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October 3, 1997

RE: **Wave Ring**
Control No. 60-501-1110B

Dear Mr. Caseiro:

This is in response to your letter dated February 13, 1997, [second appeal] addressed to the Copyright Office Visual Arts Section, appealing on behalf of your clients W. Stephen Brown/Judith L. Brown,[1] the Office's refusal to register Wave Ring. Your letter was forwarded to the Copyright Office Board of Appeals.

The Copyright Office Board of Appeals has examined the claim and considered all correspondence from your firm regarding this claim. After careful review, the Office is affirming the Examining Division's refusal to register this claim, because the jewelry design consists of common shapes and symbols which do not contain copyrightable subject matter, and which are not combined in a way that adds to the copyrightability of the work.

**Administrative Record**

The Copyright Office received the application for registration of this work of jewelry design on September 28, 1995. The work is a ring with an upsweeping terminating curve that appears as a wave poised half-way around a gem set in the center. In a letter dated January 22, 1996, the Office refused to register the work because it lacks the necessary artistic or sculptural authorship, and because copyright does not protect familiar symbols and designs, or ideas or concepts which may be embodied in the work.

On February 15, 1996, you appealed the Office's refusal to register the Wave Ring. You asserted that there is a non-functional complexity to the ring's curvature. You noted that the artist blended the rhythmic curves with a "non-uniform thickness" to "give the appearance of the never ending cycle of the formation of a wave that begins at the right of the ring as one faces the setting, and that ends at the peaking of the wave at the top of the setting." You disputed the Office's assertion that the ring design displays any familiar symbols or designs (such as a heart) or varied geometric shapes whatsoever "apart from the circularity of the interior of the ring --

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[1] Your first and second appeal letters refer to the registration application of W. Stephen Brown. The registration application lists W. Stephen Brown in line 7 as the person to whom correspondence should be sent. However, the registration application lists Judith L. Brown as the copyright claimant in line 4, and as the author in line 2. Accordingly, the Office's first letter of refusal was sent to W. Stephen Brown, while our second refusal was sent to you, but refers to the request for reconsideration made "on behalf of Judith L. Brown."

an aspect of the WAVE RING design that we do not claim as part of the artistry of the design." Feb. 15, 1996, appeal at 3. You also argued that: (1) the "shining metal, such as gold, of the setting "accentuates the gem" within; (2) the Wave Ring design took many hours to perfect; and (3) the design is "unique."

By letter dated October 17, 1996, the Office again refused registration. In the letter, Visual Arts section attorney David Levy explained that "there are no elements in the work, either alone or in combination, upon which registration is possible." The letter explained that the artist's blending of rhythmic curves as a wave poised to crash is in the nature of an uncopyrightable idea. Mr Levy cited Forstmann Woolen Co. v. J.W. Mays, Inc., 89 F. Supp. 964 (E.D.N.Y. 1950) (no originality displayed in representation of fleurs de lis), and 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, was not a work of art within meaning of 17 U.S.C. §5(g) (1909)). In response to your statement that the claimant took many hours to perfect the design of the Wave Ring, Mr. Levy noted that in Feist Publications v. Rural Telephone Service Co., 111 S.Ct. 1282 (1991), the United States Supreme Court struck down the "sweat of the brow" test as insufficient to support a finding of protectibility under copyright. He explained that uniqueness is also not relevant to copyright.

Your second appeal letter was dated February 13, 1997. In the letter, you first addressed the matter of a wax or plastic ring supplied with your first appeal letter to supplement the registration application. The registration application includes a photograph of the ring design as fixed in precious metal with a semi-precious gem. Concerned that this front view photograph of the ring presented with the original application may not have clearly shown all original aspects of the ring design, you also forwarded with the first appeal letter a plastic, or "wax," model of the Wave Ring without a set gem stone. Without the center stone, the top of the ring appears as a partial circle, within which is a sideway positioned "T"-shaped formation. In its October 17 letter, the Office discussed the T-shaped formation that can be seen in this plastic model without the set gem. The Office noted these C- and T-shapes, and stated that familiar symbols and designs such as circles and simple intersecting straight lines are not copyrightable.
In your second appeal letter of February 13, you clarified that the wax ring was merely an "exemplar" because the actual ring would be too costly to provide. In the actual ring, you pointed out, the T-shaped formation is covered by the gem and is not visible.

Second, you disputed that the crashing wave is a "partial circle" or letter "C." Rather, you argued that the wave reveals a complex and aesthetically pleasing design of "stylistic wave crashing" that sweeps back to the portion of the ring surrounding the finger, thereby demonstrating "continuity." You asked the Office to indicate how such a design could be considered "familiar."

Third, you expressed concern that the refusal to register was due to the Office perception that the Wave Ring is functional, and urged the Office to consider the Mazer v. Stein line of cases establishing that a useful article can contain copyrightable authorship. You cited case law

establishing that jewelry and other "somewhat functional items" can be protectible, including Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989 (1980); Dan Kasoff, Inc. v. Gresco Jewelry Co., 204 F. Supp. 694 (1962); and Boucher v. DuBoyes, 253 F.2d 948 (2d Cir. 1958), cert. denied, 357 U.S. 936 (1958). You argued that the wave-crashing design is in no way related "to a functional feature of the ring," but is "strictly aesthetic, in that the gemstone could be affixed to the ring in any number of ways not related to the artistic design" and "is not required in order to wrap the ring around the user's finger." Rather, the swells of the wave design ensure that the entire ring is "aesthetically pleasing."

**De Minimis Authorship**

Works of jewelry are copyrightable where they represent the "original, tangible expression of an idea rather than merely pleasing form dictated solely by functional considerations." Trifari, Krussman & Fishel, Inc. v. Charel Co., 134 F. Supp. 551, 553 (S.D.N.Y. 1955). See also Boucher v. Du Boyes, Inc., 253 F.2d 948 (2d Cir.), cert. denied, 357 U.S. 936 (1958); Dan Kasoff, Inc. v. Palmer Jewelry Mfg. Co., 171 F. Supp. 603, 606 (S.D.N.Y. 1959). You expressed concern that the refusal to register was due to the ring's functionality, and urged the Office to consider the Mazer v. Stein line of cases establishing that useful articles can be copyrightable. Certainly, the design of a useful article is copyrightable as a pictorial, graphic, or sculptural work to the extent that it 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. 17 U.S.C. § 101. According to Copyright Office practices, however, works of jewelry are not considered to be useful articles. See U.S. Copyright Office, Compendium of Copyright Office Practices, Compendium II § 504 ("three-dimensional works falling outside the definition of useful articles, such as jewelry, toys, and wall plaques...") (emphasis added). The design of Wave Ring may be considered functional in that it wraps around the finger and contains and presents the gemstone, but the test for separability is not applicable here because of the categorization of jewelry design as non-utilitarian.

The Appeals Board, however, affirms the Examining Division's assessment that the ring design, without the interior T-shape structure meant merely to hold or position the gemstone, does not represent copyrightable jewelry design sufficient to sustain a claim to registration. The design, although it may represent or evoke the image of a crashing wave, is a minor variation of a curved, S-type line with a greater width of the curve on one side of the ring. Such a simple configuration is not copyrightable. Copyright Office regulations state that familiar symbols and designs are not copyrightable. 37 C.F.R. section 202.1. Further, considerable case law supports the proposition that familiar symbols, designs and common shapes and their simple or minor variations are not copyrightable. See, e.g., John Muller & Co., Inc. v. N.Y. Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986) (upholding refusal to register logo consisting of four angled lines forming an arrow, with the word "arrows" in cursive script below); 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'); 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 Board of Appeals concludes that this work consists of a minor variation of familiar symbols and designs which are not copyrightable in a configuration that does not rise beyond the level of de minimis authorship. The Board therefore affirms the Examining Division's decision to refuse to register this claim.

This letter constitutes final agency action.

Sincerely,

Nanette Petruzzelli

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