IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1953

EMANUEL L. MAZER and WILLIAM ENDICTER, doing business as June Lamp Manufacturing Company,

Petitioners

v.

No. 228

BENJAMIN STEIN and RENA STEIN, doing business as REGLOR OF CALIFORNIA,

Respondents

Washington, D. C.

December 3, 1953

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Courtroom, United States Supreme Court Building,

Washington, D. C.,

Thursday, December 3, 1953

Oral argument in the above-entitled matter came on before the Court at 1:50 o'clock p. m.

PRESENT:

CHIEF JUSTICE WARREN,
MR. JUSTICE BLACK,
MR. JUSTICE REED,
MR. JUSTICE FRANKFURTER,
MR. JUSTICE DOUGLAS,
MR. JUSTICE JACKSON,
MR. JUSTICE BURTON,
MR. JUSTICE CLARK, and
MR. JUSTICE MINTON.

APPEARANCES:

MAX R. KRAUS, ESQ., and ROBERT L. KAHN, ESQ., counsel for Petitioners.

GEORGE E. FROST, ESQ., Counsel for Respondents.

BENJAMIN FORMAN, ESQ., Counsel for Register of Copyrights, as Amicus Curiae.

ARGUMENT OF MR. MAX R. KRAUS,

ON BEHALF OF THE PETITIONERS

- - -

MR. KRAUS: May it please the Court, the Petitioners here prayed for certiorari to the Court of Appeals of the Fourth Circuit, as the result of a conflict between the judgment and decisions of the Courts of Appeals of the Seventh Circuit and Fourth Circuit.

This Court, in granting certiorari, invited the Solicitor General of the United States to express the views of the Copyright Office, as well as other matters he deemed pertinent.

A brief has been filed by the Solicitor General on behalf of the Copyright Office, which supports the position of our opponents.

The Petitioners here were the defendants in the Court below.

The District Court held that the copyrights in suit here were invalid. The Court of Appeals of the Fourth Circuit reversed.

The issues involved here relate to the interpretation of the Copyright Laws, as well as to the interpretations of the Design Patent Laws. The facts in the case are not in dispute.

The Respondents here are lamp manufacturers engaged

in the commercial manufacture and sale of a complete line of electric table lamps.

One of the partners of the company made some designs for a line of lamps. Instead of applying for a design patent, they attempted to circumvent the Patent Office and instead created their own monopoly.

They placed upon these lamps that they commercially mass-produced and sold, and which had practical utility, the copyright notice, a C within a circle. They manufactured and sold these lamps, but, instead of sending to the Copyright Office the manufactured lamp, they proceeded to make one up in the form of a statue without any lamp embellishments, and sent that one to the Copyright Office. They secured from the Copyright Office a copyright on that statue as a work of art.

This is very significant on one of the narrow issues here:

In the Copyright Certificate, the Copyright applicant is supposed to state the date of publication. We presume that it means, and it does say, the date of first sale.

In this case they relied on the date that they had sold lamps as the date of publication of the copyrighted work of art. The fact is that they did not sell any statues until a long time after they had been manufacturing and selling lamps.

So, on one of the narrow issues in the case, we say

that the copyrights are invalid, because they copyrighted one thing and sold another.

It is interesting to note that in this case the facts are that they sold a total of approximately 8,000 lamps; they sold 5 statues.

In a similar proceeding that they had in the District Court in Detroit, the Court in its findings says that the plaintiff in this case had sold 20,000 lamps and sold 5 statues, and those 5 statues were sold only after the Court in Chicago had criticised the plaintiffs' action.

Now, the broad question here is: May a manufacturer of lamps, or, for that matter, any other type of merchandise, be it furniture or anything else, obtain a possible 56-year monopoly on the design of the product by copyrighting it in the Library of Congress? That is their contention. Or, as we contend, must they submit it to the Patent Office, where the subject matter is carefully scrutinized and examined by the Patent Office Examiners, as to originality, novelty, ornamentality and invention, and if those four requirements are found in the submitted products, then the Patent Office issues a design patent for a maximum term of 14 years?

This is very significant.

In a copyright procedure you create your own monopoly. We call it a cafeteria style monopoly, because you help yourself to it. There is nothing that anyone has to do. All the

Copyright Law requires is that, when you publish the thing, you put the copyright notice on there, and it is a "C" within a circle. That is the copyright notice.

The monopoly for 28 years runs from the date that the publication is put on the market. Now, this leaves the public completely unprotected.

If a manufacturer of lamps here, or in any other case, furniture, or whatever it might be, can create his own monopoly for 28 years, merely by putting on the copyright notice, then we say it is subverting the laws, and Congress never had any such intention, to place articles of manufacture that are mass-produced in quantity, and that have practical use, under the copyright laws.

The first Design Patent Act was passed in 1943, and Congress at that time intended to protect articles of manufacture, the ornamental designs of articles of manufacture, after they had first been examined by the Patent Office. They set standards with respect to invention involved in designs. This Court has from time to time passed upon what the standards are with respect to inventions for patents; that is, mechanical patents, and inventions with respect to designs; but there are no standards with respect to copyrights. All the owner has to do is to create his own standard. He gets himself a 28-year monopoly without any examination by the Copyright Office, in effect. Then, after the 28-year period has expired, he renews

it for another 28 years, so he, in effect, has created a 56-year monopoly, and all that the copyright office does is to accept the article that is submitted to the copyright office, stamp its seal on it, and return it to the applicant. All that they claim they have to be satisfied with is: "Is this a work of art?"

MR. JUSTICE BURTON: Cannot the competitor do the same thing?

MR. KRAUS: Yes, anyone can do that. As a matter of fact, in so far as the issues here are concerned, they claim that they have copyrighted the statues. In fact, they sold lamps first. They did sell a few statues later. If the defendant in the case had taken the identical thing and sent in his copy to the Copyright Office, the Copyright Office would have granted a copyright on it. They did not examine as to whether the thing is original or new. All they do is put the stamp on it and forward $4.00 and you get your 28-year monopoly.

MR. JUSTICE BURTON: When the competitor does the same thing, he cannot make the same statue that is already copyrighted?

MR. KRAUS: Well, the question is whether the second one is a copy of the first.

MR. JUSTICE BURTON: That is right.

MR. KRAUS: But he can send it in, because, in so

far as the Copyright Office is concerned, they do not know whether the second is a copy of the first or whether it is an original creation.

MR. JUSTICE BURTON: Copyright means something. By "copyright" you mean that you can not copy.

MR. KRAUS: That is right, but we say that it was never the intention of Congress that article[redacted] of manufacture which are produced in mass production and which have a practical purpose should ever be the subject matter of a copyright. There are other things that are copyrightable, but certainly not mass-produced articles of manufacture, because that is where they belong, under the Design Division of the Patent Office.

MR. JUSTICE FRANKFURTER: You might say that they belong there, but they are excluded by the phrase "Works of Art", that that must take them out of the copyright statute, and provide that they belong in the other statute?

MR. KRAUS: That is right. We say that the work of art as defined in the copyright law does not mean an article mass-produced and which has practical utility, and we will trace it from its historical inception.

MR. JUSTICE FRANKFURTER: That is your task. It is not whether they are patented but whether they are works of art.

MR. KRAUS: That is right.

MR. JUSTICE JACKSON: I suppose you can argue that,

if there is another scheme for the protection of whatever is novel, that that may be some indication of the intent to copyright?

MR. KRAUS: Well, if I understand your Honor's question, we do not think Congress intended to provide an overlap between design patents and copyrights, that the line of demarkation was straight down the middle.

On the one hand it says "If you produce an article of manufacture in quantity and it has utility, or even without utility, you want to protect it under Design Patents. If you create a work of art as interpreted under the law, then you get a copyright, you create your own monopoly."

But, by the "work of art" we say it is not mass production, because, in that case you are putting the industrial designer in one category and making him go to the Patent Office where he has to pass a muster of the Patent Office standards and giving the artist a different category.

MR. JUSTICE FRANKFURTER: You cannot argue, can you, that a thing is, within the copyright statute, a work of art because it has invention? If a thing is an invention, the invention is therefore patentable, has originality and cannot be a work of art and copyrighted?

MR. KRAUS: Oh, yes.

MR. JUSTICE FRANKFURTER: Because you cannot say "This is a work of art."?

MR. KRAUS: We say that the Patent Office has since 1843, from its very inception, been granting design patents on precisely this type of subject matter, statues, figurines, lamps and things of that character, and I have submitted to your Honors, a book of patents, some of which are photostats, showing design patents issued on statues of this character, from 1843 down to the present date.

MR. JUSTICE FRANKFURTER: Is mass production the decisive factor?

MR. KRAUS: We think mass producti on, and the additional factor of utility.

MR. JUSTICE FRANKFURTER: If the man does this thing about which you complain, but only does it for pleasure, and gets it copyrighted, that is all right?

MR. KRAUS: That is all right if his intentions were to treat it as a work of art and not mass produce, because, if he treats it as an article of manufacture, then we say it does not belong under copyright.

MR. JUSTICE FRANKFURTER. Is a thing a work of art because he has a restricted market?

MR. KRAUS: Yes.

MR. JUSTICE FRANFURTER: That is a work of art?

MR. KRAUS: That is a distinction, under the definition of the Copyright Office. There must be a distinction between articles of manufacture on statues. The first time

that the word "statue" was used in the Copyright Act was in 1870. That was a joint act dealing with design patents and dealing with copyrights.

The act provided that every statue as an article of manufacture should be sent to the Patent Office for examination. It also provided that statues, in so far as they concern works of fine art - and they use the words "fine art" in the act, should go to the copyright office.

So there we have the clear distinction that a statue, if it is an article of manufacture, goes to the Patent Office; if it is a statue and is a fine art, it goes to the Copyright Office. They made the distinction clear.

In so far as the definition of what are works of art is concerned, we will refer to the definition that the Copyright Office has been using for the last forty years.

In 1909, the Copyright Act was amended and, instead of listing the numerous subjects that were copyrightable, they changed it and streamlined the language by using the broad language "works of art; models or designs for works of art."

Now, the respondents contend that these words are broader than the words "works of fine art". I think they will concede - and they probably have conceded - that "works of fine art" does not include mass production. I think that that is conceded by all.

The only question that comes up is: Is "works of art;

models or designs for works of art" broader than "works of fine art"?

If I may, I will just read the definition that the Copyright Office itself placed on the Act for almost 40 years, and this is what they say:

> "Works of art and models or designs for works of art.- This term includes all works belonging fairly to the so-called fine arts (paintings, drawings and sculpture).
>
> "The protection of productions of the industrial arts, utilitarian in purpose and character, even if artistically made or ornamenting depend upon action under the Patent Law. . ."

so that definition was, if this is an industrial art, then go to the Patent Office.

So, they themselves, for forty years, have defined what "works of art" and"models or designs for works of art" means, and we say that by their own definition they must be estopped, and they cannot now at this time say that they have a broader definitionfor the same term.

Now, the Court of Appeals below was very much influenced in its decision by the position of the Government, who filed their brief incidentally four days before the hearing of the Court below, to the effect, and the respondents and the Government contended, that in 1902 the Design Patent Act had been narrowed.

Now, the Design Patent Act was first promulgated in 1843. From the period of 1843 to 1902, it had included in its terms a large number of subject matters. In 1902 it was amended and streamlined and shortened to read as follows:

"Any person who has invented any new, original, and ornamental design for an article of manufacture * * * may * * * obtain a patent therefor."

The respondents and the Government, before the Fourth Circuit, contended that this general statement narrowed the Design Patent Law, but this is not so, and I think the Court of Appeals was largely influenced in its decision on the theory that statues were taken out of a Design Patent, and, therefore, the Design Patent Law was restricted. But this is not so.

We have in our brief reprinted the letter of Commissioner of Patents Allen to the Senate Committee on Patents, in 1902, and he was sponsoring the Design Patent Law at that time, and said that by changing it and streamlining the language it was not intended to shorten the Design Patent Law; it was intended to cover any design for an article of manufacture.

So the respondents' contention does not bear out, and there is no indication anywhere that the Design Patent Act was narrowed in any respect. The Act today still defines a design

for an article of manufacture. This must be submitted to the Patent Office for examination. It must be scrutinized. You cannot create your own monopolies on articles of manufacture.

MR. JUSTICE FRANKFURTER: It can be in as bad taste as possible, and yet be copyrighted?

MR. KRAUS: That is right, because there is no comparable Division in the Patent Office that in any way has any authority to issue any copyrights or patent protection on writing, and that is where the distinction was.

If we go back to the historical conception of this thing, we will see that copyrights come first from the State. in the original inception, twelve of the thirteen original States had copyright laws, and they all related to books, pamphlets, maps and charts; in other words, printed material and material that is subject to reprinting. These rights were transferred from the States to the Federal Government, and the first Federal Copyright Act of May 1790 was entitled as follows

> "An Act for the encouragement of learning by securing the copies of maps, charts and books to the Authors, to Proprietors of such copies, during the time therein mentiones."

Now, that goes to show what the intention was of the original framers of the Constitution with respect to the subject matter that should be under copyrights. It was books and things of that character - certainly not articles of manufacture that

had practical utility, because that belongs in the Design Patent Office from the very inception.

MR. JUSTICE FRANKFURTER: Manufactured reproductions of atrocious looking paintings come into the copyright?

MR. KRAUS: Yes, because they are printed material.

MR. JUSTICE FRANKFURTER: Paintings can be reprinted?

MR. KRAUS: Yes, paintings can be reprinted. As a matter of fact, that is done by the lithographing process. We contend that printing in all its phases, the graphic arts, are what copyrights were intended to protect, because Congress made no provision for examination of this thing. If it falls within that category, register it, but they set a high standard with respect to inventions. They set a high standard with respect to design patents. The standard must be as high as with respect to things, such as mechanics and things of that character. Certainly it does not seem plausible for anyone to think that Congress would set such a high standard of invention for design patents and then say "Well, if you do not want a design patent, go into the Copyright Office and create your own monopoly for 56 years."

Why should not everyone go to the Copyright Office if they can create their own monopoly for 56 years, without an examination?

The point was that Congress intended to keep the two distinct and different.

MR. JUSTICE FRANKFURTER: Does the man who registers just a list of books, any kind of compilation, no matter how little originality, acquire a 56-year monopoly?

MR. KRAUS: That is right, but they have set high standards for inventions with respect to designs.

So, it does not seem logical that the Congress would say "Well, if you have a copyright and want to get it for 56 years, just submit it to the Copyright Office and get your monopoly, but if you want it as a design patent, go to the Design Patent Office."

They intended the line of demarkation to be clear. If it was a work of art and the artist treated it as a work of art and did not intend to mass produce it, then he has a right to a copyright.

MR. JUSTICE FRANKFURTER: What would you say of a man who is just a little neighborhood seller of these things, who restricts his sales to people living in a little district and does not have mass production, who is no Montgomery Ward or Sears Roebuck?

MR. KRAUS: We feel that is still mass production. That would be our definition. But certainly, in this case, we have two elements. We have mass production plus an article of practical utility. It is a lamp. So we have two elements to go on. We have mass production and an article that has practical day-to-day use, and we say that that never was

within the contemplation of Congress to put it under the works of art or works of fine art. It was never the intention of Congress and they cannot show that it ever was the intention, except that they are now trying to stretch these words to include a meaning that they never had. Why would Congress say that a statue, as an article of manufacture must go to the Patent Office and a statue as a fine art goes to the Copyright Office? It drew the line right through the center. If the artist wants to keep it as fine art, that is O.K.

MR. JUSTICE FRANFURTER: Maybe they want to encourage art and not subject it to the interpretation of whether it is fine art or not fine art.

MR. KRAUS: Well, I think they thought of the practical.

MR. JUSTICE FRANKFURTER: Works which are now deemed great works of art or works now deemed great poetry or music, were deemed by people at the time as garish, raucus, stupid things, and not works of art. That was a standard that they did not want to submit to the judgment of even expert patent examiners.

MR. KRAUS: That is right, but we say that when an industrial designer - and that is what the manufacturer in this case is, makes a design to be manufactured for a lamp, for a specific purpose, he or she becomes an industrial designer, and, as such, must submit himself to the Patent Office for examination.

They cannot create their own monopolies because it is not then a work of art or a work of fine art within the contemplation of the copyright laws.

Now, our book of exhibits that we have filed with this Court shows design patents. The first one that we have there, incidentally, is Number 12.

It might be interesting to note that that one was written in longhand and was issued in 1843, and shows the design for a lamp. It is the patent at the end of our book. That shows a design for a lamp issued in 1843.

Then we have the patents grouped in inverse order, the most recent patent, in 1953, being at the top.

Now, the Court will recognize that the sculptured statues there which have been patented have been examined by the Patent Office, have been allowed, and the public is completely protected. On the other hand, these copyrighted statues here have not been subject to any examination. The monopoly was created by the individual copyright owners.

Now, in so far as the practical monopolies are concerned, we say that they are substantially the same, the only difference being that in one case you create your own monopolies for 56 years, and in the other case you get a monopoly for a maximum term of 14 years after it has been first examined by the Patent Office, and they have found invention.

MR. JUSTICE JACKSON: Is there not a difference, for

instance, in a directory that is copyrighted? I suppose that that does not prevent me making exactly the same directory, provided I do not pirate it?

MR. KRAUS: Yes, that is right. You have a right to make it.

MR. JUSTICE JACKSON: If it were patentable, even though by my original work, I could not use it. Is that true? So that a copyright merely is the protection against pirating while a patent is a protection against the original? Am I right?

MR. KRAUS: Yes. Iwould say that is correct, that in so far as copyrights are concerned, it must be limited to copy.

In design patents, the contention is that there is a broader range of equivalent, but in practical effect, the monopolies are exactly the same.

Now, this Court recently had occasion to review the Woolworth case, involving a little statue of a dog, and in the District Court there was a contention that the statuette as copied by the defendant, was different in appearance from that of the plaintiff's.

The District Court said:

"There are some differences between the plaintiff's plaster model * * * and the Woolworth ceramic model * * * But, of course, it is not necessary that a copy be a 'Chinese copy' in order to find infringement."

In other words, infringement was found in that case, although there were differences between the two.

Now, we say if this Court is to construe the fact that things of this character can become copyrighted subject matter and monopolies be obtained, then if they are sold in mass production all over the country, in every dime store, how can I as a defendant, defend myself and contend that I did not see that and did not copy it, because the more widespread the manufactured article becomes the less defense I have of avoiding infringement, because, even though I have changes in my construction, the plaintiff will contend that I saw theirs in the dime store. They will contend that I got my conception from them.

So, if these articles, these manufactured articles are allowed to be placed under copyrights, and monopolies to be obtained, we say that it will be impossible for any defendants to defend themselves in copyright litigation on the theory that they have themselves created, because the more they see it from television and through the stores, the more it makes an impression upon them and, even though they try to create one of their own, the plaintiff will just throw in his copyright into the lawsuit and the defendant will be powerless to defend himself.

This is a very important point. There are such terri-

fic penalties in copyright lawsuits, that no defendant, even though he feels in his own heart that he created the thing himself, will ever withstand one of those lawsuits. There are terrific attorneys' fees, in so far as works of art are concerned. The damages are $10.00 per infringing copy. Certainly a defendant, even though he created it himself and has never copied it, if a lawsuit is thrust upon him he will just fold up. He has to, because he cannot afford to litigate. That is one of the reasons why there has not been much litigation in this type of lawsuit. Most of these fellows say "We cannot defend this kind of cases." Here the plaintiff gets a 28-year monopoly for $4.00 and throws the defendant out of business.

We do not think that Congress ever intended that.

Now, the statement that I just made to the Court that copyrights are used to suppress competition and stifle industry is brought out in an article by the former Register of Copyrights, Mr. Warner, in 1948. We reprinted that article in the appendix to our main brief.

May I just read a few sentences of that article? This is an article written by former Register of Copyrights, Mr. Warner, in 1948. He wrote an article to the Jewelry Manufacturers, and he urged them to copyright jewelry.

Incidentally, the copyright office is now copyrighting jewelry. But he was not sure of his position in so far

as copyrighting jewelry was concerned, in 1948, and here is what he told them:

> "Even if I am wrong in believing that artistic jewelry is copyrightable, jewelry manufacturers have little to lose by trying to copyright it. The fee for copyright registration is very low, only $4.00, and ordinarily, it is not a complicated process. A competitor is likely to feel that it is better not to copy a piece of artistic jewelry that bears a copyright notice, than to take the risk of having to pay the heavy statutory damages which would be imposed if he were wrong."

and that is exactly our position, that these suits cannot be defended by a manufacturer, even though he creates his own design because of the terrific penalties imposed upon him if he loses, the terrific burden of sustaining a case, because it is such that he would not dare. So consequently the copyright laws are used to suppress competition, and we say that Congress never intended that. The line of demarkation is clear.

Another thing that makes it very clear is that in the Copyright Act of 1870, it says that statues, if they are works of fine art, shall be copyrightable. Now, fine art has been defined by the Supreme Court in United States vs. Perry. May I read that definition, because I think it is very important in this case?

United States vs. Perry, 146 U. S. 71:

"The fine arts properly so-called, intended solely for ornamental purposes, and including paintings in oil and water, upon canvas, plaster, or other material, and original statuary of marble, stone, or bronze."

It says: "Original". That is what fine arts are, not anything that comes through a machine, that is reproduced in quantity. That is no longer a work of fine art. That becomes an article of manufacture, no matter how beautiful it might be.

That is where the distinction between copyrightable subject matter and design patents lies.

MR. JUSTICE FRANKFURTER: I take it that before you sit down you will deal with the fact that the 1870 Act was phrased "fine art" and that later the controlling statute was changed in that "fine" was dropped?

MR. KRAUS: Right.

MR. JUSTICE FRANKFURTER: You agree with that?

MR. KRAUS: Yes.

Now, we have reprinted the 1870 Act in the chart in our brief, and we say that the 1870 Copyright Act provided as follows, that any ". . . proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended

to be perfected as works of the fine arts, . . ."

So, there it is clear, and I do not think the respondents or Government disputes this, that under the Act of 1870, the statue that was to be produced and copyright must be a work of fine art.

Now, in the Act of 1870 there was a provision that anyone who infringes a statue or sculpture shall pay a penalty of $10 per infringing copy. That shows that Congress intended the statue to be treated as a work of fine art. It intended that the public should respect it as a work of fine art on the theory that, if the creator thought of it as a work of fine art and wanted it to be treated as such, no member of the public should try to manufacture it and destroy the fine art in the product. Consequently, the penalty of $10.00 per infringing copy was as high as it was on the theory that a fine art should not be destroyed by any manufacturer.

Now, this penalty provision, $10.00 per infringing copy, is in the 1909 Act. So that shows clearly that Congress had used different language, and even though it did not use the words "fine art" and did not use the word "statue" in the Act of 1870, still meant the same thing: a work of art or a model or design for a work of art was to be given the same meaning in 1909 as it was given in 1870, because they carried over the penalty provision, and, in the Act of 1909 it provided that any infringer of a painting, drawing, or sculpture, shall

pay $10.00 per infringing copy, showing that they treated it in the same manner that they treated it in 1870 under "fine arts", and we do not have to go any further.

All we have to do is to go to the definition that the Copyright Office placed upon the thing for 40 years, and they said, a work of art, model or design for a work of art, in the 1909 Act.

In the 1948 Act"this term includes all works belonging fairly to the so-called fine arts (paintings, drawings and sculpture)."

Then they go on to define it and say:

"The protection of production of the industrial arts, utilitarian in purpose and character, even if artistically made or ornamental depends upon action under the Patent Law . . . "

MR. JUSTICE FRANKFURTER: From what are you reading?

MR. KRAUS: I am reading from the Copyright Regulations.

MR. JUSTICE FRANKFURTER: Is it contained in your brief?

MR. KRAUS: Yes, opposite page 46.

Those were the regulations of the Copyright Office from 1909 to 1949, and they certainly defined it properly and defined it exactly as it was intended to be defined. We say that the penalty provisions being carried over from the 1870 Copyright Act to the Copyright Act of 1909, penalties of $10.00 per sculpture, clearly showed that the subject matter of copy-

rights was intended to be treated as fine arts, and as fine art it was not intended to be manufactured in quantities.

MR. JUSTICE FRANKFURTER: What do you make of the rest of Paragraph 12(g), a portion of which you read:

". . . but registration in the Copyright Office has been made to protect artistic drawings, notwithstanding they may afterwards be utilized for articles of manufacture."?

MR. KRAUS : If I make a drawing, I can copyright the drawing, and all I have is a right to a copyright of the drawing.

Assuming I make a drawing of a bridge, as involved in the Triborough case, where the copyright owner had made a drawing of a certain type of bridge to be constructed, copyrighted the drawing as a lot of architects copyright their plans or drawings today, so that a competitor cannot take that and make a duplicate copy, that is all a Copyright Office can do, but they cannot prevent anyone from making a house that is a copy of the drawing, and the Court in the Triboro case held that the bridge manufacturer can make a bridge which is a copy of the drawing, but he cannot make a copy of the drawing itself.

That is what that paragraph means.

MR. JUSTICE FRANKFURTER: Do you mean to say that a lamp concern can have a notable artist or a recognized artist

draw a design for a lamp and have that drawing copyrighted?

MR. KRAUS: That is right.

MR. JUSTICE FRANKFURTER: And that thereafter, on the basis of that design, some rival manufacturer can put out a lamp based on that?

MR. KRAUS: Yes. I think that is pretty much accepted law.

The proposition is this: that in copyrighting a drawing all you get is the right to prevent reproduction of the drawing itself, not of the article shown in the drawing. That is what that means.

MR. JUSTICE FRANKFURTER: But you can have an embodiment of that drawing?

MR. KRAUS: In a physical specimen, that is right. That is what the Court held in the Triborough case in New York.

I do not think that that question has ever reached this Court, but the courts below have interpreted it that way.

MR. JUSTICE FRANKFURTER: What is the citation of that Triborough case?

MR. KRAUS: I do not know that I cited it in this case, because that did not seem to be an issue here, but I can furnish the Court that citation. We used it, I think, in our briefs in the courts below, but not before this court.

Now, another very important point is that when the 1909 copyright law was passed they did not intend to change

the subject matter of fine arts to a broader specification. This is brought out by the committee reports that accompanied the bill, the 1909 copyright law. We make reference to it in our brief, that the committee report just passed over completely the fact that there was any change between the 1870 Act and the 1909 Act.

Now, if this Bill, this 1909 Copyright Act, was to make a significant change in the subject matter of things to be protected, certainly some statement would have been found in the committee report to show that they were intending to extend fine arts to things of manufacture. There is not a single word that there was any change contemplated.

Now, that, together with the other facts, clearly indicates that under the 1909 Act there was to be no change from that of the 1870 Act which was limited to fine works of art.

MR. JUSTICE FRANKFURTER: Is there any reference at all to the change when the word "fine" was dropped?

MR. KRAUS: Nothing at all. We have searched that thing and not found a word.

MR. JUSTICE FRANKFURTER: You referred a while ago to the Perry case.

In that case the Court classified works of art in categories, and differentiated between the fine arts andother things.

MR. KRAUS: The Perry case said that if it is an original statuary that original statuary is fine art, and the question involved in that case was whether a manufactured stained glass windows that were to be used in churches was a work of fine art or of industrial art, and the Court there held that that manufactured window glass, no matter how artistic it might be, was industrial art and not fine art.

The United States vs. Perry case, incidentally, is not a copyright case. It is a tariff case, but the issues are substantially the same.

MR. JUSTICE FRANKFURTER: I suggest that in that case that you invoked, the Court classified the kind of works of man that come under the term "works of art".

MR. KRAUS: You mean generally?

MR. JUSTICE FRANKFURTER: In the opinion of the Court, Justice Brown.

MR. KRAUS: They made a distinction between fine arts and works of art generally.

MR. JUSTICE FRANKFURTER: And utilitarian art?

MR. KRAUS: That is right, and they called that utilitarian art, and industrial art.

Now, if they considered a window that is manufactured in quantity - and certainly it has a far less utility than this - if they considered that industrial art --

MR. JUSTICE FRANKFURTER: And not fine art.

MR. KRAUS: And not fine art, certainly a manufactured statue in quantity, which is intended for a mechanical purpose --

MR. JUSTICE FRANKFURTER: -- is not fine art?

MR. KRAUS: Is not fine art.

MR. JUSTICE FRANKFURTER: Yes, but the trouble is that you say it makes no difference. You had the phrase "fine art" in the 1870 statute, but in 1909 they left out the word "fine". Your argument is that the change is not a change?

MR. KRAUS: That is right, because the resolutions accompanying the Bill in the committee report make no mention of the change and, if the change was important, and if it was a fundamental change, then certainly something should have been said, that they were taking it away from the Patent Office and giving it to the Copyright Office.

MR. JUSTICE FRANKFURTER: The Government quotes the Librarian of Congress.

MR. KRAUS: I will quote it too. The only thing they rely upon is one statement made by the Librarian of Congress, and he said, with respect to the term "work of art":

> "The term 'works of art' is deliberately intended as a broader specification than 'works of the fine arts' in the present statute, with the idea that there is subject-matter (for instance, of applied design, not yet within the province of design patents), . . ."

Now, that statement is very significant, because he says in 1909 that the words "works of art" was not intended to overlap and do anything that the Patent Office was doing, and we have shown that since 1843 they have been granting patents on articles of manufacture and it was never the intention of Congress to overlap into that area.

MR. JUSTICE FRANKFURTER: I was wondering what was meant, when anyone considers who the Librarian of Congress was at the time, and his great authority, by these words: "not yet within the province of design patents." Does that mean it was not patented because it was not original enough?

MR. KRAUS: No; I would say, in other words, they were intending to cover things of the character that the Patent Office never embraced.

MR. JUSTICE FRANKFURTER: But can the Patent Office patent anything that is not original in the patented sense?

MR. KRAUS: No.

MR. JUSTICE FRANKFURTER: You have design, you have these industrial arts. Some may be patentable because they are original and are inventions. Then there are those that are not original and do not satisfy the requirement. Is that right?

MR. KRAUS: Thatis right.

MR. JUSTICE FRANKFURTER: Therefore, they are entirely not protectable at all, according to your view?

MR. KRAUS: We say that if Congress wants to protect them --

MR. JUSTICE FRANKFURTER: I am not saying what Congress wanted. Your position must be that they are not covered by the copyright law because they might be patentable, but they are patentable only if original.

MR. KRAUS: That is right. My position is that there is a definiteline of demarkation between a thing that is mass produced and has utility. That must go to the Patent Office.

MR. JUSTICE FRANKFURTER: It cannot go if it is not original.

MR. KRAUS: Then it becomes public property, if it is not.

MR. JUSTICE FRANKFURTER: I understand that, but you cannot say it must go to the Patent Office when it cannot go there.

MR. KRAUS: Well then, does it seem logical, if the Court please, that Congress would say "If you cannot get a patent after we examine a thing and it then becomes public property, we are going to give you a monopoly for four times as long on the theory that you can create it yourself?"

MR. JUSTICE FRANKFURTER: The question is whether it becomes public property. Of course, if it is public property, it is public property. It does not help me to say it does not come within the copyright law, it does not come within

the patent law and necessarily must be in the public domain. That is what this controversy is about.

MR. KRAUS: That is right.

MR. JUSTICE FRANKFURTER: You do not prove it by asserting it.

MR. KRAUS: That is true, but I think that the statement here does not sustain the respondent's position because we contend that lamps, designs, statues and sculpture are patentable subject matter. Maybe the specific one that is in issue is not, but the general line of sculpture and work is subject matter of a patent as our book shows. Now, because a specific thing in a general field is not the subject matter of a patent, because it is not original and does not meet the requirement, that does not mean it should go to the copyright office. That is not the distinction thatwe think Congress made here.

MR. JUSTICE FRANKFURTER: And it does not mean the contrary.

MR. KRAUS: Well, we think it does.

MR. JUSTICE FRANKFURTER: I can understand thatif a thing is patentable it ought not to be also copyrightable, but from that, if it is not patentable, why should it not have the same privilege that a lot of rubbish has, that which is copyrightable?

MR. KRAUS: Because our feeling is that the line of

demarkation was made on manufacturing and utility rather than on the subject matter.

Now, I have a book here of which I have only one copy. It is a book of patents, showing various products which have been the subject matter of patents, from 1904 to date, and they show statues, figurines and various other articles in addition to the subject matter which we discussed. I would like to leave that with the Court for their perusal.

MR. JUSTICE MINTON: If I understand you correctly, if you copyright this statue, as long as they sell it as a statue, you cannot infringe that?

MR. KRAUS: No.

MR. JUSTICE MINTON: But if they incorporate it into a utilitarian object such as a lamp, then it loses its protection as a copyright?

MR. KRAUS: No. My position is this: that this subject matter here was not of a copyrightable subject matter because it was mass produced and it had the original intention of practical use. Therefore, it was a matter, an article of manufacture, and the design patent act uses the words "article of manufacture" to define what belongs under design patents, and it is that distinction that if the thing is created to be produced as a three-dimensional article of manufacture, it must go under patents. If it is intended to be produced as a work of fine art, with no reproductions, then it belongs under

copyrights. But in this specific case here we have a lamp manufacturer who created this thing specifically to mass produce, and to have practical utility. It was not a work of fine art, nor was it a work of art under out definition.

MR. JUSTICE MINTON: If the statue as a statue was produced in mass -- ?

MR. KRAUS: -- our position is that that does not belong under copyrights, that that really belongs under patents, because it then becomes an article of manufacture.

MR. JUSTICE REED: When you refer to patents, you mean design patents?

MR. KRAUS: Yes.

MR. JUSTICE REED: Then did I misunderstand about the Triborough case? Was there a design patent?

MR. KRAUS: I think they had a copyright on a drawing, if I remember.

MR. JUSTICE REED: That is a drawing, not a design?

MR. KRAUS: That is right.

MR. JUSTICE REED: I understood that they had a design patent. I thought that you said that on a patent such as that, you could reproduce that design.

MR. KRAUS: That is right.

MR. JUSTICE REED: You could reproduce an article of manufacture?

MR. KRAUS: No. In answer to Justice Frankfurter's

question dealing with the regulation, there wasone statement in the regulation and he questioned me about it.

It said this:

". . . but registration in the Copyright Office had been made to protect artistic drawings, notwithstanding they may afterwards be utilized for articles of manufacture."

now, that is under Copyrights, and the theory was that if you make an artistic drawing and copyright it --

MR. JUSTICE REED: An artistic drawing, copyrighted, can be reproduced as an article of manufacture?

MR. KRAUS: That is right. That is what this regulation means. But the Patent Office has been issuing design patents from its inception, on articles of manufacture such as sculpture, jewelry and the like .

Now, the Copyright Office has stepped into the field and is competing with the Patent Office and, depending of course, I think, on this Court's decision. If copyrights can be registered at the whim and caprice of the individual copyright owner, who creates his own monopoly, we can consider the Design Patent Office a dead letter, because there would be no reason to go to the Patent Office when he can create his own monopoly himself.

MR. JUSTICE BURTON: Under your thinking, Rodin's "Thinker", would that be a work of art?

MR. KRAUS: That is a work of art.

MR. JUSTICE BURTON: When does it cease to be a work of art in making book ends?

MR. KRAUS: When he created it for the purpose of utility. Rodin created it as a work of fine art. The one piece might have served some purpose. That is all right for copyrighting, but when he creates it for serving as an article of manufacture for mass production and utility, then we say he has to go to the Patent Office and not the Copyright Office, for protection.

MR. JUSTICE BURTON: It loses its status as a copyrighted work?

MR. KRAUS: That is right, because that is the very intent of design patents.

MR. JUSTICE MINTON: Suppose you create a work of fine art and afterwards change your mind and want to make a little money out of it?

MR. KRAUS: I would say if he creates it as a work of fine art and treats it as a work of fine art, then it is copyrightable. If he treats it as an article of manufacture, why should he get more benefit than the industrial designer who has to pass through the Patent Office for every creation he makes?

MR. JUSTICE REED: He gets a design patent on it?

MR. KRAUS: If he intends to manufacture, yes.

MR. JUSTICE REED: Can he get a design patent even if it has artistic qualities?

MR. KRAUS: Yes, sir. Our book shows sculpture and statues of the character here in question, which the Patent Office has issued in the form of patents.

MR. JUSTICE REED: What if he copyrights it?

MR. KRAUS: If he copyrights it, the position of respondents is that they have in effect a 56-year monopoly, and that prevents anyone from making it.

MR. JUSTICE REED: You say that they cannot do that?

MR. KRAUS: That is right. We say that if an artist creates a thing of practical utility as an article of manufacture for everyday use, he must go to the Patent Office and not to the Copyright Office.

MR. JUSTICE JACKSON: Scarcity is what makes art?

MR. KRAUS: I think it does. I think in regard to the fine arts and works of art, that that is the distinction.

MR. JUSTICE JACKSON: When it becomes available to all of us, it loses the art value?

MR. KRAUS: Yes, because that is the purpose of the design patent laws.

MR. JUSTICE REED: As I understand that, they could be reproduced but not indefinitely. You could not say that that was not a work of art simply because they can make a hundred of them?

MR. KRAUS: I do not say that it is not a work of art. I say it them becomes an article of manufacture. The Patent Office registers works of art as articles of manufacture.

MR. JUSTICE REED: You say you could not copyright it?

MR. KRAUS: If you produce in quantity, no matter how beautiful the thing is, it belong under design patents.

MR. JUSTICE: What is "quantity"? Is that two or more?

MR. KRAUS: I do not think that"quantity" has ever been defined, except in the British law, which says that if you produce more than 50 then it belongs under patents rather than copyrights, but the difference is that the British l. says "to produce and reproduce". They use different language in their copyright law, as compared to ours.

MR. JUSTICE REED: How about porcelains?

MR. KRAUS: If it is manufactured in quantity, we say patents, and we have in our book patents issued on porcelain dishes, engravings, jewelry, various features in which the Patent Office has issued patents, because they relate to an article of manufacture. That is our position.

I willclose now, if the Court please, and my associate, Mr. Kahn, will answer rebuttal.

CHIEF JUSTICE WARREN: Would you mind using the remainder of this three minutes?

MR. KRAUS: One of our defenses on the narrow issue was that the plaintiffs here are misusing their copyrights, and this Court has held in several cases which we cite in our brief, that if a plaintiff misuses its copyrights, they are then denied equitable relief.

Our theory is this: that they created a lamp. They manufactured a lamp. They did not copyright the lamp. They took off all of the appurtenances of the lamp and sent in a statue. We say that that is misusing a copyright, and on that theory alone we feel that we should prevail.

But the issues in the case are broader than just the narrow issue.

Now, I might summarize in one brief statement our position:

We submit - and we have repeated this in our brief and I think this just about epitomizes our case, that a three-dimensional product which is created by a manufacturer for practical utility, and manufactured by mechanical means and mass production, is neither a work of fine art nor a work of art, as contemplated by the copyright law. Such a manufacturer who sells or publicly distributes the manufactured product under copyright notice, and who registers his alleged copyright by sending such manufactured product to the Copyright Office, is not copyrighting a work of art, but is attempting to copyright

an article of manufacturer and establish a monopoly which, if it can be established at all, can only be established by way of the design patent laws. That, in effect, summarizes our position.

CHIEF JUSTICE WARREN. In your opinion, would this design have been subject to patent?

MR. KRAUS: I think so because, if your Honor will see the Book of Patents, there have been secured design patents on things of this character, some of which are in the exhibit book. It would have passed the Patent Office.

MR. JUSTICE FRANKFURTER: Would it be original?

MR. KRAUS: In the sense that the Patent Office would recognize it as such, I think they would have been subject matter of design patents.

MR. JUSTICE REED: It has to be something other than original, does it not?

MR. KRAUS: This Court has set the subject of invention.

MR. JUSTICE DOUGLAS: It must be novel and original?

MR. KRAUS: It seems foolish to me that when the Court sets such a high standard of design, that that should be thrown overboard and the man can copyright it for four times as long on his own say-so, under the provision of copyrights. If there copyrights are to be sustained and furnish a manufacturer or anyone else who creates what to him appears to be an artistic

work, furnishes him with the ability to create his own monoply, then the Patent Office will have to close its Design Division, because it cannot hope to compete with the Copyright Office, in monopoly.

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(Whereupon, at 2:00 o'clock p. m. the Court recessed, to reconvene at 2:30 o'clock of the same day.)

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AFTER RECESS

(Whereupon, at 2:30 o'clock p. m. the Court reconvened and further argument in the matter under consideration at the time of the recess was continued.)

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CHIEF JUSTICE WARREN: Mr.Frost.

ARGUMENT OF MR. GEORGE E. FROST

ON BEHALF OF THE RESPONDENTS.

MR. FROST: If the Court please, the question in this case is whether the copyrights to the statues involved in this suit are valid.

There is no question here respect either to the validity or to the scope of any copyrights in drawings. There is no question here with respect to any copyrights in jewelry. Out only question relates to the copyrights to the statues here in suit, and we have in court here one of those statues. There are a total of six involved in the case, and we have selected one to show to your Honors in this argument.

The one we have chosen, the one I have here, is called "The Curved Ballet Dancer."

The Curved Ballet Dancer was created by Rena Stein. She is one of the respondents before this Court.

Rena Stein prepared The Curved Ballet Dancer by first preparing a series of sketches, whichembodied the thoughts that she wished to express in the form of a statue. When Mrs.Stein

had finished with these sketches, she prepared a composite drawing, which embodied the best features of the various sketches.

Following preparation of the composite drawing, Mrs. Stein sculptured a clay, three-dimensional model, using the composite drawing as her guide.

Now, the three-dimensional model which Mrs. Stein prepared was, in form, identical with Plaintiff's Exhibit 8 whichI have here in my hand, and on the back side of the pedestal Mrs. Stein sculptured, right in this first clay model the copyright notice.

Mrs' Stein converted the clay three-dimensional model to a plaster model, suitable for production of further Curved Ballet Dancers, by applying what is known as the waste mold art technique.

In substance, the waste mold technique consists of pouring about the clay model plaster, and doing so in such fashion as to form a two-part negative mold.

After the process solidified, Mrs. Stein opened up the mold, cleaned the adhering particles of plaster from the cavity, closed the mold, and then poured into the cavity plaster, so that she had a plaster model embedded in this negative of waste mold.

After that, the waste mold was chipped away, until only the plaster reproduction in that waste mold was left, and

she took that plaster reproduction and then poured a rubber compound about it, allowed the rubber to solidify, and then peeled off the rubber to form a production mold from which many copies were, could and were, cast in plaster.

Now, Plaintiff's Exhibit H, which I have here, is one of those production copies. This particular copy was sent to the Copyright Office. It was sent with another identical copy, and with an application for registration as a copyright. The copy was received here in Washington, the application was received here in Washington, and the Copyright Office examiners reviewed it.

They examined it, found that we do have a work of art here, and upon so finding, they sent the copyright certificate to respondents. They deposited the two three-dimension statues in the files of the Copyright Office, and Exhibit 8 remained in those files, until it was identified by the Register of Copyrights, for use in this suit.

So there is no question here with respect to what was in the Copyright Office. It was a three-dimension statue.

Other copies were made and sold from the rubber production mold that Rena Stein made. Most of those copies were sold with lamp sockets added. Some of them - a few - were sold in the form I have here, which you see is identical with Plaintiff's Exhibit 8 excepting only that it is colored.

All of the products sold by respondents here were

cast in the same mold. There is no difference whatever, so far as the statue is concerned, between those sold with lamp sockets and those sold simply as statues.

One of the production copies reached the hands of a copyist. What did the copyist do? The copyist simply covered the production model, the Curved Ballet Dancer, created by Rena Stein, with a rubber compound or a glue compound for making a mold for himself, and to do that there was no need to prepare sketches. There was no need to sculpture a clay model, there was no need to go through the waste mold technique, because all that had been done by Rena Stein. All the copyist had to do was simply to put on the mold material, to peel off the mold when it had solidified. No element of technique was necessary, it was simply a mechanical matter.

Here we have one of those copies. There can be no question but that it was cast from precisely the same mold as the original.

The copyist simply went through the mechanical motions of getting a production copy, making a mold, and making copies for himself in plaster, and this is Plaintiff's Exhibit 1-B, one of the accused reproductions and copies.

The copyright law under which these works were registered, recites works of art, models and designs for works of art, and reproductions of a work of art.

Surely there can be no question but that the Curved

Ballet Dancer is a work of art, within any normal meaning of that term. The Curved Ballet Dancer is sculpture, a traditional art form.

The Curved Ballet Dancer is of the human figure, which is a classical art subject.

The Curved Ballet Dancer was prepared by making sketches, by making a composite drawing from the sketches, by making a clay model from the composite drawing, and finally by the waste mold art technique.

So whether we use as our yardstick the result, namely sculpture, or whether we consider the way the result was achieved, namely by the sketch, the clay model, waste mold technique, we do have sculpture and a work of art.

Now, petitioner in this case makes much of the argument that the statues of the Curved Ballet Dancer are somehow altered by the fact that a production mold was made, and by the fact that many copies were cast.

The statute, Section 5(g), 5(h) of the Copyright Code merely says "work of art". There is absolutely no qualification.

Secondly, in Bleistein vs. Donaldson, the Circus Poster case, this Court held that a painting prepared to advertise a circus, and incidentally the painting was of a dancer, was copyrightable, even though it was produced in many, many copies, even though it was applied to billboards all over the country, and never saw the inside of an art gallery.

Justice Holmes squarely held that those things have nothing to do with the question of copyright[redacted]ility. He said that a painting is a painting wherever it is, and if Justice Holmes were here now, I am sure he would say that the Curved Ballet Dancer is still the Curved Ballet Dancer, whether she is reproduced in many copies and whether she has a lamp socket on top for a light. We still have the same work of art, and that is all that the statute requires.

Now, any other rule would be simply absurd.

MR. JUSTICE DOUGLAS: You have, underlying each of these, the constitutional question as to the standard?

MR. FROST: The statute, of course, requires a work of art. The constitutional standard of writings is broad enough to cover a work of art, and there is nothing in the constitutional standards that relates to the number of copies or the useful application.

MR. JUSTICE DOUGLAS: In your view, it comes under writings?

MR. FROST: Yes, and Congress has in very broad language in Section 4 of the copyright code stated that copyrights shall cover all the writings of the author, and this Court has held thata photograph, for example, is a writing, and there is very little doubt at the present time that the term "writings" in the Constitution, is broad enough to cover works of the kind we have here.

MR. JUSTICE DOUGLAS: Has this Court ever passed upon a piece of sculpture or design?

MR. FROST: This Court had one case last term, the Woolworth case, on the damages question.

MR. JUSTICE DOUGLAS: Has it had a case in terms of whether it is a writing or not?

MR. FROST: No decision of this Court precisely on that. I think that the photograph case is surely broad enough to cover it, and I might say just one other thing, Justice Douglas, that the constitutional question is not raised in this case at all.

MR. JUSTICE DOUGLAS: That was my next question.

MR. FROST: It is not raised at all, your Honor. It is not in the answer. It was not before the District Court. It was not before the Court of Appeals and it is not here.

MR. JUSTICE REED: If it is not a writing, then there is no power in Congress - or perhaps that is not a fair question?

MR. FROST: I think that is a fair question, your Honor. The Constitution does use the term "writings" but writing, in the Constitution, means something that is different from writing it out in pen and ink. The term "writing" is intended to mean knowledge and taste, and you can find that in the history of the Constitution. That has a very broad connotation, and particularly, the photograph case does cover that subject.

So, in this case, I do not think that we come to that constitutional question at all. It is certainly not raised.

MR. JUSTICE DOUGLAS: What was the photograph case? Do you have that reference there?

MR. FROST: I am sorry. I do not have it here. It is not raised in any of the briefs.

With respect to the practical aspects of the rule for which the petitioners here contend, itwould be absurd to have such a rule come to pass. In the first place, art is of use and enjoyment to you and to me only to the extent that it comes into our homes. Art in the Art Gallery is very fine, but in terms of the enjoyment of the public, surely it is the art that is reproduced that counts.

Such works as Rodin's "Thinker" and "Venus de Milo" are only known to us and enjoyed by us by the fact that copies have gone out all over our nation. It is the art that is in everyday use, not the museum piece, that Congress had in mind.

Now, there is another point in connection with this matter of volume reproduction.

Congress wrote right into the copyright code something that cannot be reconciled with any contention that works of art reproduced in quantity are not copyrightable.

Congress provided in Section 12 of the Copyright Code for the registration of works not reproduced for sale, and what did Congress provide? I might mention, your Honors, that on

Page 3 of our reply brief, we have reproduced Section 12 of the Copyright Code.

What did Congress provide in Section 12 of the Copyright Code?

Under "Works not reproduced for sale", Congress provided this: that in the case of a work of art-which is what we have here - which is not reproduced for sale, the work can be copyrighted by sending photographs to the copyright office.

Then, in Section 13, there is a general provision, applicable to all works, namely, works reproduced for sale, as well as for those not reproduced for sale, and in Section 13, Congress provided that in the case of a work which is reproduced in quantity, that two physical copies must be deposited in the Copyright Office.

Of course, that was what was done in this instance. Two physical specimens prepared on the mold were sent in by respondent to the Copyright Office.

Now, what the petitioners are trying to do here is to erase Section 13 from the Copyright Code, strike it out as if it were not there, and we submit that Congress never had any intention of something of that kind because Congress wrote Section 13, and there it is.

Now, in addition to the language of the Copyright Code, we have a history of the Code, which clearly supports our position, that the works here are copyrightable, and in sub-

stance that history is this:

Prior to 1870 there is no provision for copyrighting statues. The Copyright Law covered other things. In 1870 a consolidated patent, trade mark, and copyright act was passed, and in that act Congress provided for registration under the Copyright Law of statues, statuary and models and designs intended to be perfected as works of the fine arts. "Intended to be perfected as works of the fine arts". So you see, in the 1870 Act there is not only emphasis on fine arts. There is emphasis upon intention as well.

MR. JUSTICE REED: The present subsection (g) is descended from that?

MR. FROST: The present subsection (g) is descended from that, Justice Reed, and the change occurred in the 1909 Copyright Act, and at that time, after the Copyright Law was expanded, broadened to cover all works of art, all reference to intention, all reference to fine arts, was deleted from the Copyright Code at that time, and that was after the testimony to which Justice Frankfurter referred, by Mr. Putnam, stating that it was the purpose to expand the scope of copyright protection.

Now, if the petitioners' position is to stand today, it is necessary to go back forty years, not apply the copyright law as it exists today, not apply the term "works of art" but to go back and take the terms that Congress discarded forty

years ago.

In addition, the Copyright Office, for many years, and at least since the passage of the 1909 Act has registered works of art irrespective of whether they can be reproduced in quantity or are reproduced in quantity, irrespective of whether they can be applied to useful objects or are applied to useful objects. We have testimony on the present record that resolves all possible doubt that the work here such as the Curved Ballet Dancer would be registerable, irrespective of whether they were or could be used in some object like a lamp base.

I might add, your Honor, that that is the testimony of the Register of Copyrights. So that whether we take as our measure the language of the statute, the history of the statute, or over forty years of administrative construction, we come out with just one conclusion: that a work of art is registerable, irrespective of whether it is multiplied in quantity and irrespective of whether it can be or is applied to some useful object.

Now, the petitioners here seize upon the design patent law. In the first place, we have a very serious question here of whether we have anything within the scope of the design patent law. Is the Curved Ballet Dancer an invention? If so, what is inventive about her? The Curved Ballet Dancer portrays just what the name implies, a ballet dancer. The courts have held

several times that the human figure cannot be invention in the design patent law sense, and I would like at this point, Justice Douglas, to answer a question that you raised.

You referred to the text of Section 171 of the Code, which relates to design patents, and that section of the patent code also refers to the general provisions of the patent law, which include Section 103, and Section 103 states the invention test which this Court has applied for many years, namely, that in order to support a patent and including a design patent there must be this thing we call invention over the prior art.

Now, the fact of the matter is that this invention concept just simply does not apply to works of art. Take Rodin's "Thinker". Surely no one would question that Rodin's "Thinker" is a work of art. Yet Roden's "Thinker" is no different than all the men that have existed for centuries before. Where is there any invention over some prior art in a work such as Rodin's "Thinker"? Obviously there is not.

We do not have a case here, you see, where we get into any question of election. The fact is that the patent law does not apply, and the Court of Appeals for the Fourth Circuit never did get to any question of an election here, just for that reason.

MR. JUSTICE DOUGLAS: You mean by that that you couldn't not have gotten this under the design patent act?

MR. FROST: I do not think we could have acquired a valid patent on the Curved Ballet Dancer, simply because, your Honor, of no invention.

Secondly, there is no such suggestion in any of the statutes, that the design patent law prevails over the copyright law. The fact of the matter is that each statute is silent with respect to the other, and that is the way the statutes have been enforced.

MR. JUSTICE REED: Can you get a design patent on an article such as a work of art?

MR. FROST: Yes, you can, your Honor. The patent law and the copyright law are administered by the Patent Office and Copyright Office separately entirely from each other, and we have in the Government's brief in this case the statement, not only that the Copyright Office considers the works here copyrightable, but also that the Patent Office considers that the copyrights were properly obtained. So there is no conflict here. So everyone agrees that these are copyrightable.

MR. JUSTICE FRANKFURTER: Does a patentee get anything that the holder of a copyright does not get?

MR. FROST: Yes, he certainly does, your Honor. The patentee and the owner of the design patent gets an absolute monopoly for the full term of the patent grant. What does that mean? That means that the patentee can bring suit against anyone who creates something thatis substantially similar.

The defendant in such a suit cannot escape by saying I did it independently, I never heard of it. This is really my work." The defendant in a design patent case does not have that defense.

Now, under the copyright law one only obtains the narrow right to prevent copyists. In other words, the grant is good only against the intellectual forger, the thief. Now, the patent, during the full term of the grant, stifles all independent production. On the other hand, the copyright has exactly the reverse effect. The copyright encourages independent production. Why? Because the man that is honest, the man that produces for himself need only show to the Court that fact, and it does not matter how similar the accused work is to the copyrighted work, there can be no copyright infringement if the defendant exercises his own talents and did not steal the talents of someone else.

Now, the petitioners in this case say, in effect, "The Courts disregard that. They do not pay any attention to difference between a copyright on one hand and a design patent on the other hand."

The fact of the matter is that the Courts do pay attention, and to illustrate I only have to point to the Woolworth case, which was before your Honors last term, involving the copyrighted dog statuette. It was before this Court only on the issues of damages, but in the lower courts, the defendant

produced the testimony of one Moyer. What was Moyer's testimony? Moyer's testimony was that "I created this thing they are charging as an infringement."

What did the Court do? You will find it in both opinions. They went into the testimony of Moyer at great length and it was only because they disbelieved Moyer that that case ever reached this Court.

So it simply is absurd to say that the courts disregard the difference.

I can add, your Honor, that we would not be here if the defendants, the petitioners in this case, had created their art. We would not be here if there was any testimony in the present record that the petitioners here had created their Curved Ballet Dancer. The fact of the matter is they took the easy way. They made a mold copy.

Now, there is a good deal that has been said about the fear of others of copy work. As I understand petitioner, he is saying in effect that when one has a copyright the rest of the industry just shudders, and no one will go ahead. I do not know of a better case to illustrate that there is no such fear than this case.

We did not have one copy made here, we have six. The respondents here have not had one suit, they have had many suits. There is no fear. The copyist will copy unless the courts stop him.

I might add that if there ever was any question of misusing a copyright, the statutes specifically provide that the Court, in its discretion, can award attorney's fees. So there is no question that the man who has created this article will go free. The fact is that he will go free.

Now, this morning we came into court here. We were handed a photostatic copy of a book. I do not know whether your Honors have a copy. Apparently you do.

This purports to be a photostat from a publication, "1953 Copyright Problems Analyzed."

It lists a number of bills which have been in the halls of Congress and have not passed, over the last year

Now, I justwant to say one thing about those bills. Those are not this case. Those bills, as the text indicates, are generally called design copyright bills. What is the general purpose of the bills?

The general purpose of the bills is to provide copyright protection to things that are in addition to works of art.

Now, I have here a lady's stocking. This lady's stocking, I do not think any of us would call a work of art. This lady's stocking was design patented and the design patent was held valid and infringed.

Now, the situation is that a thing of this kind does not have its shape, its configuration dictated by art at all.

It is dictated by the shape of the leg, and the design patent was granted on this because of the so-called picture-frame heel design, which I think your Honors can see, a mere ornamentation worked into the useful object; nothing in the nature of a classical or standard work of art such as we have here.

The thing that these statutes are intended to do, in a general way, at least, is to make it possible to copyright things of this kind, and make the copyright avenue available in addition, or in substitution for design patents. That is not the question here.

We have here a work of art, a statue. It is in a standard art form. It is a classical art subject, namely the human figure.

So these bills in Congress, whichhave not come up in this case until this morning, are wholly beside the point.

Now, just one other point:

The petitioner here has said a good deal about publication. He reads the copyright statute to mean that publication can only be accomplished by a sale. His whole argument with respect to publication is based on that.

The fact of the matter is that the copyright code in Section 26 expressly defines publication as "first placing on sale". Not a sale, but "placing on sale", secondly, selling, and thirdly, publicly distributing, and the fact of the matter is that the Curved Ballet Dancer was in fact placed on sale in

the statue form at the time indicated on the copyright certificate.

Now, the petitioner relies on some interrogatories which do not go to that question at all. They only trace the question as to when was the first sale - which was a very different thing.

Secondly, with respect to this whole argument of publication, we cannot see that it makes a particle of difference. The Curved Ballet Dancer, whether she was sold with a lamp socket or whether she was sold without the lamb socket, was still cast from the same mold, still came from the same place, still displayed the same art technique and was still the same art. So, it does not make a particle of difference.

Perhaps I should say a word or two about the Expert case.

In the Expert case the Court of Appeals for the Seventh Circuit and the District Court too, held that some of the respondent's copyrights were invalid and not infringed by the manufacturer of lamps which used the statues that had been copyrighted.

MR. JUSTICE DOUGLAS: Did they involve these lamps?

MR. FROST: Not these specific ones.

MR. JUSTICE DOUGLAS: Did they involve ones like these?

MR. FROST: Ones essentially like these, yes. We

think that the Expert case is wrong. We think that the expert case is wrong because we have here statue work, a standard art form of the human figure, a classical art structure. Surely, if the term "works of art" means anything at all, it means what we have here.

Secondly, neither of the courts in the Expert case gave any consideration to the history of the copyright law. They did not recognize that the position they had taken was, in effect, to write into our present unqualified copyright statute the limitation to the intent of the author, which had been discarded in 1909, and the limitation to fine arts, which had also been discarded in 1909.

Thirdly, the courts, in the Expert case, read the regulation of the Copyright Office as if to support the conclusions they reached. Now, had the courts known that the regulation did not mean that at all, and we do not think it means it, but in any event, that is how they construed it.

MR. JUSTICE DOUGLAS: Could you have had a copyright on that third exhibit there, with the light fixtures?

MR. FROST: Definitely, yes, Justice Douglas.

MR. JUSTICE DOUGLAS: You could have copyrighted the whole thing?

MR. FROST: Well, the copyright would have gone only to the art. The copyright statutes specifically provide that a copyright goes only to the copyrightable components of the

MR. JUSTICE DOUGLAS: Even though you copyrighted what you have in your hand, it would be only the statue itself?

MR. FROST: Exactly.

CHIEF JUSTICE WARREN: Mr. Frost, will you be more specific about your interpretation of Section 12(g) of the Copyright Regulations, that were referred to by counsel this morning?

MR. FROST: I would be glad to, your Honor.

The Copyright Regulations which have been referred to this morning were the regulations that were in force and effect during the period from approximately 1909 or 1910, I think, to 1948.

Those regulations were intended to define only the extreme . In other words, they stated, in effect, that where the work was utilitarian in purpose of character it would not be subject to a copyright registration.

What does that mean? That means a stocking. It means a buoycle. It means perhaps a refrigerator, things of that character, you see, which are basically utilitarian in character and are really not works of art.

Now, on the other side of the ledger under this old regulation, works which are in standard art form, - and it specifically states paintings, drawings and sculpture - works of that kind were copyrightable, and on the present record, Justice Warren, there is just no question that at least by 1909

the Copyright Office would register a work in standard art form, irrespective of whether it was or could be embodied in an object having some useful application. And in appendix B of the Government's brief, we have quite a list of such registrations.

We have also on the present record the testimony of the Register of Copyrights, who testified that since at least 1909, registrations of that kind had been allowed.

Now, Justice Warren, this question may arise: Where does the 1948 regulation fit into this case?

The answer is that it does not affect this case. The 1948 regulation provides that registrations will be granted to things like jewelry, perhaps, which are works of art but are not embodied in what we might call standard art form.

Of course, we do not have any jewelry here. All we have is the Curved Ballet Dancer, and five or her companions. All of them are statuary. All of them are classical art forms.

So that, in the old regulation we find the extremes. It is perfectly clear under the present record, that these works would be copyrighted.

CHIEF JUSTICE WARREN: In 1948, the regulations were broadened to include other things, which were not included before?

MR. FROST: Exactly, things like jewelry, which would not be a standard art form, you see, but that is not this case.

Now, coming back to the Expert case, the Expert case ignores the basic difference between a narrow copyright grant on the one hand and a broad patent monopoly on the other hand. There is nothing in that case that in any way relates to that subject, and of course, that goes to the heart of the distinction between the two.

The copyright is one thing, and a design patent is an entirely different thing, and if the petitioners here create their own art, we cannot go after them under these copyrights. Had we design patents and they were similar enough, we could bring suit.

Finally, with respect to the Expert case, the case has been rejected by the Court of Appeals for the Fourth Circuit in this case. It was rejected by the Court of Appeals for the Ninth Circuit in a subsequent case. And despite many many law review and other commentaries on the Expert case, each and every one of them has rejected the Expert case.

We submit that the Copyright Office and the Patent Office are right. The Copyrights in this case are valid.

Thank you.

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CHIEF JUSTICE WARREN: Mr. Forman.

ARGUMENT OF MR. BENJAMIN FOREMAN,
FOR REGISTER OF COPYRIGHTS, APPEAR-
ING IN THIS MATTER AS AMICUS CURIAE.

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MR. FORMAN: May it please the Court, as Counsel for Petitioners and Respondents have already informed the Court, the Copyright Office is of the view that the copyrights in this case are valid and that they have been infringed.

We have been advised by the Patent Office that they concur in that conclusion.

The crux of the petitioners' case in their brief and in this Court is that the Copyright Office since 1949 has interpreted the copyright law and has sought to expand its jurisdication and to encroach upon fields of the design patent law, that the regulation which was issued by the Copyright Office in December of 1948 is inconsistent with the statutory language and is also contrary to the established practice of the Copyright Office.

I think that the short answer to that is found in our Appendices B and C.

In Appendix B which starts at page 57 of our brief, we have set forth typical examples from the Catalog of Copyright entries, from 1912 to 1952, showing registrations of works of art possessing utilitarian aspects.

This listing was taken at approximately five-year

intervals and is by no means an exhaustive sample.

I think it pertinent to point out to the Court that in practically every catalog from which we have taken excerpts, there is a registration for lamps or lighting fixtures or candleholders.

As you can see, that is true in 1912; it is true in 1917; it is true in 1922; it is true in 1924, in 1927, in 1932, 1937 and 1946, all prior to the present regulations.

Indeed, in Appendix C of our brief, which has some photographs of copyright registrations prior to 1909, and the dates from 1906, you will see at page 74 a copyrighted lamp of a bear at a tree trunk. That was copyrighted in 1906. That is at page 74.

Similarly, at page 66 of that appendix there is a copyrighted work of art used as a candle-matchholder. These clearly are in the same classification as the copyrights which are in issue in this case.

The Petitioners have also asserted that the Copyright Office is like a cafeteria, that all you have to do is publish something, slap a copyright notice on it, send it in to us and we will issue a certificate, and that is the end of it: just obtain your monopoly any way you please. It is not quite true.

The Copyright Office, of course, is not like the Patent Office. We do not make a search for novelty or for

invention. We are more like a Recorder of Deeds - but still, not quite like it.

We are somewhere in between. For example, it takes approximately a week to ten days after an application is received, before registration is issued. We do not accept everything that comes in. Approximately 1,700 articles of various sorts were rejected last year, as being not within the subject of copyrights.

Although I do not have the exact figures, because we do not keep them broken down as to how many were received and rejected as not being works of art, I think we can approximate them at approximately 600.

Furthermore, although the statute provides that you do get copyrights by publication, the Certificate of Registration has a very important value, and, if we think it is not a work of art, we would always refuse to issue the certificate of registration.

That is important, because under Section 209 of the Act the certificate is prima facie evidence of the existence of the copyright, and of the fact that all requirements of the Act have been complied with.

Furthermore, under Section 13 of the Act, you cannot sue for infringement unless you have a certificate of registration.

MR. JUSTICE REED: Will you tell us what tests you

have?

MR. FORMAN: Do you mean tests as to whether something is a work of art, Justice Reed?

MR. JUSTICE REED: Yes.

MR. FORMAN: I think, for the purposes of this case, that the test can be stated in this fashion: that if the work submitted is something which historically is in a traditional art medium, such as painting, drawing, sculpture, then it is a work of art as far as the Copyright Office is concerned, regardless of how poor the artistic craftsmanship of the particular artist may be.

MR. JUSTICE REED: What of a tooled leather book binding?

MR. FORMAN: That may be and may be not. I cannot give you an unequivocal answer on that, Mr. Justice Reed. I can answer it this way:

If the leather tooling on the book binding were merely an ornamental design, that would not be a work of art. If, however, the tooling were a drawing, an illustration, which is a representation, then we would take it. We do not think it makes any difference whether you put a drawing or a painting on leather, canvas, gypsum board, or put it on the wall here, we would copyright it.

MR. JUSTICE REED: If it had a dog's head on the book binding, that would be a work of art?

MR. FORMAN: Yes, I think they would take it as a work of art. We would copyright that eagle (indicating eagle on flagstaff). If you wanted to take a drawing and tool it in leather, I do not see that it is any less a work of art.

MR. JUSTICE REED: Are there rules that set that out?

MR. FORMAN: I do not think we have a rule which says what a work of art is. I think that this Court has defined a work of art in the Perry case, at least by defining it in terms of what it includes. We have set forth the language from that case in our brief at pages 15 to 16, where the Court pointed out that:

"Works of art may be divided into four classes: (1) the fine arts, * * * (2) minor objects of art, * * * (which) are susceptible of an indefinite reproduction from the original. (3) Objects of art,which serve primarily an ornamental, and incidentally a useful, purpose * * *. (4) Objects primarily designed for a useful purpose . . ." so a work of art includes fine arts as well as other objects of art. I think it is difficult to try and say what is not a work of art, because then we get into the concept of art.

MR. JUSTICE REED: When you changed the language, as I understand, it was changed from "fine art" to "art"?

MR. FORMAN: Yes. I would like to turn to that now, your Honors.

As I understand the petitioners' argument, apart from

the erroneous statement as to what our practice has been, which was disproven by the appendices, they seem to make a threefold argument: (1) that you cannot have utility in a copyrightable article; (2) that it cannot be manufactured; and (3) that, as developed in the colloquy with Mr. Justice Minton, I believe, if the artist has an intent to create art for art's sake, that is all right, but if his intent is something different, no matter how beautiful it may be, if done by Picasso or anybody else, if he wants to commercialize it, it is not copyrightable.

I would like to direct my remarks to those three points.

As to the statutory language, as Mr. Frost has already pointed out, Section 4 of the Copyright Law, which appears at Page 51 of our brief, provides that:

"The works for which copyright may be secured under this title shall include all the writings of an author."

Earlier, when he was up here, Mr. Justice Douglas and you, Mr. Justice Reed, asked questions about whether works of art were writings, and,as to the constitutional effect, Mr. Frost referred to the socalled Photograph case.

The name of that case is Burrow-Giles Lithographic Co. vs. Sarony, 111 U. S. 53, which is cited in the Government's brief at page 38 of that brief, and that case involved a photograph of Mr. Oscar Wilde, and the Court held that the photograph

was a valid copyright.

At page 58, after the Court had defined an "author" in the constitutional sense, as people to whom anything owes its origin, originator or maker, the Court went on to say:

> "So, also, if one would now claim that the word 'writings' in this clause of the Constitution, although the only word used as to subjects in regard to which authors are to be secured, is limited to the actual script of the author and excludes books and other printed matter. . . " By 'writings' in that clause is meant the literary productions of those authors, and Congress very properly has declared these to include all forms of writing, printing, engraving, et cetera, by which the ideas in the mind of the author are given visible expression."

In that case, I might add, of course, that we have motion pictures copyrighted under the law today, and also phonograph records.

MR. JUSTICE REED: What about furniture?

MR. FORMAN: Ordinarily, we would not take furniture, if it is merely a piece of furniture whose design is dictated by functional considerations, or perhaps has mere ornamentation on it.

For example, this chair has some border lines on it. We would not take that.

MR. JUSTICE REED: What if it had embossing on the leather?

MR. FORMAN: I think that we would take that. As a matter of fact, your Honor, there is a case involving a drawing which was copyrighted, and then the drawing was reproduced on the leather for a chair, and the Court held that there was a copyright infringement.

MR. JUSTICE REED: Would it make a difference whether it was embossed on the leather or carved in the wood?

MR. FORMAN: I do not think it would make any difference, your Honor. Generally, we have not taken furniture. However, I can give you an example of something that we have taken, on page 78 of the Appendix, which is a copyright for a stationery cabinet. I do not think that the photograph is very good on that. I do not know whether you can make it out. I have a better photograph here, your Honor. You can see that it is very ornate. What we do copyright there is not a box with a drawer which is all a piece of furniture which is a stationery cabinet can be. That, of course, is not copyrightable. What we are copyrighting is this moose or deer head, and the various other little animal figures on there which we regard to be works of art, and traditionally works of art.

For example, I do not think that your Honors would say that the frieze around this wall is not a work of art. At least you thought well enough of it to have the builder put

it in this building. There is certainly no reason why some of those figures could not be reproduced and used as book ends. It would still be a work of art.

Going back to the statute, your Honors, as I said, Section 4 refers to all of the writings of an author. Sections 5(g) and 5(h) refer to works of art, reproductions of works of art, and, as the Court has already been told, this is a change in the language from the previous language of "works of fine art."

I also would like to call the Court's attention to the provision in Section 5 which provides that these specifications in Section 5 "shall not be held to limit subject matter of copyrights defined in Section 4", which is "all the writings of an author".

I might also add in that connection, which is something which Mr. Justice Frankfurter has pointed out, that many of the things listed in Section 5, which is at page 51 of our brief, such as directories, gazetteers, maps, periodicals, musical compositions, photographs, have a very limited aesthetic appeal, if any, and that most of them are designed for utility.

I also would like to point out Section 6, which has not been referred to as yet. That is not set forth in our brief, unfortunately, but it is set forth in an earlier version as the amendment in the Copyright Act of 1874, which is at page 22 of our brief.

Congress there provided for the copyright registration of pictorial illustrations and prints and labels designed for articles of manufacture.

Now, in 1874 they separated the functions of registration. They said that the Copyright Office shall register pictorial illustrations of works connected with the fine arts, and that the registration of prints and labels designed to be used for articles of manufacture were to be registered by the Patent Office.

I think this is important, for two reasons; one, that you do have an awareness by Congress in 1874 of a distinction between works of fine art and works of art, and second, that prints and labels which are designed for use for articles of manufacture, either as advertisements, or something describing the contents of a bottle of whiskey, can be given copyright protection.

If that can be done, I think that these statuettes are also entitled to copyright protection.

Also, in connection with the legislative history and the understanding of Congress is the 1882 amendment, also set forth at page 22, which has not as yet been referred to by counsel.

That amendment authorized "manufacturers of designs for molded decorative articles, tiles, plaques, or articles of pottery or metal subject to copyright (to) put the copyright

mark * * * upon the back or bottom of such articles * * *."

I think it is plain from that language that Congress contemplated that there could be mass production of those articles. Indeed, Mr. Kraus, during the course of his argument, referred the Court to the $10.00 penalty provision, whichexists in the present law and which also existed in the 1870 Act. He has set that forth at page 23 of his brief. I think that that provision is rather an argument against him than one in his favor, because that provision states that there is a forfeiture of $10.00 for every copy of the painting, statue or statuary in the infringer's possession, and under the 1870 Act, which your Honors will remember, that the statuary copyrighted, was statuary intended to be perfected as works of fine art.

Now, this $10.00 penalty for every copy is meaningless if, as petitioners assert, the only copyright protection is for the original, and for something which is intended to be created only in the original.

I think that your Honors may take judicial notice that almost any work, even the fine arts, can be reproduced for a useful purpose, and can be mass reproduced under modern techniques. Paintings may be reproduced, for example, on plates, on bowls, on vases. I have recently seen, for example, drawings by Toulouse Lautrec on cocktail napkins. That does not change the fact that the original is a work of art. The

original hanging in a museum.

MR. JUSTICE FRANKFURTER: You will find reproductions on various pieces of crockery. I am talking about the picture.

MR. FORMAN: We would take those.

MR. JUSTICE FRANKFURTER: According to the argument of petitioners, that is not copyrightable, because it is mass production.

MR. FORMAN: That is correct.

Along that line, I think I might point out that the Lincoln Memorial, which I think most of us would regard as a work of art, although it was not copyrighted, the sculptor of the Lincoln Memorial did get a copyright on a reproduction of the Lincoln Memorial.

In that connection, I would like to show the Court something which belongs to Mr. Fisher, the Register of Copyrights.

This is something which he has in a bird bath at his house. It is a figure of a cherub, with a waterpipe, and the water comes out the top. This is a reproduction of a statue by Verocchio, which is approximately 500 years old, and which is in the courtyard of a palace in Florence, Italy, a city well known for its works of art.

Certainly the artist who designed that, at the time, did not contemplate that it would be reproduced, but is it any

less the work of art that it is now being reproduced? And should an artist be denied the opportunity to profit from his work if he has a commercial intent at the outset?

Now, with regard to this business of subjective intent, as we state in the brief, we think it is unworkable, administratively. We cannot tell when something is submitted to us ordinarily, what the intent of the author is, whether he thinks he is doing something merely for the sake of art, or wants to make money on it. Presumably it is copyrighted because he wants to make money on it.

Section 1(a) of the Act gives him the exclusive right to multiply copies of what he has done, and sell them.

MR. JUSTICE MINTON: You do not believe that the protection of the copyright is lost if used in the manufacture of a utilitarian object?

MR. FORMAN: No, your Honor. I do not see what the point of obtaining a copyright is if you cannot reproduce the article. There could only be one other reason, and that is, to prevent other people from mass-producing the article.

In our brief we refer to some jewelry which we have copyrighted. I may say, in passing, that we have not copyrighted much jewelry. We have copyrighted some jewelry designed by Mr. Salvador Dali, the famous artist.

MR. JUSTICE REED: You have copyrighted the jewelry itself?

MR. FORMAN: We have copyrighted the jewelry itself. I can show the Court the photographs of the jewelry. They are reproductions of articles from his paintings, such as Limp Watches, Bleeding Hearts.

For example, this is a photograph of something called a Bleeding Heart which appears in one of his paintings.

These are the illustrations and the paintings, which I think are probably too small for your Honors to see. The Jewelry is reproductions of those. Those were copyrighted by Mr. Dali and by people for whom he worked, because they did not want this expensive jewelry, which sold from $5,000 up, reappearing in every Five and Dime store. So they got a copyright on it, because they did NOT want to reproduce it. They wanted to prevent other people from reproducing it. That copyright is senseless if the thing can be reproduced by others, - and, obviously, it can.

Petitioners will then say "Well, this can be reproduced" and, if the artist does not want others to reproduce it, then the copyright is no good.

With regard to intent, not only can the Copyright Office not administer this test, but it may also lead to subterfuge by applicants. It may discourage new creations if, as petitioners suggest, only something whichwas created with the intent of creating work for the sake of art is entitled to copyright protection. Then manufacturers will use only

something which has been so created, something old, and that will discourage further artistry.

For example, take the Statue of Liberty. As appears from the book of exhibits filed by petitioners, Mr. Bartholdi obtained a design patent on the Statue of Liberty. Two and a half years before he obtained his design patent, he obtained a copyright on it.

What he obtained a copyright on was not the tremendous statue, of course. He did not obtain the design patent on it, either. He obtained it on a smaller reproduction of the statue.

With reference to this particular bronze article, since it was created almost 500 years ago it is in the public domain, and somebody cannot create it now.

I might also add, with regard to utility, that the specific language with regard to the constitutional provisions with respect to copyrights refers to "the useful arts" and does not refer to "the fine arts".

I would like to make one reference to English law, which has been touched upon in petitioner's reply brief, and just briefly, orally, by petitioner's counsel.

The English law is not in point here. They have a different statutory pattern. They have a different language. They have something called the Copyright Act of 1911, and the Registered Design Act of 1949.

The Registered Design Act, which would cover indus-

trial designs with reproductions of more than 50 copies, is not a patent act, like it is in the United States. It is also a copyright act, and even under that system they still have problems.

I would like to refer the Court in that connection to a report of the Copyright Committee of the Board of Trade of Parliament in October, 1952, in discussing the problems which have arisen - and they are similar problems to those here, but under a different statutory system.

This article is cited in the Michigan Law Review Article, which is cited in the brief.

I think that Mr. Justice Douglas asked a question about whether or not this third lamp which was over here was copyrightable, if it had been submitted with the lamp parts, and petitioners have made the point that there has been a misuse of the copyright, that respondents misled the Copyright Office by submitting it as a statue.

Mr. Frost answered the question by saying that the Copyright Office would take the lamp. That is correct. We would take the lamp, but the copyright protection would only be to the statue, and that is because of an express provision in Section 3, whichprovides protection for copyrightable components, and also Section 27, which makes the copyright an intangible property right, distinct from the object itself that is copyrighted.

I might also point out that Appendix B and Appendix C will show that many of the lamps which have been copyrighted, the sculptured work, the work of art components of them were sent in as lamps.

MR. JUSTICE MINTON: What does Regulation 12(g) mean?

MR. FORMAN: I do not think that that is in this case, your Honor. That is under the old regulations.

MR. JUSTICE MINTON: It is no longer in force?

MR. FORMAN: Do you refer to the whole regulation, your Honor?

MR. JUSTICE MINTON: I am referring to the copyright regulations, as shown in the appendix.

MR. FORMAN: You are referring to the 1917 regulations which I have at page 25 of Government's brief?

MR. JUSTICE MINTON: From 1909 to 1949.

MR. FORMAN: Was your Honor's question directed to the earlier question, about the meaning of this last sentence, about artistic drawings?

MR. JUSTICE MINTON: I was referring to what is designated as 12(g): "Works of Art and Designs of Works of Art." It says:

> "The protection of productions of the industrial art, utilitarian in purpose and character, even if artistically made or ornamented depends upon action under the patent law. . . "

That regulation is no longer in effect?

MR. FORMAN: No, your Honor, that is still in effect. We do not register articles which are solely utilitarian in purpose, whose design is dictated by functional considerations, and which is merely ornamental, which cannot be said, despite the presence of this pleasing ornamentation, that it is a work of art.

I might add, your Honor, that because of that fact we would not, for example, take that lamp up in the ceiling. That is pure utility.

It is because of that that the Copyright Office has been criticised. We have not been criticised because of being over-generous and taking too much. We have been criticised for turning down too much; that these things which today command a large value, and are sold, such as automobile bodies, primarily have, because of their ornamentation, a value, but are denied copyright registration. We do it because they are not works of art.

CHIEF JUSTICE WARREN: Mr. Forman, may I ask if, in your opinion, any of these objects that are contained in your Appendix C would be subject to patent?

MR. FORMAN: I can answer your Honor by saying that many of those would fall within the general classification of the design patent statute; that is, an invention of a novel, original and ornamental design for an article of manufacture."

Whether or not a design patent would issue in a particular case could, of course, not be determined without a search being made in the Patent Office for novelty and for invention.

With regard to the particular statue here, I cannot speak for the Patent Office and say whether or not they would grant a patent.

CHIEF JUSTICE WARREN: Take this particular one to which you referred ago, with the Elk's head on the box. Would that art work in that exhibit be subject to patent?

MR. FORMAN: Well, as I say, I could not answer it unequivocally, your Honor. If there has been an earlier work of this kind, then a patent would not issue. For example, if this copyright had existed, or similar work had been reproduced without copyright, then, of course, someone else could not come along and do the same thing. It would be no invention.

CHIEF JUSTICE WARREN: Let us refer, then, to this exhibit in this case, the Curved Ballet Dancer. Would that be subject to patent?

MR. FORMAN: I wish to make clear, before I answer the question of the Chief Justice, that I am here speaking for the Copyright Office and not for the Patent Office.

CHIEF JUSTICE WARREN: I thought that you said that you were in agreement.

MR. FORMAN: We are in agreement that this is copy-

rightable, that the copyright is valid, and has been infringed. We are also in agreement that there is a partial overlap between the design patent law and the copyright law.

MR. JUSTICE DOUGLAS: Is there an overlap in this case?

MR. FORMAN: I cannot say that there is a definite overlap here; that is, that the Patent Office would have issued a design patent for this article. I can say, however, that if they would have issued one, that they are in agreement with us that, nevertheless, if a copyright was first taken out then there would be a valid copyright.

Of course, if the copyright was taken out, then there would be no right to a design patent.

MR. JUSTICE DOUGLAS: Is it your position that it might be able to get both a copyright and a patent?

MR. FORMAN: No, your Honor, we do not take that position. We take the position that you might get one or the other, and not both.

I said earlier that, as a matter of fact, in 1876 and 1879 Bartholdi got both a copyright and a design patent for the Statue of Liberty. He would not be able to get it today. Since that time there have been judicial decisions announcing that this is against public policy. Those decisions are cited in Part 3 of our brief. You have your election of obtaining one or the other.

MR. JUSTICE FRANKFURTER: Mr. Forman, do I understand you to say that if man comes to the Patent Officer for a design patent, and a copyright is outstanding, that they say "Nothing doing"? That the copyright has preemption?

MR. FORMAN: That is correct, your Honor, assuming, of course, that the thing is eligible for a design patent. As a matter of fact, we refer to a particular case in our brief, and there is a footnote at page 44 of our brief where we refer to the case, in the matter of the application of Lurelle Guild, where just that heppened.

There had been a copyright on a design and later an attempt to obtain patent protection, and the Patent Office denied it both for anticipation, and because there was copyright protection, and it was so ordered in the Court of Customs.

MR. JUSTICE REED: What was that citation?

MR. FORMAN: It is 52 Mich. Law Review, 33. I refer to that with reference to the fact that that Law Review discusses this report of the English Law. You can get a reference to what I mentioned.

MR. JUSTICE DOUGLAS: He takes the position that you take, that the fields overlap. I was not sure of your answer to the Chief Justice, as to whether or not, if you walked into the Patent Office with this model of a lamp figure, you could get a patent.

MR. FORMAN: I can answer it only by saying "Maybe",

that it is not an automatic thing. It is within the general scope.

MR. JUSTICE DOUGLAS: If you were in the Patent Office, how would you go about determining whether or not a patent would issue?

MR. FORMAN: By making a search of the files.

MR. JUSTICE DOUGLAS: To see if there are any other Ballet Dancers? Purely prior? No flash of genius, nothing like that?

MR. FORMAN: Well, you get into an embarrassing field, your Honor. There has been some discussion as to whether or not the recent amendments of the Patent Act have changed the flash of genius test.

MR. JUSTICE DOUGLAS: Whatever the test may be.

MR. FORMAN: It is a test of invention, your Honor.

MR. JUSTICE DOUGLAS: It would be the same test that would apply in other cases?

MR. FORMAN: I have cited in my brief the case of Smith vs. Whitman Saddle Company, 148 U. S., cited in another connection, and I believe that case, which arises under the earlier Design Patent Statute, is probably the first case to refer to invention, and the Court there anticipated your Honors' later decision with reference to flash of genius, because they also then spoke that it must be more than mere mechanical skill, but must approach genius.

So, the tests are the same for the design patent and the mechanical patent.

MR. JUSTICE DOUGLAS: I could not get a patent on that ground?

MR. FORMAN: No, you have been anticipated in 148. But, as Mr. Frost points out, some Courts have held that the human figure cannot, in any event, be said to be the subject of invention or novelty - it exists.

MR. JUSTICE MINTON: If the human figure were used in the design in the object, could it be patented? If there was a certain ornamental value to it, or beauty to it, as well as some novelty?

MR. FORMAN: If the Patent Office were of the opinion that there was novelty and invention akin to genius, then they would issue a patent and, of course, that would not guarantee that the patent would be valid.

I remember that Mr. Justice Jackson, I think it was, observed some time ago - and correct me if I misquote you - that the only valid patent was one which this Court had not yet had occasion to consider.

Now, I cannot say what would happen if they tried to get a design patent. There would have to be a search for invention. I do not know whether the Patent Office would issue it, and I cannot say whether or not the Courts would validate it.

MR. JUSTICE FRANKFURTER: The proof of the difference between the two is that I suppose, if I had a design patent and it was thrown out by the Patent Authorities, and finally found that there was no invention, I could then get a copyright?

MR. FORMAN: You could not get a copyright, not by that time. Apart from the fact that there is an election, and your Honor's suggesting that perhaps we had a nunc pro tunc cancellation of that election, once there is a patent, the idea or disclosure of the design patent is then in the public domain, and you cannot get it copyrighted. There is a case in the Second Circuit on that point, Karczinski vs. Underwood. I do not have it cited in my brief.

CHIEF JUSTICE WARREN: Thank you.

MR. FORMAN: Thank you.

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REBUTTAL ARGUMENT OF MR. ROBERT L. KAHN

ON BEHALF OF THE PETITIONERS.

MR. KAHN: May it please the Court, Mr. Forman and the Counsel for Respondents have tried to get this Court to do something that Congress has repeatedly refused to do.

There is no denial of the fact that the design patent laws with their requirement for invention and their demands for searching, are difficult to fulfil, and the fact that the Courts do invalidate such patents is no excuse for making an extension of the copyright monopoly to regions where it never was intended to be.

In the Copyright brief, there is one illustration here of the spoon, which is a very good thing to consider. It is on page 70.

Now, that spoon was copyrighted as a work of art.

In a very famous case by this Court, Gorham vs. White, this Court had a spoon as a subject of a design patent to consider, and at that time the distinction between copyrights and design patents was based upon the fact that design patents were for articles of manufacture.

Now, if this spoon can be manufactured in quantity, I do not see how anyone can argue that it is not an article of manufacture.

It seems to me that the basic difficulty in this case is the fact that the Copyright Office is trying to do by indir-

ection what it was unable to do directly.

Since about 1913, at least, we have a table of bills that failed of passage. The Copyright Office has been in the forefront, or at least the former Register was instrumental in trying to obtain legislation to meet the problem of piracy.

Now, that is a very serious problem, and it is something that no one will deny exists.

But Congress has repeatedly refused because, while there are plenty of arguments in favor of making a registration procedure for articles of manufacture, there are some very good arguments against it.

Extensive hearings were held by the various Congresses and all the hearings were held by the Committee on Patents and Copyrights. The same committee in Congress handles both.

The gist of most of this legislation was to cover a gap that exists between copyrights and design patents.

The Copyright Office and the respondents seem to feel than an artist who makes a creation and then becomes a businessman and attempts to make money out of it is a different kind of businessman than any other kind of businessmen.

Now, I think that the design patent act is able to provide protection for any businessman who has some artistic ability, and a design patent is directed toward material which has no real aesthetic value. I do not think that the respondents are correct in saying that the Patent Office has restricted

its field of operation to utilitarian articles, like refrigerators.

Our exhibits clearly indicate that works of fine art have been patented and are still being patented up to this date.

It is quite true that a person who wants to run the test of novelty as against merely originality is choosing the harder course, and is choosing a harder way. That is true.

On the other hand, to open up the gates for people who just register monopolies, would be a very dangerous thing, and everybody would simply make his own monopoly, and the net result would be that there would be a mass of litigation.

CHIEF JUSTICE WARREN: Mr. Kahn, how do you distinguish this exhibit on page 74 of the Government's brief, the little statue of a bear, in very much the same position as this dancer uses, registered in 1906? How do you distinguish that from this case? Do you say that the copyrightee here was not protected against infringement, even though registered?

MR. KAHN: No, sir.

CHIEF JUSTICE WARREN: How do you distinguish as to this?

MR. KAHN: Our distinction is based on what the creator intends, or what he actually is going to do with it. When he makes his election, or goes to the copyright office,

he is saying, in effect, to the whole world "This is a masterpiece. It is the finest thing I have ever created, on par with the masterpieces of anybody else. I do not intend to have it degraded by manufacturing in quantity."

If, on the other hand, he wants to make a business and manufacture, we submit he has to run the gauntlet that everyone else has to run, in the Patent Office. He has to submit his design for an article of manufacture, and, in this connection it should be noted that we do not have to manufacture to get a design patent. It is merely a subject, a new design for an article of manufacture, and whether you manufacture it or not makes no difference.

So that this man who had this copyright on the spoon could have gone to the Patent Office also, but in this case, if he had gotten the design patent, he could have very well have said "This is an article of manufacture. I intend to make it in quantity and intend to be protected against competition."

CHIEF JUSTICE WARREN: I understood Mr. Forman to say that it made no difference to them whether the copyrighter was going to manufacture or not. As a matter of fact, he said that most people who do copyright do so because they intend to manufacture, and want protection, and all of these exhibits in here appear to be of that class. Now, is that the practice, throughout the last half century, for instance?

MR. KAHN: Well, that brings up a very fundamental question that we have considered in the brief. The copyright acts cover a certain field, and originally they were only intended to cover literary work. In 1870 they were extended to cover three-dimensional works of art. The mechanical patent act did not cover works of art, nor did it cover any designs, but in 1842 for the first time a design patent act was enacted. That was before copyrights on three-dimensional works of art were possible.

Now, it seems to me that just on a fundamental theory of Government, that when Congress enacts one set of laws, related to design patents, covering articles of manufacture, and they enact another set of laws relating to copyrights, that you should not interpret any part of one law to overlap any part of the other, and the parts of the copyright law that are affected by the design patent law are the parts relating to three-dimensional works of art. Paintings are not involved. The contents of books are not involved. Writings are not involved. It is only a three-dimensional work of art, and we submit that, just on a fundamental basis, Congress does not have to write several sets of laws and give you one department, if you please, for a higher fee, and a bargain basement where you can serve yourself. That is, in effect, what the other side is contending.

CHIEF JUSTICE WARREN. Mr. Kahn, all I wanted to

ask you was whether you believe that the Copyright Office is wrong in copyrighting something of that kind and permitting the copyrighter to have protection if he manufactures it, or whether you think that the law contemplates this or does not contemplate it?

MR. KAHN: Answering your first question, sir, the Copyright Office has no machinery for determining what the intent of a person is and what he is going to do after he receives his copyright. So on that point I would say the Copyright Office is not in error in copyrighting, and, as a matter of fact, they copyright anything from one extreme where you have this spoon, which is probably a work of art, or can be, to something like this, as a work of art. Well, perhaps this is a work of art, but their definition of art is something that is so elastic that it would cover about everything under the sun.

CHIEF JUSTICE WARREN: If it is original, what difference would that make, if it were a work of art?

MR. KAHN: If it is original, that is right, but the thing is that once you start to manufacture in quantity, you convert this thing into an article of manufacture, and that would subvert the design patent law. Why should anybody go to the Patent Office and for a higher Government fee, subject himself to strict examination and no assurance that he is going to get a patent? There is no guarantee at all.

CHIEF JUSTICE WARREN: I understand that there is no assurance that you can get a copyright.

MR. KAHN: Yes, sir, there is. The copyright monopoly begins with the date of sale under the copyright notice. The registration is a mere formality.

CHIEF JUSTICE WARREN: Mr. Forman said that they turned down 1,700 applications last year.

MR. KAHN: I do not know why, your Honor. It is clear that, as Mr. Forman stated, the Copyright Office is like a Register of Deeds. So that there is no examination. The copyright form itself is a fairly simple form and all you need is a typewriter and you can fill it out in duplicate for $4.00 send it in, and that merely registers your claim and you do not have to send it in if you do not want to until you file suit.

MR. JUSTICE FRANKFURTER: Mr. Kahn, why do you speak of overlap when concededly, I suppose, multitudinous things that come within the general abstract category of design patents could not possibly get to first base for a patent? Why do you call that an overlap when it leaves out masses of things that come out of people's heads and are original, which are not inventive, for the purpose of the patent law, but are nevertheless just as good as all this mass of trash that is copyrighted, to which no court in the country would deny a copyright?

Why do you call that an overlap?

MR. KAHN: Well, anything that is an article of manufacture, any three-dimensional item which is an article of manufacture, is susceptible to design patent protection, provided it meets the test of novelty.

MR. JUSTICE FRANKFURTER: But what if it cuts off the vast mass of stuff that could not get through the Patent Office?

MR. KAHN: That is true, but that fault is up to Congress.

MR. JUSTICE FRANKFURTER: We are discussing whether Congress has made the distinction that you make: that because it belongs to a class which, if it were original, would be patentable, it ought not to be allowed to go to the Copyright Office. That is your argument?

MR. KAHN: The Copyright Law provides for the right to copy. It does not use the word "manufacture". Mr. Forman mentioned the 1883 Act with regard to manufacture. That is the only time that "manufacture" was used in connection with statuary, and that Act also changed the location of the copyright notice. It permitted a copyright owner to put the notice on the bottom or back of the statue because, previous to that, the artists had complained. The 1909 version dropped that "manufacturing" completely. It kept the location feature of the 1883 Act, but it did keep the manufacturing feature, and

there is nothing in the committee hearings, and they are given in full in the back of Howell's Book on Copyrights, there is nothing in the committee hearings to indicate that Congress had any intention of permitting a party who does not meet the requirements of the design patent law to go to the Copyright.

There is nothing to be implied from that at all, and that is quite a radical departure. The hearings in Congress on various bills, were voluminous. In fact, probably the most extensive one was connected with the whole field of copyrights, as regards articles of manufacture, and it met determined opposition in the Senate on various grounds, and certain industries were adamant against being included in it.

The automobile industry, for example, felt that they could be subjected to a lot of litigation if a copyright procedure on articles of manufacture were permitted, whereas, with a design patent there would be a different proposition. It seems to me that the fundamental philosophy of the Copyright Act, the historical background is addressed not to the manufacturer, but to the artist, the craftsman.

We have no objection to artists making money, but the artist is not given any special protection on income tax; he is not given any special protection in any other way.

MR. JUSTICE FRANKFURTER: But the Copyright Law addresses itself to people who want to make money, does it not?

MR. KAHN: Yes, sir.

MR. JUSTICE FRANKFURTER: Then how can you say that sordid consideration of money is irrelevant to the copyright system?

MR. KAHN: It depends on how he makes his money.

MR. JUSTICE FRANKFURTER: He makes it on the manufacturer of the copies.

MR. KAHN: That is very, very true, your Honor, but there is no design patent background.

MR. JUSTICE FRANKFURTER: I understand the argument that Congress has dealt with this category of production in one statute and put it into another. I can understand that. I cannot understand the argument that artists are supposed to be people who do not have the brains with which they are created.

MR. KAHN: I did not advance such argument. I say if an artist wants to go into manufacturing he is no better thana businessman.

MR. JUSTICE FRANKFURTER: But a businessman can get a copyright and make money out of it.

MR. KAHN: That, sir, is the problem.

MR. JUSTICE FRANKFURTER: He possibly should not be protected in doing so?

MR. KAHN: That may be a shortcoming in the law.

MR. JUSTICE FRANKFURTER: This may be that shortcoming in the law that needs a remedy?

MR. KAHN: May I suggest that the remedy is up to the law. Congress has passed this Act and provided for copying. They did not say "manufacture." All the other items subject to copyright are very well protected, as far as the rights. A book, a reprint, there is no question about that.

MR. JUSTICE FRANKFURTER: If you take the most conservative, respectable publisher, he talks about manufacturing the book, does he not? "Manufacture" is a trade word: "The book has reached the manufacturing stage."

MR. KAHN: But a book, under no consideration could be considered an article of manufacture upon which you could get a design patent.

MR. JUSTICE FRANKFURTER: I am addressing myself to your suggestion of copying.

MR. KAHN: By mechanical means.

MR. JUSTICE FRANKFURTER: How do you suppose books are published these days, except by mechanical means?

MR. KAHN: I think that with regard to books, there is no necessity for limiting the interpretation of the manufacturing right. There is nothing in the Act that limits the number of printings or reprintings, but with regard to three-dimensional works of art, it says "copy". You cannot print a three-dimensional work of art. It is meaningless and you cannot reprint it. But you can copy, and by "copy" I believe is meant a hand-copying, making the thing over by hand, not

by machine.

Otherwise, here you have a lamp manufacturer who can establish his own monopoly, and anybody can establish a monopoly on anything.

MR. JUSTICE FRANKFURTER: Mr. Kahn, how many copies could you want to print? There is the word "copy".

MR. KAHN: "Copy", "article of manufacture", or even "work of art", is susceptible to a large number of meanings, and, as far as I am concerned, I am only discussing it in connection with this case in a three-dimensional work of art, with relation to copyright, and the design-patent act.

Now, the word "copy" itself would undoubtedly be construed to cover a wide variety of things. In England it is interesting to observe that they do not use the word "copy". They use "produce and reproduce." There they had to go to the additional provision that, if you manufacture more than 50, you would have to go over to the design.

MR. JUSTICE FRANKFURTER: They specify. The English are specific.

MR. KAHN: They are.

MR. JUSTICE FRANKFURTER: Our problem arises from the fact that it is not specific.

MR. KAHN: I think our problem, sir, derives from the fact that in 1948 the Copyright Office departed from its traditional role. Up to that time they confined their oper-

ations to works of fine art.

Whether the statute was broader than they interpreted it or not, the Copyright Office interpreted that as works of fine art for forty years. Forty years is a long time and it seems to me that the public is entitled to consider that a settled interpretation.

If the Copyright Office wants to change that interpretation, we submit that it has to go to Congress.

MR. JUSTICE FRANKFURTER: Do you mean that everything they copyrighted in three-dimensional form was fine art? It would live fifty years in the world of art?

MR. KAHN: I am not going to attempt to define fine art, and I do not think that anyone else could. The person who comes into the Copyright Office with whatever he has, defines it. If he thinks it is fine art, that is up to him, and, as long as it is not too far removed, the Copyright has to take his definition. He isgetting a self-made monopoly for 28 years, plus another 28 years. That is quite a long time.

CHIEF JUSTICE WARREN: Mr. Kahn, you speak of him getting a monopoly, as though he were preventing someone else from manufacturing lamps stands and lamp shades. He did not do that. All he gets is a monopoly, if there is a monopoly, on the fruit of his own work, just that particular design. You or anyone else can make any other kind of design that you want, or even approximate this design very closely, if the design is

of your own design, your own origin.

I do not see wherein the monopoly comes. Do you think that it is right for anybody else to just come along and take the fruit of his work and use it to his disadvantage, if he has protected himself under the Copyright Law? Does that seem fair?

MR. KAHN: From an ethical angle, your Honor, I agree thatit does not seem fair.

On the other hand, we cannot create these rights that are not created by statute. It strikes me that unless the respondents can justify their rights under statute, and on a fair interpretation of the statute, that they must fall.

As a matter of fact, it is not a species of unfair competition. The law on that is very well developed and, if there is any question of unfair competition, that is something else again.

But here is a land of 155,000,000 or 160,000,000 people, 3,000 miles wide and 2,000 miles long. Should a person create his own monopoly?

I will admit that very few people do have the ability to create. Most of the people are followers, and there is some injustice to that, but the fact is that the law does not correct that, and the Congress has been importuned many times, and that list that we handed in this morning clearly shows, the hearings clearly show that this problem has been considered,

and Congress has rejected it. It is a very serious problem and it has very many difficulties.

MR. JUSTICE MINTON: If these statues were sold as statues, no matter how many were sold, you would still object?

MR. KAHN: Yes, sir; we would.

MR. JUSTICE MINTON: It is not only that they are sold as lamps?

MR. KAHN: A statue is still an article of manufacture, and among the patents that we have shown the Court, there are many statues.

Now, the respondents are trying to differentiate this case from jewelry and other items, on the basis that they use live, free art, and free art forms, and so forth. Well, the Patent Office has free art forms shown in patents. I do not know whether you can get a patent on every application they would file, but if you cannot, and they deserve some kind of protection, the remedy is up to Congress.

It seems to me, your Honors, that the Copyright Office and the respondents are trying to lift themselves up by legislative bootstraps.

(Whereupon, at 4:20 o'clock p. m., the argument in the above-entitled matter was concluded.)

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