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December 28, 1998

RE: 35-Minute Incense Burner; 1-Hour Incense Burner; 2-Hour Incense Burner
Copyright Office Control Number: 60-503-5265(B)

Dear Mr. Summe:

The Copyright Office Board of Appeals has reviewed the second appeal for registration of the three works referenced above, which you submitted April 27, 1998, on behalf of your client, Rolf Stone, Inc., d.b.a. Ferra Stone Mfg. Co. After careful consideration of the applications, deposits, and related correspondence, the Board has concluded that the Two-Hour Incense Burner and the One-Hour Incense Burner can be registered. However, the 35-Minute Incense Burner does not embody sufficient original authorship to support copyright registration, and thus, the Board must deny registration of this third work.

Administrative Record

On October 9, 1997, the Copyright Office received applications, deposits, and registration and special handling fees for registration of the three works named above. The works were described as two-dimensional artwork, three-dimensional sculpture, and incense burner designs.

In a letter dated October 15, 1997, Visual Arts Examiner Joy Mansfield explained to the applicant's then-representative, David Pritchard, that the works could not be copyrighted because they were useful articles without separable sculptural authorship. The pattern in the 35-Minute Incense Burner was described as "circular with a simple maze pattern on the burner" which grew to include an additional circular ring as the burning time increased. These design elements were recognized as familiar shapes that could not be registered for copyright protection.

You responded in a letter dated November 6, 1997, asking for reconsideration of the refusal to register. You stressed that protection was intended for the conceptually separable, decorative patterns of the burner tops, not the burners themselves as functional objects, adding that the burner tops were not in the form of well-known shapes such as geometric designs. You wrote that under Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340 (1991), authorship in the three works was copyrightable.

On February 13, 1998, the Examining Division of the Copyright Office responded, explaining that upon review, copyrightable authorship could not be discerned in any of the three works submitted for registration. Attorney-Advisor Virginia Giroux explained that the works were useful articles, and that although the surface design patterns were conceptually separable, none embodied sufficient copyrightable authorship to support registration. She cited as support 37 CFR § 202.1, John Muller & Co. v. N.Y. Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986), and Jon Woods Fashions Inc. v. Curran, 8 U.S.P.Q.2d 1879 (S.D.N.Y. 1988), and noted that the Office's decisions were consistent with the Feist standard, which requires at least minimal original authorship for registration to occur.

In your client's second appeal letter, dated April 27, 1998, you cited Mazer v. Stein, 347 U.S. 201 (1954), and 17 U.S.C. § 101 to support the assertion that the decorative patterns on the three works submitted were copyrightable, even though they were incorporated into useful articles. You noted that although Ms. Giroux wrote that the design patterns were variations of familiar shapes, she did not state what shape the design followed or why she thought the designs were variations of familiar shapes. You wrote that you presumed she meant a circle, and you argued that the patterns were not circles, spirals or minor variations thereof. You described maze patterns, stressing that they were not standard shapes. You found the Muller and Woods cases to be inapposite, because they discuss designs that incorporate familiar shapes, unlike the incense burner designs.

The Appeals Board's Decision

As mentioned above, the Appeals Board has examined *de novo* the applications, deposit copies, and correspondence associated with the three incense burner designs. The Board members have concluded that two of the designs submitted, the 2-Hour Incense Burner and the 1-Hour Incense Burner, could be registered. However, the

35-Minute Incense Burner cannot be registered because it does not embody sufficient original authorship to support registration.

The Board accepts the Examining Division's conclusion that the surface designs of the incense burners are conceptually separable from the useful articles themselves. However, the question remains whether there is any copyrightable authorship in those surface designs.

Originality and *De Minimis* Authorship

The Copyright Office Appeals Board, as well as Copyright Office Examiners day-to-day, must determine whether works embody elements the law requires in order to register authors' expressions for copyright protection. The standard is set forth in 17 U.S.C. § 102 (Subject matter of copyright: In general) and is discussed further by the United States Supreme Court in the Feist case. To be copyrightable, a work must be original, meaning not a copy of another claimant's work. See Feist, 499 U.S. at 347; see also Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951). Also, importantly, a work must possess "at least some minimal degree of creativity." Feist at 345. As the Court recognized in Feist, "[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity," *id.* at 363, and there can be no copyright in works in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359.

Although the standard for determining the copyrightability of a work is low, some works fail to meet that standard. The Office has long held that at least a minimal amount of original authorship must be perceivable in a work in order to register it. See Compendium of Copyright Office Practices, Compendium II, § 202.02(a)(1984). The Office does not examine a work for the presence of an author's effort or the aesthetic merit of a work.

Review of the Works

35-Minute Incense Burner

The Appeals Board upholds the Examining Division's previous conclusion that this work cannot be registered. The work embodies the sculptural representation of

a spiral, or two concentric circles. Under 37 C.F.R. § 202.1(a), familiar symbols or designs cannot be registered because they are in the public domain. For pictorial, graphic and sculptural works, the class within which the incense burners would fall (*see* 17 U.S.C. §102(a)(5)), the Compendium of Copyright Office Practices, Compendium II (1984) ("Compendium II") has long recognized this principle, stating that a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." Compendium II, §503.02(a)(1984). The Compendium recognizes that it is not aesthetic merit, but the presence of creative expression that is determinative of copyrightability, *id.*, and that "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. ... 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." *Id.* The 35-Minute Incense Burner consists, at best, of minor linear of spatial variations on a spiral or, alternatively, two concentric circles. The fact that the spiral shaped form in this work reverses its direction once in its inner loop constitutes *de minimis* authorship insufficient to support a claim to copyright protection.

1-Hour Incense Burner

The 1-Hour Incense Burner embodies slightly different authorship than the 35-Minute Incense Burner. It contains the same basic circular design, with reverse center loop, as the 35-Minute Incense Burner. However, the 1-House Incense Burner also embodies alterations in the outer loops, resembling indentations, which, combined with the other aspects of the design, rise to the level of original authorship the Supreme Court recognized as copyrightable in its decision in Feist. The Board notes that in this work it perceives no more than a "spark of original authorship." However, a perceivable "spark" is sufficient to merit registration with the Copyright Office.

2-Hour Incense Burner

This work expands upon the design of the 1-Hour Incense Burner by providing another concentric ring, with an additional indentation at the beginning of the outer ring. For the reasons explained in the paragraph above, the Appeals Board has

decided that the 2-Hour Incense Burner can be registered for copyright protection because it embodies a modicum of creativity.

Conclusion

For the reasons stated above, the Copyright Office Board of Appeals affirms the decision of the Office's Examining Division not to register the work 35-Minute Incense Burner for copyright protection. However, upon reexamination, the Board finds that the 1-Hour Incense Burner and the 2-Hour Incense Burner both embody (albeit barely) original authorship sufficient to support registration. The effective date of registration for the two works is August 19, 1996. You will receive the two certificates in a separate mailing.

This action constitutes final agency action.

Sincerely,

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

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December 28, 1998