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September 29, 2000

Wayne L. Jacobs, Esq.
Wood, Herron & Evans, L.L.P.
2700 Carew Tower
Cincinnati, OH 45202

Re: Control Number: 60-607-9878(W)
Lynnridge Maple, HILB-622A
Goldridge Oak, HILB-622B
Brenckinridge Cherry, HILB-622C
Westridge, HILB-622D

Dear Mr. Jacobs:

I am writing on behalf of the Copyright Office Board of Appeals in response to your letter dated July 20, 1999, in which you appeal a refusal to register, as a 3-dimensional sculpture, two horizontally spaced groupings of three vertical grooves carved into the casket shell sidewalls of the identified works.

The Board has examined the claims and considered all correspondence from your firm concerning these applications. After carefully reviewing the claims, the Board affirms the Examining Division's decision to refuse registration because the design lacks the modicum of creativity needed to support a copyright.

Administrative Record

On July 25, 1997, you submitted four applications for registration of four caskets as "3-dimensional sculptures" on behalf of your client, Batesville Casket Company. On each application, you identified the sculptures as derivative works and stated in space

6a that the preexisting material was "All except carving artwork on casket shell sidewalls" and in space 6b that the material added to the work was "Carving artwork on casket shell sidewalls." On March 16, 1998, in a letter from Visual Arts Section Examiner Helen Livanios, the Examining Division of the Copyright Office explained that the caskets were useful objects, and therefore, that only separately identifiable pictorial, graphic, or sculptural features were appropriate subject matter for copyright protection. The examiner acknowledged that additional decorative carvings identified on the application met the test of conceptual separability, but denied registration because the works were comprised only of familiar shapes and designs which, alone or in combination, lacked sufficient creativity on which to base a copyright registration.

On July 10, 1998, you wrote to the Copyright Office requesting reconsideration of the Office's refusal to register the works. The central argument offered in support of registering each work was the assertion that the vertical grooves carved on the casket shell sidewalls are not common elements, but original designs because no other caskets display such carvings. In addition, you noted that the U.S. Patent and Trademark Office had issued a design patent for these very same designs.

On February 23, 1999, Melissa Dadant, Special Assistant to the Chief, Examining Division, sent you a letter upholding the original decision not to register the works. She acknowledged the principle that independently created works are original, but noted that originality is not sufficient. Upon further evaluation, she determined that the works, even though original, did not contain the modicum of creativity needed to support a claim to copyright. Specifically, she identified the carvings of the vertical grooves as a simple geometric design found in the public domain, and therefore, not appropriate subject matter for copyright. She also explained how the standards used to grant a design patent differ from the standard used to determine copyrightability.

You responded to this second refusal to register the works with the current request for reconsideration, set forth in a July 20, 1999, letter to the Board of Appeals. In this letter, you argue that it was inappropriate for the Office to rely on cases that discuss the copyrightability of design elements in 2-dimensional works because the works under consideration are 3-dimensional. You also suggest that the Office's failure to cite an example of a public domain design that mirrors the designs under consideration supports your position that the work is "new," and therefore, entitled to registration.

De Minimis Authorship

No registration is possible where the work consists solely of elements which

are incapable of supporting a copyright claim. Uncopyrightable elements include geometric figures or symbols, such as a hexagon, an arrow, and a five-pointed star. Compendium of Copyright Office Practices, Compendium II § 503.02(b) (1984). 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').

A simple, repetitive pattern of a common shape lacks the requisite minimal level of creativity needed to meet the decidedly low level of creativity needed to support your claim. In order to sustain a copyright, the creative expression must consist of something more than the mere bringing together of two or three standard forms or shapes with minor linear or spatial variations. Compendium II § 503.03(b). See also, John Muller & Co. v. N.Y. Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986) (upholding Register's refusal to register a simple logo consisting of four angled lines which form an arrow and the word "Arrows" in cursive script below the arrow); Jon Woods Fashions, Inc. v. Curran, 8 U.S.P.Q. 2d 1870 (S.D.N.Y. 1988) (upholding Register's decision that fabric design consisting of striped cloth over which is superimposed a grid of 3/16" squares, even though "distinctly arranged or printed," did not contain a minimal amount of original artistic material to merit copyright protection); Homer Laughlin China Co. v. Oman, 22 U.S.P.Q. 2d 1074 (D.D.C. 1991) (upholding Register's determination that there was insufficient creative authorship in "Gothic" chinaware design pattern to merit copyright).

In your second letter of appeal, you argue that John Muller and Jon Woods Fashions are not applicable because they deal only with two-dimensional designs. Nevertheless, the principles underlying the decisions in those cases applies with equal force to an analysis of three-dimensional sculptural works. See, e.g., Bailie v. Fisher, *supra*; DBC of New York, Inc. v. Merit Diamond Corp., 768 F. Supp. 414 (S.D.N.Y. 1991) (upholding decision of Register of Copyrights denying registration for ring designs featuring triangular indentations on the ring band).

Common shapes, whether represented in a two-dimensional image or as part of a three-dimensional object, are not copyrightable because they are readily found in the public domain. For example, grooved indentations, similar to those under consideration, are routinely impressed into columns styled after the classic Greek and Roman designs; but because they are common design elements, they do not warrant copyright protection. This is addressed in the section of the Compendium that sets forth the minimal standards for sculptural material, Compendium II § 503.02 (b):

> Minimal standards: sculptural material. ... registration cannot be based upon standard designs which lack

> originality, such as common architecture moldings, or the volute used to decorate the capitals of Ionic and Corinthian columns. Similarly, it is not possible to copyright common geometric figures or shapes in three-dimensional form, such as the cone, cube, or sphere. The mere fact that a work of sculpture embodies uncopyrightable elements, such as standard forms of ornamentation or embellishment, will not prevent registration. However, the creative expression capable of supporting copyright must consist of something more than the mere bringing together of two or three standard forms or shapes with minor linear or spatial variations. ..."

Consequently, the Board of Appeals concludes that the design elements do not rise to the minimal level of creativity needed to support a copyright. The Board therefore affirms the Examining Divisions's decision to refuse to register this claim.

This letter constitutes final agency action.

Sincerely,

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