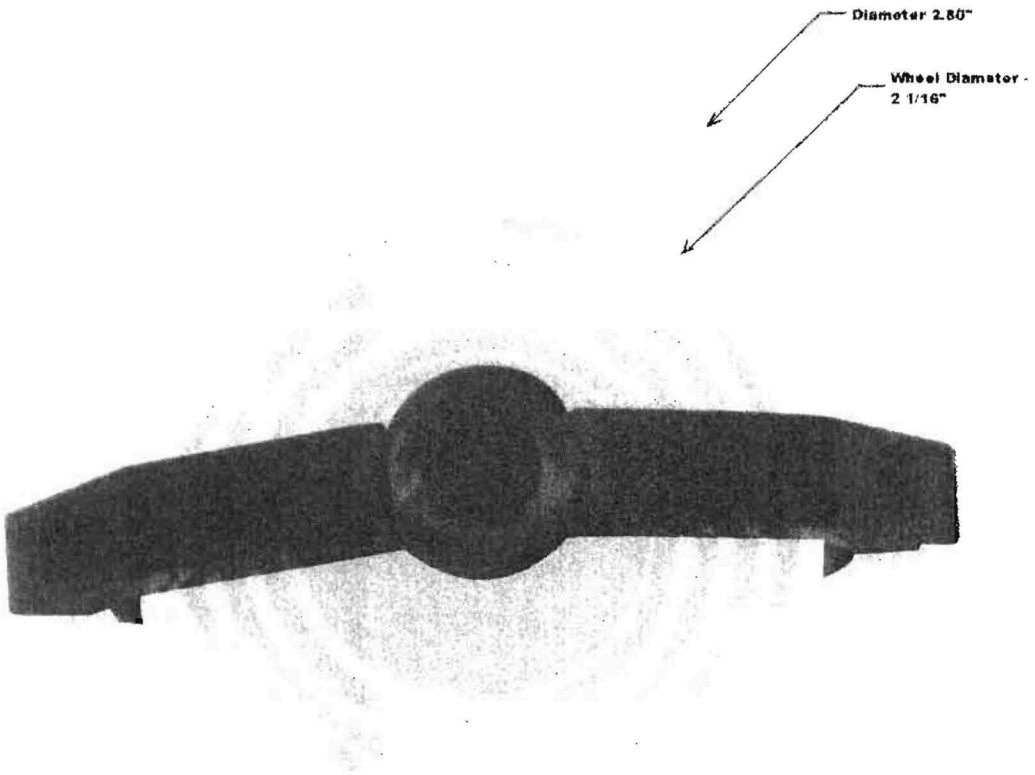
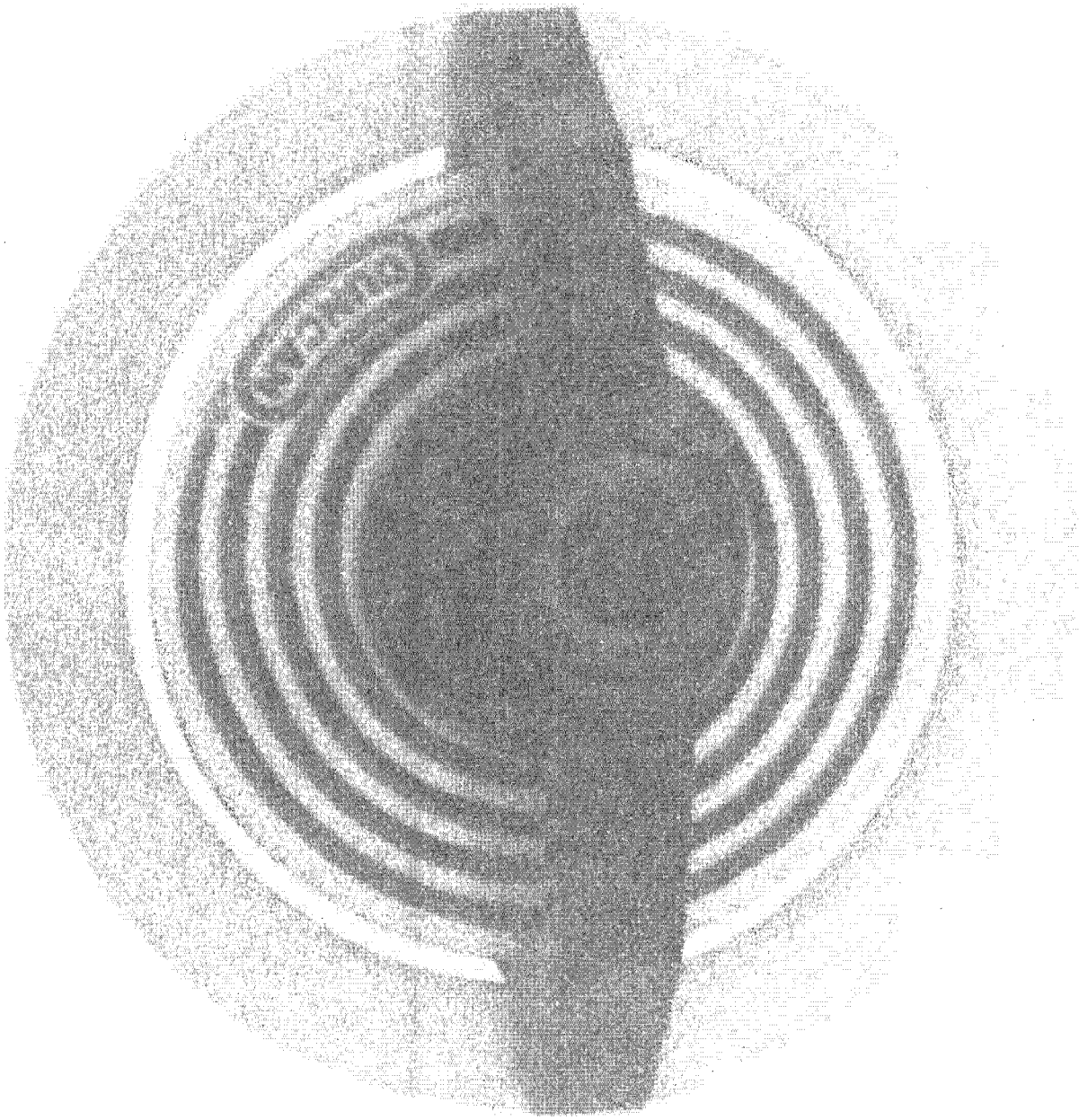

Diameter 2.80"
Wheel Diameter -
2 1/16"

Exhibit C



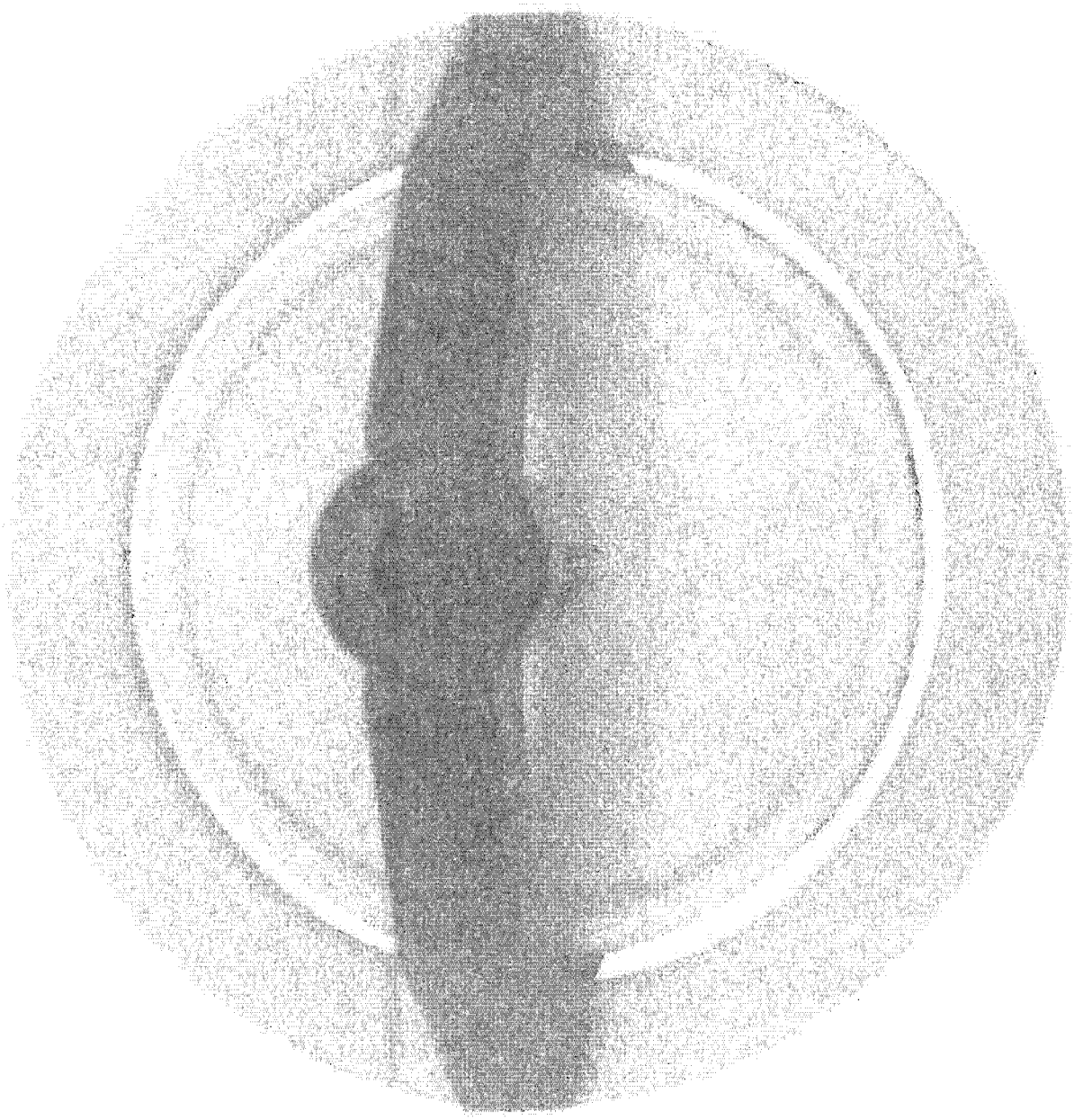
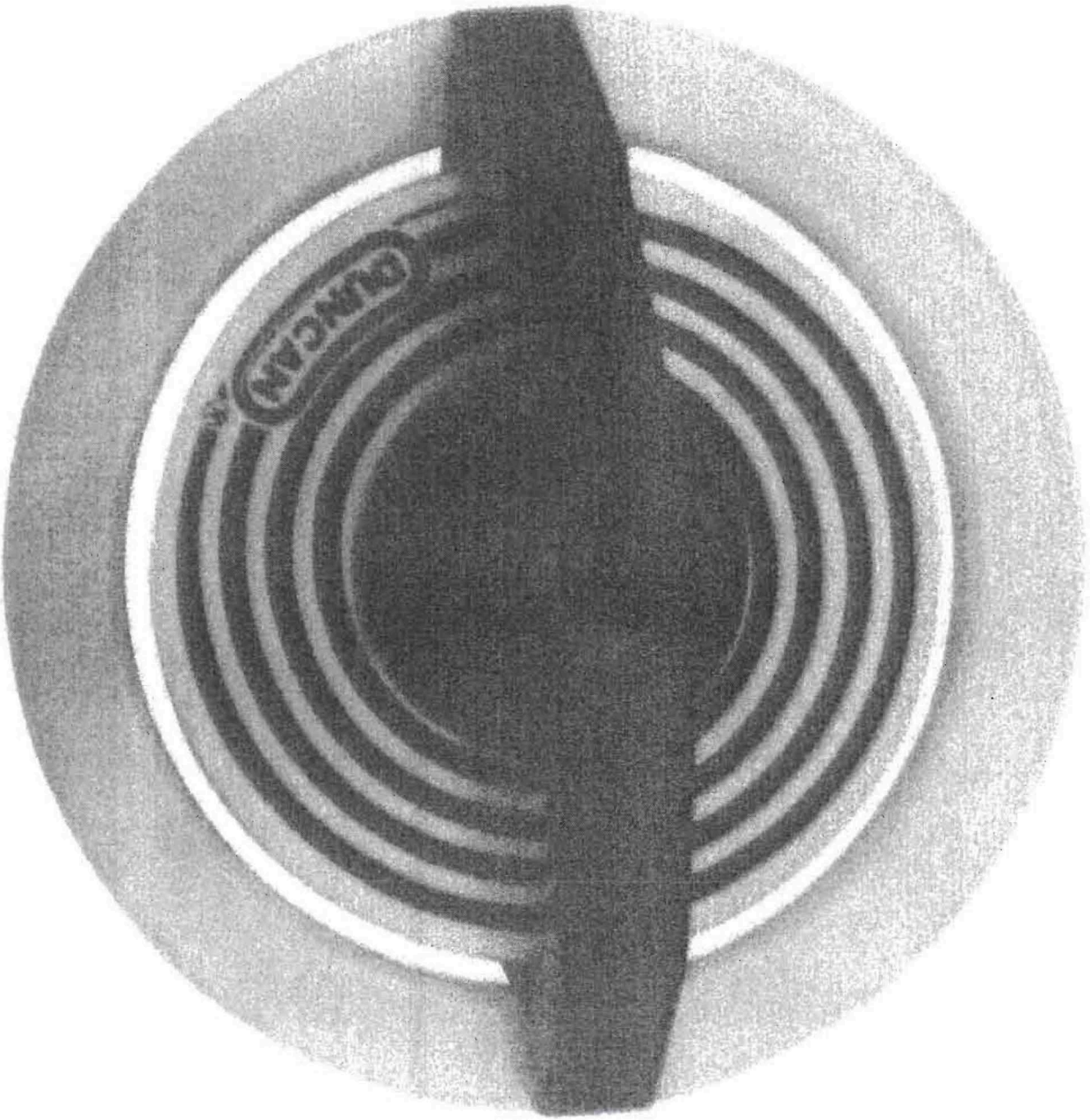
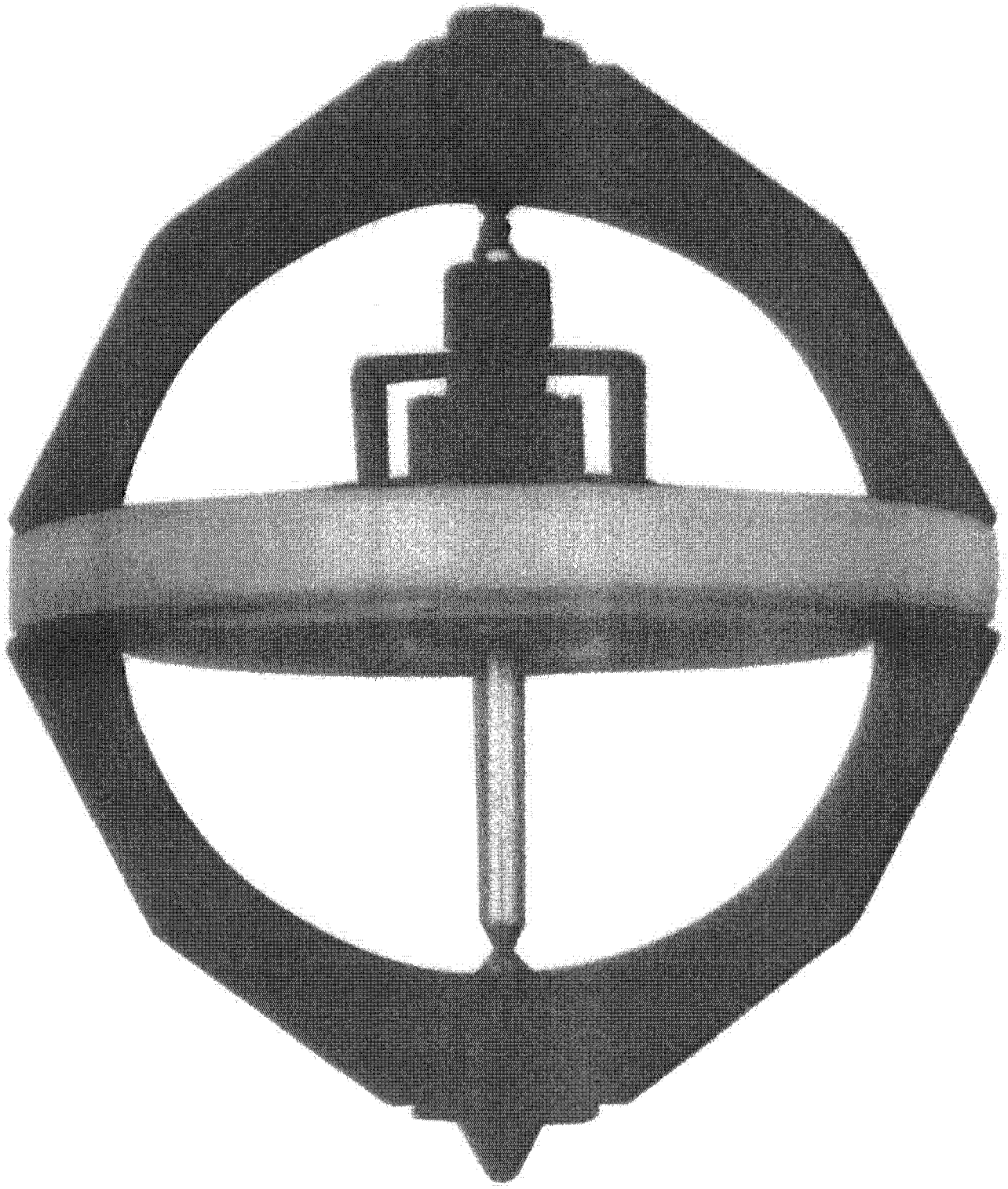


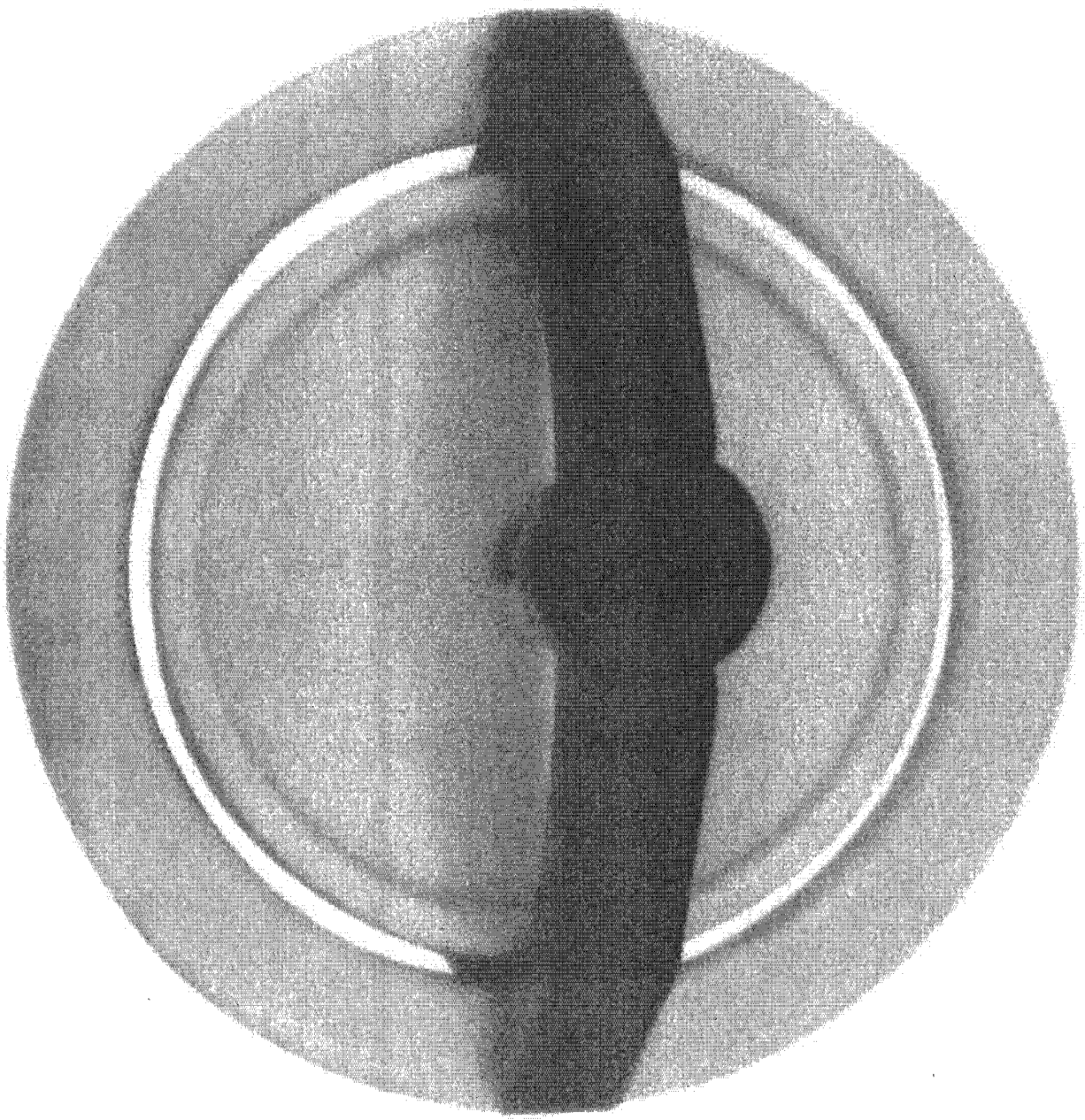
Exhibit D

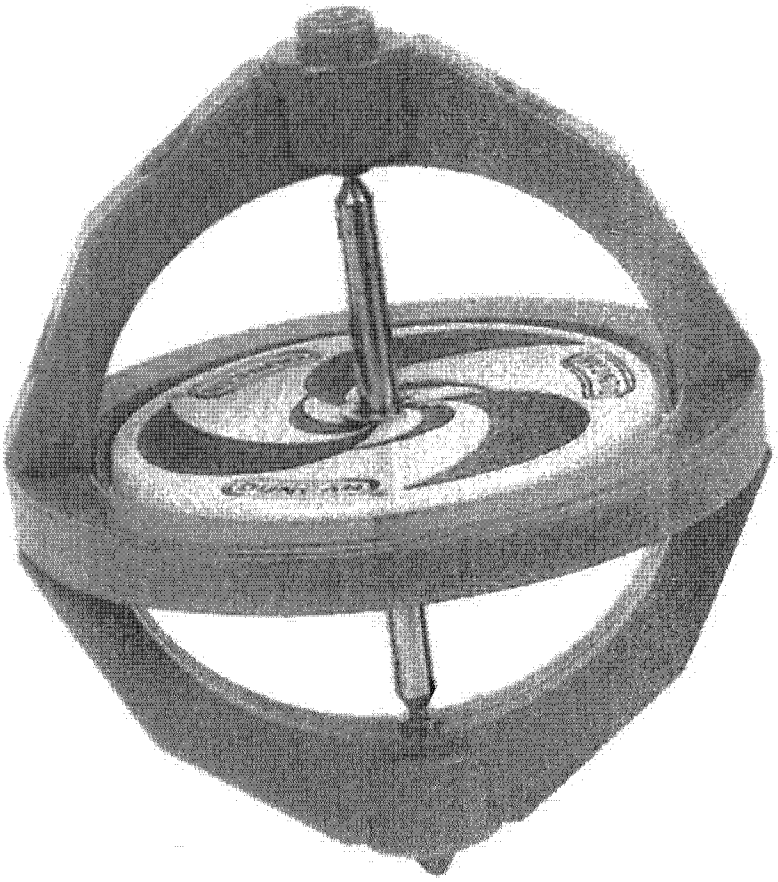


EXHIBIT

A







authorship, and therefore copyrightability of 2-dimensional elements is not at issue before the Board. *See* Exhibit A (No claim in 2-dimensional authorship at space 2a, and at space 1, "nature of this work," is indicated as "shape and surface").[1] If the claimant seeks to register such a claim, it should submit a new application, indicating the nature of the authorship as "2-dimensional authorship" and properly describe the nature the work.[2]

IV. CONCLUSION

For the reasons stated above, the U.S. Copyright Office Review Board affirms the refusal to register the work entitled *Gyroscope Octagonal Shape and Dimples*. This decision constitutes final agency action on this matter. 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

By: _____
Stephen Ruwe
Member of the Review Board

[1] In addition to the apparent confusion regarding the nature of the claims of authorship for which registration was sought, the Board wishes to point out an apparent inconsistency regarding the Work itself. This apparent inconsistency is evidenced by a comparison between the deposited images and the images submitted in the course of the requests for reconsideration, as well as by the inconsistent reference to the title of the work for which registration was sought. *See* Attachments B, C, and D.

[2] In any future application, the claimant should be sure that applications for copyright registration include the certification of an actual person, which in the case of a paper application, should be in the form of a handwritten signature at space 8.