:COPYRIGHT
OFFICE

September 25, 1997

RE: Alexander H. Drummond, SH101, SH102, SH201, SH202, SH203 And SH204,
Control No. 60-511-1523(D)

Dear Mr. Ruben:

This is in response to your letter dated May 29, 1997, addressed to David Levy, Attorney Advisor, Visual Arts Section, Examining Division. On behalf of your client, Alexander H. Drummond, you appealed the Copyright Office's refusal to register works entitled "SH101," "SH102," "SH201," "SH202," "SH203," and "SH204." These works are lamps that have bent glass forms that function as shades or screens.

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The Copyright Office Board of Appeals has considered your request and has affirmed the Examining Division's refusal to register. With regard to SH201, although the decorative element consisting of depending fused glass sheets is separable from the useful object, it is not registrable because the authorship is *de minimis*. Registration is denied to the other lamp designs because they are not separable from the utilitarian aspects of the works in which they are incorporated. The Appeals Board also found that, even were these sculptured glass works found to be separable, they are not copyrightable because their authorship is also *de minimis*.

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Administrative Record

On February 2, 1996, the Copyright Office received six Form VA applications for copyright registration from Alexander H. Drummond. The works were described as lamp designs, titled "SH101," "SH102," "SH201," "SH202," "SH203" and "SH204." In a letter dated July 25, 1996, the Copyright Office refused to register any of the lamp designs. The Copyright Office found that the works are useful articles. The letter stated that none of the lamp designs have any separately identifiable pictorial, graphic or sculptural feature subject to copyright. Because of the lack of separable authorship, the Copyright Office refused registration.

In a letter dated September 10, 1996, the Claimant, Alexander H. Drummond, asked the Copyright Office to reconsider his six applications for copyright registration. Mr. Drummond stated that the lamp designs are an "extension" of his sculptural ideas for "decorative works for the home using bent glass." He said that the lamp designs "were developed as sculptures." In Mr. Drummond's words, the sculptural shapes of bent glass "manipulate light into a pleasing interplay of glass and shadow." Mr. Drummond stated that he was seeking copyright protection only for the sculptural glass shapes. He was not seeking copyright protection for the "light

source, back plates, armatures, or supporting structures." Mr. Drummond compared his works to the lamp and sculpture in Mazer v. Stein, 347 U.S. 201 (1954), arguing by analogy that the sculptural glass shapes are separable from the utilitarian function of the lamps. Finally, he cited 37 C.F.R. 202.10(a) in support of registering his works on the basis that the language explicitly says that registrability of a work is not affected by the author's intention "as to the use of the work . . . ."

In a letter dated January 21, 1997, the Copyright Office again refused to register the six works, again on the basis that the works are useful articles that have no separate authorship that is copyrightable. The Office found that the sculptural glass shapes are useful articles as defined by Section 101 of the copyright law because they are designed to illuminate patterns of light and shadow created by light fixtures utilizing these shapes. The lamp designs are integral parts of the useful articles. The Copyright Office distinguished Mr. Drummond's works from the work in Mazer, stating that there is no comparable separable authorship in the sculptural glass shapes. The Copyright Office stated that 37 C.F.R. 202.10(a) only applies to a separately identifiable pictorial, graphic or sculptural work that can be distinguished from a useful article and which contains copyrightable authorship. Mr. Drummond's works did not satisfy that threshhold test of containing independent and separable copyrightable authorship.

In a letter dated February 7, 1997, as counsel for Mr. Drummond, you submitted a second request for reconsideration. As part of this request, the applications were amended to clarify that registration was being sought only on the basis of the bent glass shapes.

Relying on Brandir, 834 F.2d 1142 (2d Cir. 1987), you reasoned that the test for conceptual separability is whether the design elements reflect the designer's artistic judgment independent of utilitarian concerns. As evidence of separability, you stated that, "the shape and appearance of the glass that ornaments the lamp is separate from the function of the lamp; the glass could be any shape, any size, any color, such as a simple sphere or a complex shape as shown in the present applications." As evidence of conceptual and "often" physical separability, you pointed to the folded glass for SH102 and the two layers of glass hemispheres for SH202 which you described as ornamental, artistic and "neither critical nor necessary to the functioning of the lamp." You also pointed to the design for the depending fused glass sheets for SH201 as being clearly separable.

In addition, you compared the lamp designs to the antique telephone casing in Ted Arnold, Ltd. v. Silvercraft Co., 259 F. Supp. 733 (1966) in which the court ruled that the casing did have separable authorship. As with the antique telephone casing, you stated that the bent glass shapes contain superfluous sculptured designs which serve no function for the useful articles of which they are a part. In rebuttal to the Copyright Office's assertion that the lamp designs are part of utilitarian works, you argued that, in Mazer v. Stein, the Supreme Court upheld registration for a statue that functioned as an integral part of a lamp. You also argued that 37 C.F.R. 202.10(a) should be applied to the lamp designs because they should be examined as if

there were no utilitarian connection since the bent glass shapes are sculptures with inherent artistic merit that is copyrightable subject matter.

Finally, you asserted that the lamp designs satisfied the requirements of Sec. 505.03 of The Compendium of Copyright Office Practices because they could be conceived of independently of the useful article as free standing sculptures without destroying the basic shape of the useful article. Whether the light bulbs were removed or turned off, the artistic qualities of the bent glass shapes would still be evident. Taking another approach, the lamp designs could be conceived of as sculptures originally designed without a light source. If the light source were added later, this would not "divest the original sculpture of its copyrightability."

Conceptual Separability

After reviewing the applications and argumentation, the Copyright Office Appeals Board concluded that, except for the work entitled SH201, the sculptured shapes made from bent glass are not separable from the utilitarian aspects of the useful objects in which they are incorporated.

The definition of a useful article in Section 101 of the copyright law is an article "having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." 17 U.S.C. Sec. 101 (1994). The statute further provides that registration is possible only if and to the extent that a work contains pictorial, graphic or sculptural features that are separable from the useful article. Id.

The Office's implementation of the copyright statute, including its legislative history, is reflected in Compendium II of the Copyright Office Practices which states that "registration of claims to copyright in three-dimensional useful articles can be considered only on the basis of separately identifiable pictorial, graphic, or sculptural features which are capable of independent existence apart from the shape of the useful article." U.S. Copyright Office, Compendium of Copyright Office Practices II, Sec. 505.02 (1984).

Section 505 of Compendium II is a direct successor to the Copyright Office regulation that was affirmed in Esquire. 591 F.2d 796 (D.C. Cir. 1978). Based on explicit statements in the statute's legislative history, the District Court of Appeals there found that the Office's regulation was an authoritative construction of copyright law. Id. at 802-803. Esquire and later cases held that, despite an original and creative shape, the overall design or configuration of a utilitarian object may not be copyrighted if it is not "capable of existing as a work of art independent of the utilitarian article into which [it is] incorporated." Esquire at 803-804. In Esquire, the Court held that the Copyright Office properly refused copyright registration for a useful article, in that case a lighting fixture, notwithstanding how aesthetically pleasing the useful article's shape or configuration may have been. Esquire at 800. Esquire most clearly enunciates the rule underlying

the Office's legal analysis of whether a work is separable from the utilitarian object in which it is incorporated.

The Appeals Board found that one component of SH201, which is described as depending fused glass sheets, is separable from the utilitarian function of the useful article in which it is incorporated. The House Report accompanying the current copyright law states that:

> The test of separability and independence from "the utilitarian aspects of the article" does not depend upon the nature of the design--that is, even if the appearance of an article is determined by esthetic (as opposed to functional) considerations, only elements, if any, which can be identified separately from the useful article as such are copyrightable. And even if the three dimensional design contains some such element (for example, a carving on the back of a chair or a floral relief design on silver flatware), copyright protection would extend only to that element, and would not cover the over-all configuration of the utilitarian article as such.

H.R. Rep. No. 1476, 94th Cong., 2d Sess. 55 (1976) (emphasis added).

The Copyright Appeals Board found that the design element of depending fused glass sheets on SH201 is analogous to the separable elements of carving on the back of a chair or a floral relief design on silver flatware. As such, this design element is capable of existing as a work of art independent of the utilitarian article in which it is incorporated. However, regarding its copyrightability, see the discussion infra.

The Appeals Board found that the sculptured shapes made from bent glass in the works entitled "SH101," "SH102," "SH202," "SH203" and "SH204" serve the purpose of covering or shading the light sources. The function of the sculptured shapes, which is to filter light, is intrinsic to the useful articles which are lamps. This is a common feature of light fixtures, notwithstanding the fact that the lights could be turned off or the bulbs removed. Part of the definition of a useful article in Section 101 of the Copyright Law is that "an article that is normally a part of a useful article is considered a 'useful article.' " A light shade which blocks the glare of the bulb but through which light is visible is normally a part of a light fixture.

Nor is it relevant that the appearance of the sculptured shapes is unique or decorative. As was quoted above from the House Report accompanying enactment of the current copyright law, "The test of separability ... does not depend upon the nature of the design -- 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 [utilitarian aspects of the] useful article as such are copyrightable." H.R. Rep No. 1476, 94th Cong., 2d Sess. 55 (1976).

Consequently, unique or decorative qualities of the sculptured shapes are not relevant to a determination of whether, as components of a useful work, they are registrable.

Secondary Consideration:
De Minimis Authorship

In determining whether a useful article is entitled to registration, the Examining Division follows a two part analysis. First, it looks at whether or not there is any separable artistic authorship, as was done above. If there is separability, as was found with regard to the depending fused glass sheets of SH201, then the Examining Division considers whether such separable work rises to the level of authorship required by law. 17 U.S.C. Sec. 102(a) (1994). Although the Examining Division did not proceed to this second step in the analysis because it found no element separable, the Copyright Office Appeals Board did so because, unlike the Examining Division, it found an element of SH201 to be separable.

The required level of authorship for copyrightability is modest. See Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991). Further, the Copyright Office follows the policy set forth in a long history of case law, beginning with Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903), which requires examination to be made on the basis of finding a certain modicum of original authorship, and not on a subjective determination of the quality or aesthetic value of a work submitted.

The Appeals Board found that the design element of SH201, the depending fused glass sheets, is not copyrightable because its authorship is *de minimis*. Nor can registration be made on the basis that the first rejection only found that there was no separable authorship and did not address this second part of the analysis.

The decorative element that is part of SH201 is a simple variation of a few common shapes. The common geometric shapes or arrangements lack the originality and creativity needed to support a copyright claim. Even aesthetically pleasing designs may not be registered for copyright protection if the design lacks a minimum amount of original authorship. See Jon Woods Fashions v. Curran, 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988) (deference shown to Register's decision in rejecting *de minimis* fabric design); Forstmann Woolen Co. v. J.W. Mays, Inc., 89 F. Supp. 964 (E.D.N.Y. 1950) (reproduction of standard fleur-de-lis could not support a copyright claim without original authorship).

Under Copyright Office regulations, familiar symbols and designs are not copyrightable. 37 C.F.R. Sec. 202.1. This principle is supported by numerous judicial decisions. See John Muller & Co. v. New York Arrows Soccer Team, Inc., 802 F.2d 989 (8th Cir. 1986) (logo of four angled lines forming arrow with the word "Arrows" in cursive script held not copyrightable); Magic Marketing, 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" did not exhibit minimal level of creativity necessary for copyright registration); Jon Woods Fashions (upholding Register's decision that fabric design of striped cloth with grid of squares was not copyrightable); Bailie v. Fisher, 258 F.2d 425 (D.C. Cir. 1958) (cardboard star with circular center for photographs, and two folded flaps allowing star to stand for display, not a work of art within the meaning of 17 U.S.C. Sec. 5(g) (1909).

Finally, the Copyright Office Appeals Board also found that the above considerations relating to authorship apply to all the lamp designs. In other words, even were all the other sculptured shapes made from bent glass found to be separable from the utilitarian aspects of the works in which they were incorporated, their authorship is *de minimis* and therefore not copyrightable since they exhibit minor variations of common shapes and symbols.

In conclusion, with regard to SH201, although the decorative element consisting of depending fused glass sheets is separable from the useful object, it is not registrable because the authorship of which it consists is *de minimis*. Registration is denied to the other lamp designs because they are not separable from the utilitarian aspects of the lamp works in which they are incorporated. The Appeals Board also found that, even were these other sculptured glass works considered to be separable from the functional lamp elements, they are not copyrightable because their authorship is also *de minimis*.

For the reasons stated in this letter, the Appeals Board affirms the refusal to register the submitted claims and is closing the file in this case. This decision constitutes final agency action on this matter.

Sincerely,

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