United States Copyright Office
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April 9, 2012

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Re: Surf Braid
Law Firm Reference No. 2110.78314
Copyright Correspondence ID: 1-2DPEEH
SR 1-248435180

Dear Mr. Juettner:

I write in regard to the Copyright Office's refusal to register a design for fabric trim entitled "Surf Braid." After carefully examining the applications and all correspondence, the Board hereby affirms the refusal to register this work because it lacks sufficient creativity to be copyrightable.

I. DESCRIPTION OF WORK

Surf Braid, shown below, is a narrow, solid strip of fabric, approximately 3/4 of an inch wide. A symmetrical braid design is attached to it that is approximately half an inch wide.

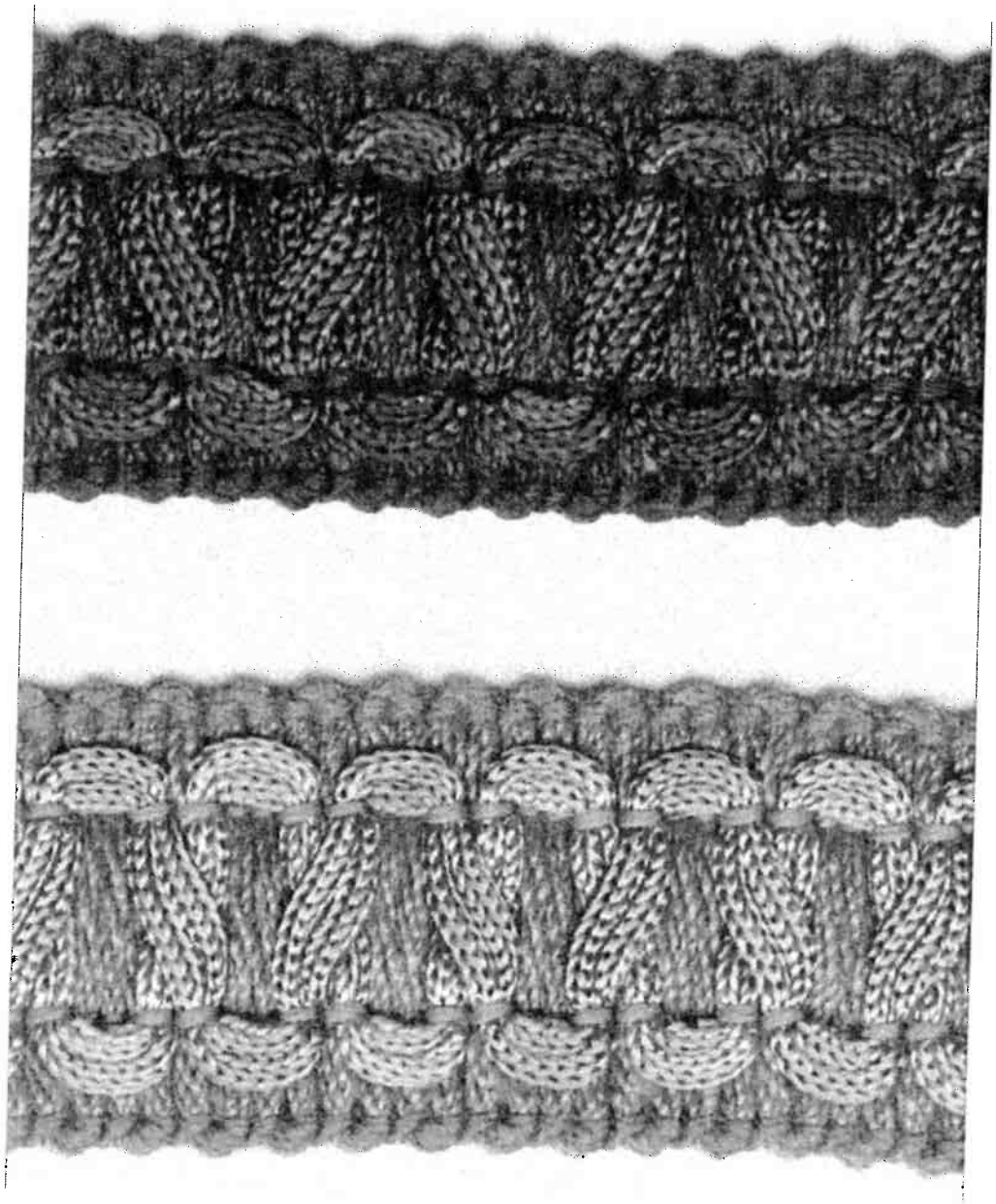
The solid fabric strip is formed by weaving a single, tiny cord of thread back and forth in tight parallel rows that have loops along both edges. Thread is stitched along each side of the solid strip through its loops which gives the edges a scalloped appearance.

The braid design on the fabric strip is composed of two identical rows that are merged together. Each row is made from two tiny cords of thread that are woven in tandem back and forth creating "V" shapes that are all the same size. However, the V shapes alternate so that every V is upside down from the ones on either side of it. Instead of an angular point, the Vs have a loop like a "U" shape. To form the braid design, the two rows are put together, one on top of another.

The two rows are arranged opposite each other so that the U-shaped loop for a V in one row is directly opposite the loop of a corresponding V shape in the other row. This creates an unbroken row of loops along both edges of the braid. Another line of thread is stitched along the edges of the braid securing it to the solid strip. The stitches pass over the cords on each side of a loop which gives the edges a scalloped appearance. Down the middle of the braid, the cords that form the sides of the V shapes make a crisscross or "X" pattern in which the crossed cords undulate in a very slight "S" shape.

Surf Braid has three different colors. Each of the two rows that form the braid are different shades of the same color. The solid strip of fabric is a third, contrasting color.

SURF BRAID



II. ADMINISTRATIVE RECORD

A. Copyright Office refusal to register SURF BRAID

On August 26, 2008, the Copyright Office received an electronic application which you certified on behalf of your client, Deckers Outdoor Corporation, to register a two-dimensional design for fabric trim, entitled Surf Braid. In a letter dated December 19, 2008, the Copyright Office refused to register Surf Braid because it lacks the creative authorship necessary to support a copyright claim. Letter from Copyright Office to Jeuttner of 12/19/08.

B. First request for reconsideration

In a letter dated March 17, 2009, you requested the first reconsideration of the Office's refusal to register Surf Braid. You argued in summary that Surf Braid has sufficient creativity to be copyrightable on the basis of its combination of elements. You stated that it is impermissible for the Copyright Office to dissect the subject work into specific individual components; you further argued that the combination of elements in this creative woven pattern that is Surf Braid does not fall into any of the categories that are per se uncopyrightable. Letter from Juettner to Copyright Office of 3/17/2009, at 1-2.

C. Refusal of first request for reconsideration

In a letter to you dated June 18, 2009, Attorney-Advisor Virginia Giroux-Rollow, Registration Program, stated that Surf Braid does not have sufficient authorship to be copyrightable, either considering each element alone or together in combination, citing 37 C.F.R. §202.1 and *Compendium of Copyright Office Practices II*, Ch. 500, § 503.02(a) (1984) [hereinafter *Compendium II*]. Ms. Giroux-Rollow asserted that Surf Braid lacks sufficient creativity even though the level required is very low. Ms. Giroux-Rollow, citing several cases in which Copyright Office refusal to register works of authorship was judicially upheld, concluded that Surf Braid fails to meet the admittedly low level of creative authorship necessary to sustain a registration. She also cited the hallmark *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), as the guideline for copyrightability : the vast majority of works of authorship are found copyrightable but there is a very small quantity of works that are not. Finally, Ms. Giroux-Rollow reminded us that it is not the possibility of authorial choices that determines copyrightability but, rather, whether the resultant expression or product manifests copyrightability. Letter from Giroux-Rollow of 6/18/2009 at 2-3.

D. Second request for reconsideration

In a letter dated September 15, 2009, you request a second reconsideration of our refusal to register Surf Braid, asserting that Surf Braid has sufficient creativity to be copyrightable based on the combination, placement and arrangement of compositional elements which you have described in detail. You have identified works that courts found to be copyrightable based on combinations of elements which you argue have less creativity than Surf Braid. Letter to Copyright Office from

Juettner of 9/15/2009, at 3-4, citing *Boisson v. Banian, Ltd.*, 273 F.3d 262 (2d Cir. 2001); *Tennessee Fabricating Co. Moultrie Mfg. Co.*, 421 F.2d 279 (5th Cir. 1970); *Stevens Linen Assoc., Inc. V. Mastercraft Corp.*, 208 U.S.P.Q. 699, 670-671 (S.D.N.Y. 1980).

You also rejected Ms. Giroux-Rollow's argument refusing registration on the basis of 37 C.F.R. § 202.1 and *Compendium II*, § 503.02(a) because you have argued that those provisions apply to familiar designs and Surf Braid is not a familiar design. You argued that Surf Braid can be distinguished from the works at issue in previous cases cited in Ms. Giroux's letter refusing registration because the work at issue here, Surf Braid, "embodies creativity in the placement, arrangement and integration of the constituent elements sufficient to meet the minimal degree of creativity test." Letter from Juettner of 9/15/2009, at 6.

III. DECISION

After reviewing the application and your arguments in favor of registering Applicant's fabric trim, the Review Board upholds the Registration Program's decision to refuse registration on the basis that Surf Braid does not have sufficient creativity.

A. Legal framework

Copyright protection is available only for "original works of authorship." 17 U.S.C. §102(a). Within the context of copyright law, courts have interpreted "original" as consisting of two elements: independent creation and sufficient creativity. The Supreme Court has held that originality consists of two elements, "independent creation plus a modicum of creativity." *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 346 (1991). *See also Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d Cir. 1951) (" 'Original' in reference to a copyrighted work means that the particular work 'owes its origin' to the 'author.' No large measure of novelty is necessary,"); *Burrow-Giles Lithography v. Sarony*, 111 U.S. 53, 58 (1884) (court defined "author" to mean the originator or original maker and described copyright as being limited to the creative or "intellectual conceptions of the author.") Based on its evaluation of the application submitted for this work, the Board accepts the fact that Applicant independently created Surf Braid. The Board's analysis focuses, therefore, on the second prong of originality— that a work must possess sufficient creativity.

In determining whether a work embodies a sufficient amount of creativity to sustain a copyright claim, the Board adheres to the standard set forth in *Feist*, where the Supreme Court held that only a modicum of creativity is necessary to support a copyright. *Id.* However, the Court also ruled in *Feist* that some works (such as the telephone directory at issue in that case) fail to meet the standard. It 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 a work in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359; *see also* 37 CFR § 202.10(a) ("In order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its

delineation or form."); *Nimmer* § 2.01(B) (2005) ("[T]here remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright.").

1. Familiar symbols, designs or shapes

Copyright Office registration practices reflect the fact that some works of authorship incorporate only a *de minimis* amount of authorship and, thus, are not copyrightable under the law. *See Compendium II*, § 202.02(a). With respect to pictorial, graphic and sculptural works, which are Class VA [visual arts] works, § 503.02(a) of *Compendium II* states that a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." Further, there is no protection for familiar symbols, designs or shapes such as standard geometric shapes. 37 C.F.R. § 202.1. *Compendium II* essentially provides detailed instructions for Copyright Office registration procedures and reflects the principle that creative expression is the basis for determining whether a work is copyrightable, not an assessment of aesthetic merit. Section 503.02(a) of *Compendium II* states that:

> Copyrightability depends upon the presence of creative expression in a work, and not upon aesthetic merit, commercial appeal, or symbolic value. Thus, registration cannot be based upon the simplicity of standard ornamentation such as chevron stripes, the attractiveness of a conventional fleur-de-lis 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. Likewise, mere coloration cannot support a copyright even though it may enhance the aesthetic appeal or commercial value of a work. ... 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.

Section 503.02(a) reflects one of the most fundamental principles of copyright law: common ordinary shapes and designs, and minor variations of those, may not be copyrighted because that could limit their availability to the general populace. Basic, common and ordinary shapes, designs, and symbols are in the public domain for use by all since they form the building blocks for creative works of authorship.

2. Combination of public domain elements

We agree that unprotectible elements may be arranged or combined in a work so that they exhibit sufficient creativity. However, merely combining unprotectible elements does not automatically establish creativity. *See, e.g., Feist* at 358 (the Copyright Act "implies that some 'ways' [of compiling or arranging uncopyrightable material] will trigger copyright, but that others will not"; determination of copyright rests on creativity of selection, coordination or arrangement). In *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) the Ninth Circuit ruled that a sculpture

composed of unprotectible elements was not copyrightable, stating, "It is true, of course, that a *combination* of unprotectable elements may qualify for copyright protection. . . . But it is not true that *any* combination of unprotectable elements automatically qualifies for copyright protection. . . . [A] combination of unprotectable elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.") (emphasis in original)

Reviewing courts have upheld the Register's exercise of her authority in cases where the Copyright Office refused registration for what were essentially works consisting of combinations of uncopyrightable elements on the basis that such works, nevertheless, lack sufficient creativity to be copyrightable. For example, in *Jon Woods Fashions, Inc. v. Curran*, 8 USPQ 2d 1870 (S.D.N.Y. 1988), the District Court upheld the Register 's refusal to register a fabric design consisting of striped cloth over which a grid of 3/16" squares was superimposed, even though distinctly arranged and printed. Similarly, the Eighth Circuit upheld the Register's refusal to register a simple logo consisting of four angled lines which formed an arrow with the word "Arrows" in cursive script below the arrow. *John Muller & Co. v. New York Arrows Soccer Team*, 802 F.2d 989, 990 (8th Cir. 1986).

B. Analysis of Surf Braid

Although the copyrightability standard is very low, the Board has determined that Surf Braid does not possess sufficient creativity to constitute an original work of authorship under the law.

1. Surf Braid has *de minimis* creativity

Stating that the correct analysis for creativity is to consider the design as a whole, you argue that the creativity of Surf Braid is in the combination, placement and arrangement of its elements. Letter from Juettner of 9/15/2009, at 3. You analogize Surf Braid to the jewelry at issue in *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101 (2d Cir. 2001) where the court found that, although the individual elements are not copyrightable, their arrangement together in that work was protected. *Id.* You describe Surf Braid as follows:

> Here there are four component elements to the design, namely a strip of fabric in a first color, a first undulating wave comprised of two yarn strands or a second color superimposed over the base fabric, a second undulating wave comprised of 2 yarn strands of a third color, and a pair of parallel stitch lines that catch only the upper and lower crests of each wave. The thickness of the undulating waves varies because of the way the waves are stitched to the backing material. All four component elements are superimposed on one another and work together to form an original braid design. Letter from Juettner of 9/15/2009, at 3.

The Copyright Office accepts the principle that a work should be viewed in its entirety, judging the work as a whole. *See, e.g., Atari Games Corp. v. Oman*, 888 F.2d 878 (D.C. Cir. 1989): although the Office had initially refused to register the videogame at issue, registration, upon Office reconsideration, was made in recognition of the overall audiovisual authorship composed of several individual elements which, taken together, were sufficient. Therefore, the Board has evaluated the creativity of both the individual elements of Surf Braid and their creativity as a whole, based on their selection, combination or arrangement.

Essentially, Applicant's design is a combination or arrangement of basic geometric shapes, including curving lines and loops or scalloped edges. As previously discussed, the requirements of 37 C.F.R. § 202.1 and § 503.02(a) of *Compendium II* bar copyright protection for elements that are common and familiar shapes. Individually, the elements in the work at issue that are not copyrightable include (1) the tiny thread cords, (2) the rectangular fabric strip with its scalloped loops formed by weaving cord back and forth, (3) the line of thread sewn along the edges of the fabric strip and (4) sewn along the edges of the braided design, (5) the braided shape itself and (6) color in itself. The first four elements are all basic shapes or designs that, individually, do not in themselves carry copyright protection. The braid shape is not sufficiently creative to be copyrightable because it is a minor variation on a common shape or form. Color by itself is not copyrightable and these two threaded designs carry only three basic colors each as shown in the close, detailed photos reproduced at page 2 of your September 15, 1009 Letter.

Considering Surf Braid as a whole, the Review Board finds that it is a simple arrangement of a few elements. The combination of a simple braid design on an even simpler, basic weave pattern is commonplace. The resulting elements created by sewing stitching along the edges may be termed an obvious choice, particularly since it serves the practical function of securing the braid's cords and the weaving for the solid strip. The textural appearance created by using cords made of thread is a commonplace and obvious choice for fabric trims. The use of very few colors, indeed, of very few color shades or hues, is too trivial to raise the level of creativity to more than a *de minimis* level. Approximately a one-inch length of Surf Braid contains the few basic design elements that are symmetrically arranged in two simple woven patterns. Those are repeated uniformly throughout the work. There is little authorship evident and what is present is either banal or a trivial variation on a common shape or configuration.

The Board recognizes that Surf Braid is a fabric trim that is usually used as an adornment in sewing and home decor to embellish or decorate objects, such as clothing, personal items and furnishings. It is usually a type of fabric trim called "gimp" which is a flat, narrow strip of fabric usually ranging in size up to a few inches wide, often sold by the yard to be cut to desired lengths. It can be made in many styles, often with a metallic wire or a coarse cord running through it. It is made by tightly weaving or braiding tiny cord-like material. One or both edges of a gimp can be plain or cut, or have scalloped loops. *See, e.g.,* http://dictionary.reference.com/browse/gimp

The creativity analysis in copyright law does not involve comparing Surf Braid to other works or prior art. *Compendium II,* §108.03. However, the Copyright Office may take administrative notice of matters of general knowledge, as we have just done. *Compendium II,*

§108.05(b). Considering the historic tradition of design and construction for gimp fabric trim [probably dating back to the 1600's; apparently Dutch in origin], the Board also finds that the combination or arrangement of Surf Braid's elements is not sufficiently creative because it is a minor variation on the selection and arrangement of elements that are traditional or usual for gimp. The individual elements selected and the resulting manner in which they are combined or arranged is rather common and traditional; it may also fairly be termed banal or garden variety. It is a typical, routine expression of gimp elements, without more. The only aspects of the work that are not predictable or expected are the braid design and the coloring but the variations in those elements are so minor that they are not sufficient for Surf Braid to achieve more than a *de minimis* level of creative authorship. Again, the braid design is based on a common gimp pattern or design of weaving back and forth within the narrow limits of the fabric strip with the resulting scallop motif at the edges. The V-shaped pattern within that design is a minor variation on that common weaving pattern. The slight variation in combination with the other elements is not sufficient to provide even the low level of authorship required by *Feist*.

The Board agrees that, "even though a particular color is not copyrightable, the author's choice in incorporating color with other elements may be copyrighted." *Boisson*, 273 F.3d at 271. However, there is little creative authorship in the trivial use of color in Surf Braid. The few colors present are used in a simplistic manner. The cords for each of the three major elements have been dyed a different color, which includes two different hues for the two combined pieces that make up the braid design and a contrasting color for the solid fabric strip. The authorship in such selection and use of color is minimal. It is trivial in relation to the work as a whole and does not add enough so that the work rises above having *de minimis* authorship. Surf Braid does not represent copyrightable authorship.

2. Case law does not compel registration

In your second request for reconsideration, you have cited cases for the proposition that combination, placement or arrangement of public domain elements may result in the minimum amount of creativity necessary to sustain a copyright claim. Letter from Juettner of 9/15/2009, at 3. The Review Board does not agree that these cases comple registration of Surf Braid because its combination of elements possesses a level of creativity that is analogous to the creativity of the works considered in those cited cases.

You analogize Surf Braid to the alphabet quilts in *Boisson v. Banian, Ltd.*, 273 F.3d 262 (2d Cir. 2001), to the decorative metal screen having a filigree pattern in *Tennessee Fabricating Company v. Moultrie Manufacturing Company*, 421 F.2d 279 (5th Cir. 1970), and to the upholstery fabric in *Stevens Linen Associates, Inc. v. Motley*, 208 U.S.P.Q. 699 (S.D.N.Y. 1980). The alphabet quilts at issue in *Boisson* have a greater level of creativity than Surf Braid. You argue that the Court there found the "choices as to the selection and arrangement of color can entail a minimal degree of creativity especially when combined with other creative choices." Letter from Juettner of 9/15/2009, at 4. We point out that the quilts at issue there were sufficiently creative because of the presence of: 1] use of the alphabet (in itself, obviously, in the public domain) PLUS 2] arrangement of the alphabet-letter shapes in a five-by-six block format AND 3] use of several colors within the

quilt design. These elements were held by the Second Circuit to constitute an overall work that sustained copyright in its entirety. The Board does not see a sufficient comparison between the *Boisson* quilts with their block-format layout, 273 F3d at 269, and their use of colors [note *plural*].[1]

It is difficult to evaluate the comments of the Court in *Tennessee Fabricating Company v. Moultrie Manufacturing Company*, 421 F.2d 279, 281. Although it characterized the design on the decorative metal casting unit as a "filigree pattern" formed "entirely of intercepting straight lines and arc lines," there is little else to evaluate the Court's assessment. Even given that description, however, it does not seemingly represent a work of design authorship equivalent to the simple braid design of Surf Braid. In *Stevens Linen Associates, Inc. v. Mastercraft Corp.*, the upholstery fabric at issue there had significantly greater creativity because, as the Court stated, it was made from a "variety of yarn sizes, types and colors" which were arranged to "form parallel stripes of random widths, colors, bulk and texture." 1980 U.S. Dist. Lexis 10045, at *2. The upholstery fabric possessed a level of creative choices and authorship that is not reflected in Surf Braid; the elements in the Surf Braid work are, on the contrary, symmetrically arranged and uniformly repeated in a commonplace manner.

Finally, because you have stated in your September 15, 2009 Letter that, having read *Homer Laughlin China Co. v. Oman*, 1991 U.S. Dist. Lexis 10680 (D.D.C.), you have come to the conclusion that the opinion "is of no help in evaluating what designs do or do not satisfy the minimal degree of creativity test" [Juettner 9/15/2009 Letter, at 6], the Review Board has pulled the Office's litigation file in that case [plaintiff had filed an action under the Administrative Procedure Act [APA] against defendant, former Register of Copyrights Ralph Oman]. The photos of the chinaware at issue in *Homer Laughlin* show a simple design on the chinaware, consisting of criss-crossed rounded lines with the single lines coming to narrow, pointed 'arches.' The arch-like design circles the border of the plate with a double line circling the inner border of the plate and coming to similar pointed, arched ends at four places on the plate. The accompanying chinaware pieces reflect the same simple arch-type lines with single lines running from the criss-crossed, narrow arches down the surface of cups, saucers, and teapots. This minimal design, appearing on the surface of the utilitarian chinaware, was too banal to sustain copyright registration and the Court, in this APA action, thus found no abuse of discretion on the Register's part in refusing registration. 1991 U.S. Dist. Lexis 10680, at *4 - *6.

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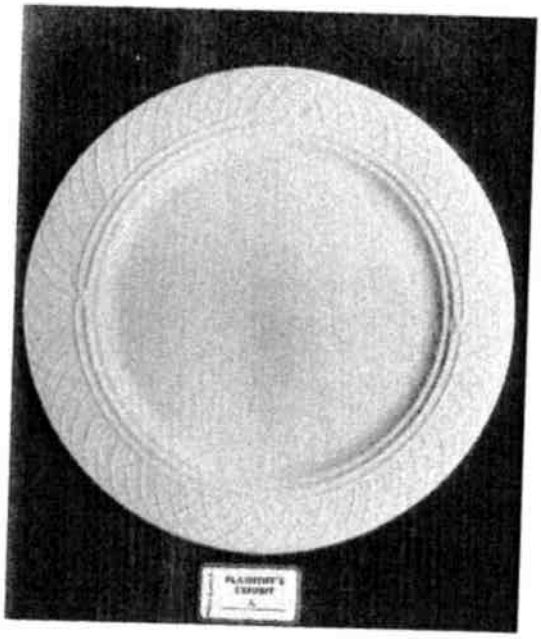
[1] Copyright regulations, C.F.R. § 202.1, refers to material not subject to copyright; among the materials– coloration. *Boisson* refers to this regulation but further notes that color may be considered as an element in an overall visual work that contributes to that work's copyrightability. Citing *Nimmer*, § 2.14, at 2-178.4, the Court accepts that "an original combination or arrangement of colors should be regarded as an artistic creation capable of copyright protection." The *Boisson* Court also noted that, in finding infringement, it credited the plaintiff with "arranging all the design elements and colors into an original pattern...." *Boisson*, 273 F.3d at 271.

NOTE: for the sake of clarity, see photos from Office litigation file immediately below.



IV. CONCLUSION

For the reasons stated above, the Copyright Office Review Board affirms the Registration Program's refusal to register the work Surf Braid. This decision constitutes final agency action in this matter.

Sincerely,

/s/

Nanette Petruzzelli
Associate Register,
Registration Program
for the Review Board
United States Copyright Office