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September 25, 2000

Roger R. Myers, Esq.
Steinhart & Falconer, LLP
333 Market Street, Suite 3200
San Francisco, CA 94105-2150

RE: "RIPPLE"
Control Number 60-508-5784(S)

Dear Mr. Myers:

I am writing on behalf of the Copyright Office Board of Appeals in response to your letter dated August 12, 1998, appealing a refusal to register a collection of glass dinnerware. The letter was addressed to the Board and constituted the second appeal to the refusal to register the work entitled: RIPPLE.

The Board has examined the claim and considered all correspondence from your firm concerning this claim. After carefully reviewing the claim, the Board affirms the Examining Division's decision to refuse registration.

Administrative Record

On December 11, 1996, the Copyright Office received a completed Form VA, identifying reproductions, and the fee, from your firm covering a dinnerware design entitled RIPPLE. This application was submitted for your client, Ann Morhauser, who was designated as author and copyright claimant.

Visual Arts examiner James Shapleigh refused registration on the ground that the dinnerware design lacked the artistic or sculptural authorship necessary to support a copyright claim. The denial letter stated that ideas or concepts which may be embodied in a work are not protected by copyright. In addition, copyright does not protect familiar symbols and designs, minor variations of basic geometric shapes, lettering and typography, or mere variations in coloring.

In a letter dated July 11, 1997, you requested reexamination of your client's copyright claim. You described the work as "a three-dimensional sculpture consisting of five variously-sized textured glass dinnerware pieces in an array of colors." The author was inspired by daffodils, and some of the pieces resembled a corona, while others, a trumpet.

You argued that the level of creativity required to a support a copyright was extremely low, citing Feist Publications, Inc. v. Rural Telephone Service Company, Inc., 499 U.S. 340 (1991). While the "garden-variety" white pages in that case was found insufficient to meet the low threshold, the applicant's work was not "garden variety" but was the result of "intellectual production, of thought, and conception," quoting Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 59-60 (1884). Other cases cited in support of registration included Runstadler Studios, Inc. v. MCM Ltd. Partnership, 768 F.Supp. 1292 (N.D. Ill 1991); Roulo v. Russ Berrie & Co., Inc., 886 F.2d 931 (7th Cir. 1989); Brandir Intern., Inc. v. Cascade Pacific Lumber Co., 834 F.2d 1142 (2nd Cir. 1987); Soptra Fabrics Corp. v. Stafford Knitting Mills, Inc., 490 F.2d 1092 (2nd Cir. 1974); and Tennessee Fabricating Co. v. Moultrie Manufacturing Co., 421 F.2d 279 (5th Cir. 1970).

In a letter dated April 15, 1998, Melissa Dadant reaffirmed the refusal to register. Ms. Dadant began the letter by citing the copyright standards for "useful articles", as set out in the definitions of "useful article" and "pictorial, graphic, and sculptural works" in section 101 of the copyright law. In the case of sculptural works embodied in a useful article, Ms. Dadant stated: "the Office looks for either physical or conceptual separability of sculptural elements." The inspiration for a work plays no role in making such a determination.

The cases cited in support of registration, Ms. Dadant concluded, were all distinguishable. In Runstadler, supra, many pieces of cut glass were fixed in a permanent arrangement, and it was that arrangement that formed the sculptural work. The case of Roulo v. Russ Berrie, supra, concerned greeting cards, not useful articles, and both Soptra Fabrics, supra, and Tennessee Fabricating, supra, concerned more complex designs.

In a letter dated August 12, 1998, you appealed to the Board of Appeals expanding on the arguments you raised in your first appeal. The letter begins with an extensive physical description of the pieces of dinnerware, and leads to the conclusion that "the combination of shapes and angles" evidences "a degree of creativity well above the low threshold required to support a copyright registration." A number of cases were cited supporting copyright protection in certain combinations of design elements, and the letter further asserted that the test of conceptual separability was met. Finally, even if only the scalloped rim could be regarded as separable, that element alone met the creativity test.

Registration Requirement for Useful Articles

With respect to copyright protection of useful articles, the copyright statute provides special criteria. 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 normally a part of a useful article is considered a 'useful

article." 17 U.S.C. §101 (1998). The dinnerware in this case clearly falls within the definition of "useful article."

Moreover, the definition of "pictorial, graphic and sculptural works" limits copyrightability of the design of a useful article to "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.

The question before the Board is whether this collection of dinnerware satisfies the statutory definition for this type of work. The Board concludes that they do not. Congress clarified its intent with respect to the shape of useful articles in the legislative history. Specifically, the House Report accompanying the current copyright law states that:[1]

> In adopting this amendatory language, the Committee is seeking to draw as clear a line as possible between copyrightable works of applied art and uncopyrightable works of industrial design ... [[A]lthough the shape of an industrial product maybe aesthetically satisfying and valuable, the Committee's intention is not to offer it copyright protection under the bill. 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 is determined by aesthetic (as opposed to functional) considerations, only elements, if any, which can be identified separably from the useful article as such are copyrightable.

Conceptual Separability of Overall Shape

You assert that the dinnerware meets the conceptual separability test of the copyright law because the sides and rims constitutes an independently existing sculpture. You observe that pieces of the dinnerware resemble the corona of a daffodil. You also assert that Compendium II of Copyright Office Practices § 505.03 supports registration in this instance.

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

The rims and sides of the dinnerware are clearly utilitarian features of the dinnerware and as such can not support a copyright claim.[2] Although they could be shaped differently, that fact does not make the dinnerware copyrightable. The shapes of virtually all useful articles could be designed differently. If this were the test, virtually all useful articles would qualify for copyright protection.

Moreover, any resemblance of this dinnerware to flowers is irrelevant. Even if an observer of the dinnerware recognized its shape as being the shape of a flower, which is possible but by no means obvious, the fact remains that it is the shape of the dinnerware itself. The fact that the dinnerware may exhibit artistic craftsmanship does not make it any less a useful article, and that fact that the shape of the useful article may be aesthetically pleasing does not make it any less the shape of the article.[3]

In arguing that your client's dinnerware meets the test in the Compendium, you quote only a small part of § 505.03, and omit the heart of the section.[4] Under this provision, conceptual separability is met when "artistic or sculptural features ... can be visualized as free-standing sculpture 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." No free-standing work of sculpture, independent of the shape of the useful article itself, can be visualized from your client's dinnerware or from the features ("the narrow bottom and slanted sides plus the nearly horizontal rippled rim in glossy textured glass") that you specify as separable. As section 505.03 states, "The mere fact that certain features are nonfunctional or could have been designed differently is irrelevant under the statutory definition of pictorial, graphic, and sculptural works. Thus, the fact that a lighting fixture might resemble abstract

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[2] The Board does not agree with Ms. Dadant's statement that the scalloped rim of the dinnerware is separable. It is a central component of the shape of each piece.

[3] You rely on Hart v. Dan Chase Taxidermy Supply Co., 86 F.3d 320, 321 (2d Cir. 1996) for the proposition that 'many objects are both useful and works of artistic craftsmanship." But Hart cast doubt on whether the animal mannequins at issue were useful articles and in any event found them to be copyrightable because "[w]e conclude that fish mannequins, even if considered 'useful articles,' are useful insofar as they 'portray their appearance.' 17 U.S.C. § 101. That makes them copyrightable." 86 F.3d at 323. In contrast, the dinnerware items at issue here clearly are useful articles and their usefulness is not based on their portrayal of their appearance.

[4] In fact, immediately after the sentence quoted at pp. 5-6 of your August 12, 1998 letter, section 505.03 continues with an example that illustrates the type of expression that is conceptually separable: "Thus, carving on the back of a chair, or pictorial matter engraved on a glass vase, could be considered for registration." Unlike the aspects of the dinnerware that you claim are conceptually separable, the carving and pictorial matter discussed in section 505.03 are not aspects of the shape of the useful article.

sculpture would not transform the lighting fixture into a copyrightable work."

Esquire Inc v. Ringer, 591 F.2d 796 (D.C. Cir. 1978 cert. denied, 440 U.S. 908 (1979), although decided under the 1909 law, most clearly enunciates the rule underlying the Office's principal reason for refusal. Esquire held that the Copyright Office regulation properly prohibited copyright registration for the overall shape or configuration of an utilitarian article, no matter how aesthetically pleasing that shape or configuration may be. Id. at 800. In fact, section 505.03 of Compendium of Copyright Office Practices II is a direct successor to the Copyright Office regulation which was affirmed in Esquire as an authoritive construction of the statute as explicitly stated in legislative history. Id. at 802-03. *See also* Custom Chrome, Inc. v. Ringer, 35 USPQ 2d 1714, 1718 (D.C.D.C. 1995), where the court stated that the "conceptual separability test" as it is enunciated in Compendium II is consistent with the holding in Esquire, later cases decided under the present law, and the legislative history.

De Minimis Authorship

Even if the scalloped rim of the dinnerware were considered separable, the simple shape would fail to rise above a de minimis quantum of creativity.

Copyright Office regulations forbid registration of "familiar symbols or designs; mere variations of typographic ornamentation, [or] lettering." 37 C.F.R. § 202.1(a). In John Muller & Co. v. New York Arrows Soccer Team, Inc., 802 F.2d 989 (8th Cir. 1986), the court upheld a refusal to register a logo consisting of four angles lines forming an arrow, with the work "arrows" in cursive script below, noting that the design lacked the minimal creativity necessary to support a copyright and that a "work of art" or a "pictorial, graphic or sculptural work ... must embody some creative authorship in its delineation of form." *See also* Bailie v. Fisher, 258 F.2d 425 (D.C. Cir. 1958)(cardboard star with two folding flaps allowing star to stand for display not copyrightable 'work of art'); DBC of New York, Inc. v. Merit Diamond Corp., 768 F.Supp. 414, 416 (S.D.N.Y. 1991)(upholding refusal to register jewelry design and noting that "familiar symbols or designs are not entitled to copyright protection," citing 37 C.F.R. §202.1); Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc., 634 F.Supp 769 (W.D. Pa. 1986) (envelopes with black lines and words "gift check" or "priority message" did not contain minimal degree of creativity necessary for copyright protection); 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 fleurs de lis held not copyrightable); The Homer Laughlin China Co. v. Oman, 22 USPQ 2d 1074 (D.C.DC 1991), (upholding refusal to register chinaware design pattern composed of simple variations or combinations of geometric designs due to insufficient creative authorship to merit copyright protection); Jon Woods Fashions v. Curran, 8 USPQ 2d 1870 (S.D.N.Y. 1988)(upholding refusal to register fabric design consisting of striped cloth with small grid squares superimposed on

the stripes where Register concluded design did not meet minimal level of creative authorship necessary for copyright); Tompkins Graphics, Inc. v. Zipatone, Inc., 1984 Copyright Law Decisions (CCH) section 25,698 (E.D. Pa. 1983) (collection of various geometric shapes not copyrightable).

Finally, the cases you have cited of allegedly similar works all involve works which were dissimilar and far more complex. A significant number of the cases involved fabric designs which were registered by this Office as pictorial works.[5] Others involve photographs,[6] a glass sculpture sold as an art object,[7] a decoration appearing on glassware,[8] pictorial stationary and novelty items,[9] and a taxonomy of dental procedures.[10] The works in these cases bear little analogy to the shapes of useful articles.

For the reasons stated above, no registration can be made for your client's dinnerware.

This letter constitutes final agency action.

Sincerely,

David O. Carson
General Counsel
for the Appeals Board
U.S. Copyright Office

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[5] The Prince Group Inc. v. MTS Products, 967 F.Supp. 121 (S.D.N.Y. 1997); Folio Impressions, Inc. v. Byer Co., 937 F.2d 759 (2nd Cir. 1991); In Design v. Lynch Knitting Mills, Inc., 689 F.Supp. 176, aff'd 863 F.2d 45 (2nd Cir. 1988); Concord Fabrics, Inc. v. Marcus Bros. Textile Corp., 409 F.2d 1315 (2nd Cir. 1969); North Coast Industries v. Jason Maxwell, Inc., 972 F.2d 1031 (9th Cir. 1992).

[6] Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884).

[7] Runstadler Studios, Inc. v. MCM Ltd. Partnership, 768 F.Supp. 1292 (N.D.Ill. 1991).

[8] William A. Meier Glass Co. v. Anchor Hocking G. Corp., 95 F. Supp.264 (W.D. Pa. 1951).

[9] Lisa Frank, Inc. v. Impact International, Inc., 799 F. Supp. 980 (D.Ariz. 1992).

[10] American Dental Ass's v. Delta Dental Plans Ass'n, 126 F.3d 977 (7th Cir. 1997).