COPYRIGHT
OFFICE

September 14, 1998

RE: MINI SABER
Copyright Control No. 60-602-9031(C)

Dear Mr. Cohen:

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OF
CONGRESS

I am writing on behalf of the Copyright Office Board of Appeals in response to your letter dated September 9, 1997, appealing a refusal to register the work "Mini Saber," a key ring, on behalf of your client, S.R. Mickelberg Company, Inc. The Board has examined application, the work, and the correspondence from your firm concerning the application. After a carefully review, the Board affirms the Examining Division's decision to refuse registration of the work because it does not contain copyrightable subject matter.

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Administrative Record

The Copyright Office received an application, deposit, and special handling fee for registration of the "Mini Saber," described on the application as a three-dimensional sculpture, on May 1, 1997.

In a letter dated May 5, 1997, Visual Arts Examiner Anne Zirkle informed you that the work could not be registered because it was a useful article not protectible by copyright law. Ms. Zirkle did not detect separable copyrightable authorship in the deposit.

You responded in a letter to Ms. Zirkle dated May 15, 1997, disagreeing with her conclusion and explaining that the applicant was not attempting to register the functional aspects of the key ring, but, rather, wanted to protect the "sculptural details of the toy sword" that were separable from the key ring base. You stressed that litigation involving the work was pending, and asked for expedited reconsideration.

Visual Arts Attorney Advisor David Levy responded to your appeal in a letter dated August 1, 1997. He explained that the Office re-examined the deposit, but did not find separable sculptural authorship in the over-all shape of the work or its individual elements that could sustain a copyright registration.

He noted that to register a work, it "must not only be original, but it must also contain a certain amount of creative authorship..." regardless of the work's aesthetic or commercial value. He described the shape of the saber toy/key chain as "that of a minor variation of a handle and prong," and explained that "familiar symbols or designs such as these handles and prongs are in the public domain" and cannot be copyrighted under 37 C.F.R. § 202.1. Id. Mr. Levy also cited 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), as support for the proposition that familiar symbols or designs cannot be registered.

In a letter dated September 9, 1997 addressed to Mr. Levy, you submitted a second appeal of the refusal to register the "Mini Saber," which you characterized as a "toy sword." You disagreed with Mr. Levy's description of the work as consisting of common shapes, and described the blade and handle portions of the "Mini Saber," asserting that the sculptural details in these parts contained sufficient authorship not in the public domain to warrant registration.

You asserted that the cases Mr. Levy had cited were not applicable to your client, writing that "the sculpture contained in Applicant's toy sword goes far beyond the minimalist depiction of an arrow and the work `Arrows,' in issue in John Muller." Regarding Jon Woods, you asserted that "the sculptural details of Applicant's work contain far more original sculptural detail than the stripes and squares involved" in that case. Id.

You stressed that just a minimum amount of creativity is required to support copyright registration, citing Thomas Wilson & Co. v. Irving J. Dorfman Co., 433 F.2d 409, 411 (2d Cir. 1970), and Harcourt, Brace & World, Inc. v. Graphic Controls Corp., 329 F.Supp. 517, 523 (S.D.N.Y. 1971).

Appeals Board's Decision

After carefully reviewing the application you submitted on behalf of S.R. Mickelberg Company, Inc., as well as the related correspondence, the Copyright Office Appeals Board has concluded that the "Mini Saber" key chain does not embody any copyrightable authorship.

Although this work functions as a key chain, the Board recognizes that the "toy sword" portion of the key chain is separable from the utilitarian function of the key chain. Nevertheless, the Board can discern no sculptural or other authorship in the "Mini Saber." The "Mini Saber" is, obviously, a miniature reproduction of the "light saber" featured in the Star Wars motion pictures. See Ideal Toy Corporation v. Kenner Products Division of General Mills Fun Group, Inc., 443 F. Supp. 291, 298 (S.D.N.Y. 1977). Although it is not identical to that fictional weapon, any distinctions between the two are trivial.

In any event, addressing the merits of the claim of authorship in the "Mini Saber" on its own terms and without reference to preexisting works, the Board cannot discern sufficient

sculptural authorship to permit registration. The work consists of a slightly tapered cylinder, rounded at the end (the "blade" or "prong"), affixed to a somewhat thicker cylinder (the "handle"). One-third of the handle (the portion of the handle closest to the blade) is slightly thicker than the remaining two-thirds. Several ribbed concentric circles are placed on the handle.

These elements do not constitute original authorship that can be registered for copyright protection. Common geometric shapes are public domain forms and ineligible for copyright. 17 U.S.C. § 102, 37 C.F.R. § 202.1. See also John Muller & Co., *supra,* (upholding Register's decision to refuse registration for logo consisting of common shapes — four angled lines forming an arrow, with the word "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"); Jon Woods Fashions, Inc., *supra,* (upholding Register's refusal to register design consisting of common geometric shapes). At best, the Appeals Board perceives merely *de minimis* authorship in the work, insufficient to support copyright registration.[1]

The Appeals Board agrees with your statement that "only a minimum amount of creativity is required to support copyright registration of an artistic work." However, the Board cannot agree that the "Mini Saber" meets even that minimum requirement. The 1991 Supreme Court ruling in Feist Publications v. Rural Telephone Service Co., 499 U.S. 340 (1991), confirmed that although there is a low standard for determining the copyrightability of a work, some works fail to meet that standard. The Court held that the originality required for copyright protection consists of "independent creation plus a modicum of creativity." Id. at 346. The Court observed that "[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 that 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. The Court also recognized that some works, such as a "garden-variety white pages directory devoid of even the slightest trace of creativity," are not copyrightable. *Id.* at 362.

Ample case law indicates that not all works of the visual arts meet the low threshold for copyrightability. *See. e.g.,* John Muller & Co. *supra*; Durham Industries, Inc. v. Tomy Corp., 630 F.2d 905 (2d Cir. 1980); Sherry Mfg. Co. v. Towel King of Florida, 753 F.2d 1565 (11th Cir. 1985); 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'); Jon Woods Fashions Inc., *supra;* The Homer Laughlin China Co. v. Oman, 1991 Copyright Law Decisions (CCH) ¶ 26,772 (D.D.C. 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); Creeks U.S.A. Corporation v Roger Gimbel Accessories, 16 U.S.P.Q.2D (BNA) 1639

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[1] The Board cannot agree with your assertion that the "Mini Saber" exhibits more originality than the works in John Muller and Jon Woods. In any event, the works in those cases did not represent the outer limits of uncopyrightable authorship.

(C.D. Cal. 1989) (denying plaintiff's motion for summary judgment on claim involving keychains featuring miniature canvas sneakers, and expressing doubt as to copyrightability of the keychains); Towle Mfg. Co. v. Godinger Silver Art Co., 612 F. Supp. 986 (S.D.N.Y. 1986).

Copyright Office registration practices have long recognized that works with only a *de minimis* amount of authorship are not copyrightable. See Compendium of Copyright Office Practices, Compendium II, § 202.02(a)(1984). With respect to pictorial, graphic and sculptural works, the class within which the "Mini Saber" would fall, the Compendium states 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.*

Applying the foregoing standards, the Board has no choice but to conclude that the "Mini Saber" exhibits, at most, *de minimis* authorship consisting of simple, public domain shapes which, in combination, represent an unoriginal representation of a familiar object.

For the reasons stated above, the Copyright Office must refuse to register the "Mini Saber." The Appeals Board's decision constitutes final agency action.

Sincerely,

David O. Carson

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General Counsel
for the Appeals Board
U.S. Copyright Office

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