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Case

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BENJAMIN STEIN and RENA STEIN,
dba REGLOR OF CALIFORNIA

vs.

EMANUEL L. MAZER and WILLIAM ENDICTER,
dba JUNE LAMP MANUFACTURING COMPANY

No. 5879 - Civil

NOVEMBER 20, 1952

TRANSCRIPT OF PROCEEDINGS

Before
HON. WILLIAM C. COLEMAN
Judge

RAY FARRELL
Official Reporter
537 Post Office Building
BALTIMORE 2, MARYLAND
LExington 4103

#1705

I N D E X

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>
William Endicter	35	43
Benson L. Cohen	47	--
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1705

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Baltimore, Maryland,

November 20, 1952

The above-entitled case came on for trial, before
His Honor, William C. Coleman, at 12 o'clock Noon.

A P P E A R A N C E S

For the Plaintiffs:

Mr. Joseph T. Brennan, 2d,
Mr. George E. Frost

For the Defendants:

Mr. Max R. Kraus

P R O C E E D I N G S

THE COURT: Gentlemen, we will proceed for a few minutes with this case. I am sorry it is so late in being reached. We will then go on this afternoon. From the estimate given by both sides the other day, I assume it can be heard fully today.

MR. FROST: Yes, Your Honor.

MR. KRAUS: I think we should be through by 4 o'clock, or by 4:30, at most.

THE COURT: We will go on until a quarter of one, at which time we will recess for about an hour.

I understand, after a brief discussion on defendants' motion to dismiss some weeks ago and the Court having expressed its view that the matter ought to be heard more fully, the defendants' motion was withdrawn.

MR. KRAUS: Yes, sir.

THE COURT: So we are now ready to hear the case on the complaint and answer on the merits.

Very well, Mr. Frost.

MR. FROST: If the Court please, this is a case of copyright infringement.

THE COURT: If I might interrupt you, I might say that I have had, in all, two briefs from plaintiff, but I have not had a brief from defendants.

MR. KRAUS: We have not filed a brief, Your Honor.

It was my understanding that after we finished the case we would have a brief argument, and then I would file my brief.

THE COURT: I don't know that that will be necessary. It may well be that I will decide the case at the conclusion of the argument.

MR. KRAUS: I have all of the cases here.

THE COURT: You can argue everything you would put into the brief. In patent cases I do not delay deciding the matter. Of course, counsel may think they want to file a brief. I will give consideration to the cases plaintiff has put in his brief, and I will be glad to receive, over the lunch hour, references to one or two cases you claim you rely upon primarily. I will be glad to examine them before we reconvene.

MR. KRAUS: I do not believe I have referred to any cases in my presentation so far; so I would like to have the opportunity of doing so. I will do that during the noon-time.

MR. FROST: If the Court please, there are six copyrights involved in this case. In each instance the copyright was obtained on the figurine or statuette. On the jury rail we have six different figurines or statuettes and the accused infringements.

THE COURT: Will you point out the six that are illustrated by the figurines?

MR. FROST: Yes, Your Honor. I will start with plaintiffs' Exhibit 8.

THE COURT: Plaintiffs' Exhibit 8?

MR. FROST: Yes, Your Honor.

THE COURT: Why is that number 8 and not number 1?

MR. FROST: The reason is that number 8 was identified by the Register of Copyrights, and we had to assign that exhibit number to it. This was one taken from the files of the Copyright Office. It is actually physically deposited.

Plaintiffs' Exhibit No. 1 is identical in every physical respect with what was deposited in the Copyright Office. I mean 1-A. Number 1 is the Copyright Certificate which was received on basis of the deposit.

Plaintiffs' Exhibit 1-B, Your Honor, is a lamp which was sold by the defendant in this case. And we will show that he sold it.

THE COURT: How many copyrights do you say are involved?

MR. FROST: There are six, Your Honor.

THE COURT: What I really asked you was to identify the six statuettes that are covered by the six copyrights.

Those six statuettes?

That is all I wanted for the moment.

MR. FROST: Those six statuettes, Your Honor, are

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Plaintiffs' Exhibits 1-A, 2-A, 3-A, 4-A, 5-A and 6-A.

THE COURT: They are all different, from the point of view of the figure or design?

MR. FROST: Yes, Your Honor. It is our position they are six separate and distinct works of art.

THE COURT: How about number 8? Is that included in one of the others?

MR. FROST: Yes, Your Honor.

THE COURT: That is the same?

MR. FROST: Numbers 1 and 8 are physically the same. We have one number 8 here because the Register of Copyrights took it from the office of the Copyright Office and has identified it in his deposition.

We want to show exactly the form in which at least one of them went to the Copyright Office. We will have testimony, Your Honor, that the deposits that were made in the Copyright Office with respect to all of the rest of these were physically identical with what we have here; but we do not have the actual specimens from the files of the Copyright Office.

It is our position, Your Honor, that Exhibits 1-A to 6-B -- and here is 1-B, 2-B, 3-B, 4-B, 5-B and 6-B, which were sold by the defendant -- are infringements of those works of art.

THE COURT: Because they have your exact figure or

design?

MR. FROST: That is exactly it, Your Honor. I might mention that there are some slight detailed differences. We will point those out to Your Honor as the case progresses.

As Your Honor conceives, the changes are not substantial in any respect. We will point out that the mold from which these figures are made leaves their fingerprints; and you can trace by the fingerprints on the mold from the original plaintiffs' product to the accused product; and you can find trivial comparisons that show beyond any doubt the fact of the copy.

The plaintiffs in this case are Benjamin Stein and Rena Stein, husband and wife, who are doing business as partners as the firm of Reglor of California, represented by Mr. Cohen, who is local representative.

The firm is in the business of making and selling these artistic figures, most of which are sold as complete lamps. Some have been sold as figurines or statuettes.

The defendants in this case are Emanuel Mazer and William Endicter, who are doing business as a partnership here in Baltimore under the name of June Lamp Manufacturing Company.

Both the defendants and the plaintiffs do business on a nation-wide scale, selling to furniture stores.

We will show, Your Honor, that Rena Stein is an artist of considerable education and experience. We will show

that in 1947 she created a number of statuettes or figurines which she reproduced in plaster by a rubber mold process and sent to a few Los Angeles stores. That start led to the business which has since been built up by the plaintiffs in this case.

We will show, Your Honor, that Rena Stein's artistic work created a new trend in interior decorating. There is some evidence in this case they are identified as California style numbers. In any event, the business has prospered; and we are in here this morning because the defendants are selling what we consider to be copies of part of that line.

THE COURT: As I understand it -- and I do not want to state it erroneously -- the defendants' position is simply this: They say that in the absence of your getting a design patent, you cannot get a copyright for an artistic thing, a statuette, or whatever it may be, and prevent other people from using that if they make a commercial article out of it, such as is done here.

MR. FROST: I think that is a fair statement, Your Honor.

THE COURT: I am frank to say, gentlemen, that is rather an astonishing doctrine to me. The Court will be very glad to hear you on it. I have examined the cases, and I do not believe there is force to that in the law. I mean so

far as the weight of authority goes. I do not want in any way to prejudge the matter, but I might as well tell you the way my mind has been running.

Do you want to say anything more before I hear from the other side?

MR. FROST: I will just make this one suggestion to Your Honor. The issue of infringement is raised by the pleadings and, so far as I know, it is still in this case. If there is no contest on the infringement question, we will not bore Your Honor with proof with relation to it. But if infringement is still an issue here, I am afraid we will have to bring in our proof on that point.

THE COURT: I don't know that I understand you. You are claiming that your copyrights have been infringed?

MR. FROST: Yes, Your Honor; and we are claiming that there is a copy of the work of art which is registered in the Copyright Office in each instance; and we will prove that.

Now, this Expert case defense, this design patent defense --

THE COURT: I do not understand what you mean by saying that infringement is not in the case. Maybe I did not understand you.

MR. FROST: As I see it, Your Honor, the first question is: Is the defendants' product physically a copy

of what was deposited in the Copyright Office? We think it is perfectly plain that it is. The burden of proof on that is on us.

The second question, the motion to dismiss question, Your Honor, is this.

THE COURT: The motion to dismiss is out of the case.

MR. FROST: Yes; but the legal point raised by the defendant is, assuming that we have a perfect copy here and that there was a copy, then, Your Honor, is it or is it not an actionable wrong for the defendant to sell the product 1-B, for example, as a lamp? As I understand it, that is the so-called equity defense.

THE COURT: You claim that it is, and that you are entitled to damages?

MR. FROST: That is exactly our position, Your Honor.

I might mention two other things: First, there is a case in California, Stein vs. Rosenthal, where Judge Tolin held that the copyright to exhibits 1-A, 2-A, 5-A and 6-A in this case were valid, and were infringed by manufacturers of lamps.

THE COURT: That is in 96 Fed. Supp.?

MR. FROST: I believe it is 103 Fed. Supp., 227. That is the citation I have.

THE COURT: I was looking at the wrong one.

MR. FROST: I have a copy of the opinion here.

THE COURT: I have it. It is 103 Fed. Supp., 227?

MR. FROST: Yes, Your Honor, decided February 21, 1952. I think you will find that in the second paragraph of the opinion. It gives the identification of the certificates; and those are exhibits here.

THE COURT: You claim that that decision is controlling here?

MR. FROST: We think it is entitled to great weight, Your Honor. It is a decision of another District Court after the so-called Expert case; and we think the fact that another District Judge heard a case of this kind and came out with the opinion he did, Your Honor, is entitled to very great respect.

THE COURT: Is there an appeal pending in that case?

MR. FROST: There is an appeal pending in that case, Your Honor; but the issue of validity of the copyright has been stricken from that appeal.

THE COURT: What is the appeal on?

MR. FROST: The appeal is on the question of infringement. I have here some of the papers from that appeal.

THE COURT: Well, never mind. I have a general idea of what this case is about.

How long do you claim this infringement has been

going on?

MR. FROST: Our records indicate that it was in the spring of this year that the defendant in this cause received the product which he subsequently sold. So the infringement started, I should say, in April, or along in there; and, so far as our information goes, it continued into August.

THE COURT: Assuming you are entitled to a judgment, are you claiming that this is a case which should be referred to a Master for computation of damages and profits?

MR. FROST: I do not think there is any need of that, Your Honor. We have the invoices here. I think we can run through them in a great hurry. This is not like a patent case where you have a complicated accounting. I don't think we have that at all in this case.

THE COURT: To summarize, as I understand it, you have a copyright.

MR. FROST: Yes, Your Honor.

THE COURT: You claim that is a valid copyright?

MR. FROST: Yes, Your Honor.

THE COURT: For these works of art; and you claim that, having that, there is no question of prior invention or the inception of this design? That is not in the case.

MR. FROST: No, Your Honor.

THE COURT: You claim they are valid, and it is not

upset by any prior inventor or conceiver, and that you should have a right to prevent the public generally, during the life of your copyright, from copying these statuettes and putting them in that form for any use whatever?

MR. FROST: Exactly, Your Honor.

THE COURT: And you claim you are entitled to certain damages and profits for so doing, if the Court should find that that is what has happened?

MR. FROST: Damages and profits, Your Honor.

THE COURT: We will recess until 2 o'clock, at which time I will be glad to hear counsel for the other side.

(Whereupon, at 12:45 o'clock p.m., a recess was taken until 2 o'clock p.m.)

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AFTERNOON SESSION

(Met, pursuant to the taking of the recess, at
2 o'clock p.m.)

THE COURT: Now, Mr. Kraus, I am ready to hear you.

MR. KRAUS: Has Your Honor had an opportunity to
read that?

THE COURT: I have had an opportunity to examine
the case from the Seventh Circuit. I want to ask you again,
what is the status of that? Do I understand there is a
petition for a writ?

MR. KRAUS: The Supreme Court has denied certiorari
in that case. So, our position is that that is the law. We
believe that if the Supreme Court had felt the Court of
Appeals had misinterpreted the law, they would have granted
certiorari.

THE COURT: Denial of certiorari does not mean to
affirm it.

MR. KRAUS: I appreciate that. But in the brief
I prepared in the District Court in Detroit, we refer to
decisions of the Supreme Court of the United States dealing
with the Miller Gorham case, which deals with the question of
design patents. At the conclusion of this argument I will
read Your Honor's decision in the case of a design patent
about ten years ago, in which Your Honor cited that decision.

Recently, the Fourth Circuit cited the Miller Gorham case. I will refer to all of those cases.

In my opening, I would like to refer to the case of Stein vs. Expert. I think that case decides exactly what is involved here. The Court of Appeals of the Seventh Circuit has there held that a copyright of a statuette does not grant to the owner of the copyright the right to monopolize it for an article of manufacture, such as an electric table light.

THE COURT: That case, as I read it, is primarily rested directly on the point that if the copyright application has as part of the design --

MR. KRAUS: That is the position that the plaintiff takes.

THE COURT: That is one of the points.

MR. KRAUS: But that is not the decision of the Court of Appeals as I read the decision, Your Honor. If I might refer to the decision itself where the Court of Appeals definitely states -- and there is no question, and I think counsel here will admit that in the Chicago case they registered a statuette, pure and simple. There were no stubs extending from the copyrighted statuette.

THE COURT: Were they the same copyrights we have here?

MR. KRAUS: Not the same. Different figures, but they were registered in the identical manner they are register-

ed here.

THE COURT: What do you understand about that?

MR. KRAUS: Without stubs. I think counsel will have to admit that. There is no doubt about that. I think this is important. I might say that in the case we tried before Judge Picard, in Detroit, the same plaintiffs against another defendant, involving similar copyrighted subject matter, they tried to confuse the Court as to what the decision was in the Expert case. And here is what the Judge said. The case is Stein vs. Benaderet, et al. That is in the District Court. It is not a reported case, because it is still under advisement by the District Court in Detroit. Here, Your Honor, I examined Mr. Stein in that case, and here is a copy of the portions of that transcript, -- the cross-examination of Mr. Stein. The copyright was forwarded to the Copyright Office for an ordinary statuette, wasn't it? There were two balancing figures without stubs. Is that correct?

THE COURT: By "without stubs", you mean --

MR. KRAUS: In other words, the copyrights in the Chicago case were registered as pure statuettes, without stubs. There were no stubs registered with it.

MR. FROST: Mr. Kraus, will you read all of the testimony?

MR. KRAUS: Yes, I will.

THE COURT: I don't know that that is necessary immediately. It may be that I have been laboring under some misapprehension; but if you turn to the Court of Appeals' opinion, to Circuit Judge Turner's opinion, 188 Fed. (2d) 612, at the top of the second column, here is what I had reference to:

"The Trial Judge held that plaintiff's submission of the statuettes with the lamp mounting stubs to the Copyright Office was evidence of the practical use to which the statuettes were intended to be put."

MR. KRAUS: That is right.

THE COURT: Then, I was correct, was I not, in saying that the copyright, according to this opinion, did have the lamp stubs in them?

MR. KRAUS: No, they did not.

THE COURT: Is that a misstatement?

MR. KRAUS: It is a misstatement of fact, Your Honor, for this reason.

5 THE COURT: We need not have any dispute about that. Did they or did they not? That is a question of fact.

MR. FROST: If Your Honor please, the specimen sent to the Copyright Office in the Expert case did not have the lamp mounting stubs. We made that clear to Judge Picard, in Detroit.

THE COURT: Then, this is a misstatement of that,

is it?

MR. FROST: Yes, Your Honor.

THE COURT: In the Court of Appeals, either because of an error in the lower court or an erroneous misconception of what happened in the lower court?

MR. FROST: Judge La Buy was under the same impression. It is an erroneous impression.

THE COURT: Then, you and opposing counsel are in agreement on this point, that there were no stubs in the copyright as submitted and issued?

MR. KRAUS: That is right. There were no stubs.

THE COURT: In the petition as submitted and in the copyright as issued? You are agreed on that?

MR. KRAUS: There were no stubs. That is right. And the Court of Appeals recognized that fact in its decision.

THE COURT: Where did it recognize it?

MR. KRAUS: In the paragraph before that, if Your Honor please. Read the paragraph before, and I will point out to Your Honor that it recognized the fact that they did not have stubs. Beginning with "It is true that plaintiffs have never manufactured and sold any statuettes such as they registered in the Copyright Office."

THE COURT: That does not answer the question.

MR. KRAUS: The next line: "they have, however, manufactured and sold electric table lamps which embody the

design of the copyrighted statuettes, marked with a copyright notice, that is, plaintiffs have added lamp sockets and shades to the statuette and used it as a base or standard for table lamps."

That is clear that they registered it as a pure statuette.

THE COURT: But as to what they did --

MR. KRAUS: That is exactly what they did.

THE COURT: I do not read that language as being as clear as you read it.

You do not need to spend any more time on this point. In other words, it is a fact that in the application for copyright and in the issuance of the copyright there was no utility connected with it such as a lamp socket or stub, or anything of that nature?

MR. KRAUS: That is correct. They were registered as pure statuettes.

I handed the Clerk a photostatic copy of the photograph that appeared in the Expert case. That is in the Supreme Court record before Your Honor. Also, a petition for reconsideration before Judge La Buy, with affidavits to the effect that there were no stubs in the copyrights -- And here is what Judge La Buy did: He considered the question and said the mere fact they had stubs or did not have stubs was immaterial to the issue in the case. I have here the order.

It is not reported. I have here a certified copy.

THE COURT: What is not reported?

MR. KRAUS: This order by Judge La Buy. In the Expert Chicago Case before Judge La Buy, the plaintiff filed, after he decided the case or within ten days thereafter, a petition for reconsideration, and with the petition a certified copy; and they set forth that the statuettes as they registered them in the Copyright Office were pure statuettes,-- and no stubs on them at all. With that they attached these photographs to show same registered with no stubs, -- and also the affidavits. This is a certified copy (indicating).

Then, two days thereafter, Judge La Buy entered this order:

"The Court has considered plaintiff's petition for reconsideration, together with the accompanying exhibits, Plaintiffs' Exhibits 18, 19 and 20, and hereby denies the petition for the reason that the evidence offered by plaintiffs in the aforesaid exhibits is immaterial to the decision on this case."

That is, the "without stubs" was immaterial to the decision. This is a certified copy of his order (indicating).

And we say the record before the Court of Appeals was clear that there were no stubs. They were registered as pure statuettes. The record before the Supreme Court of the United States shows they were registered as pure statuettes,--

6 despite the fact that the Court of Appeals held you cannot copyright matter of that kind nor get an exclusive monopoly on it for the purpose of preventing others from utilizing it.

THE COURT: Just a moment, please. Judge La Buy says in his opinion, reading from page 98 of 96 Fed. Supp., 96:

"It would seem that plaintiff's submission of the statuettes with the lamp mounting stubs to the copyright office was evidence of the practical use to which they were intended to be put. Had it been merely the statuette, use of the statuette thereafter in any practical manner would not remove it from the scope of copyright protection."

So, that seems to be very definite, if I understand it. The statement of both of you gentlemen here today^{is} that that first sentence I read is a misstatement of fact that is carried over into the opinion of the Court of Appeals as a misstatement of fact?

MR. KRAUS: We do not think it is a misstatement of fact in the Court of Appeals, because the Court of Appeals definitely says the plaintiff has never manufactured the statuettes as registered.

THE COURT: This statement I just read?

MR. KRAUS: Yes; they carried it over. But I think it is quite material in their opinion that they decided you cannot copyright a design for an electric table lamp. When

we argued the case before Judge La Buy in the District Court, we did not make mention^{of} the fact of whether they were with stubs or without stubs, because we did not think it important one way or the other. The other side mistakenly informed Judge La Buy that the copyright, as registered, had stubs. We did not proceed on that point. It made no difference to us.

Then, after Judge La Buy rendered the opinion that Your Honor is now reading, the plaintiff came back and filed a petition for reconsideration ten days thereafter, in which they tried to correct the Court's misinterpretation as to how the statuettes were registered. Then he decided it did not make any difference one way or the other. Judge Picard had the same problem before him. Plaintiffs were contending in the District Court --

THE COURT: Is it an unreported opinion that you are about to read from?

MR. KRAUS: He has not decided the case. It is under advisement.

THE COURT: Then, let's don't consider that.

MR. KRAUS: I just want to read the statement that Judge Picard made, which plaintiff's counsel admit, which I think is important.

THE COURT: Made when?

MR. KRAUS: Made a month ago.

THE COURT: Where?

MR. KRAUS: In Detroit. He has the case under advisement.

THE COURT: Under what conditions did he make the statement? If he has not rendered his opinion, I am not interested in that.

MR. KRAUS: The Court says --

THE COURT: No; we need not bother with that.

MR. KRAUS: It is my opinion here that the Expert case decided the question. Here is what the Court of Appeals there said.

THE COURT: Before you go into that, let me ask you this question: Is it your contention that all that you can get in this kind of a situation, under the copyright law, is simply a prima facie writing to exclude others from copying the statute, and that is all?

MR. KRAUS: That is right.

THE COURT: But if you put something else on it that alters it, or improves it, something else which alters it or adds to it so as to make it commercially usable for a lamp or something -- Suppose you put it on a high pedestal, a heavy iron or stone pedestal, different from the pedestal in the design, and use it for a door stop, let us say; what would you say about that?

MR. KRAUS: I would say that if its only purpose

was ornamental, I think the copyright law would cover.

THE COURT: Where it is usable?

MR. KRAUS: Then, the design patent law sometimes applies. Even the copyright regulations themselves do not permit you to do that. We have the testimony here of the Register of Copyrights.

THE COURT: Then, you mean that it is perfectly silly --

MR. KRAUS: That is what the copyright regulations themselves say. And you can't use it for anything else. The copyright regulations are very specific on that.

THE COURT: Have you given me a copy of that?

MR. FROST: Your Honor, that is Plaintiffs' Exhibit No. 7. It is attached to the testimony of the Register of Copyrights. He is speaking with reference to Regulation 202.8. It is on the back side of the sheet.

THE COURT: I have the deposition of Arthur Fisher, Register of Copyrights.

MR. FROST: That is right, Your Honor.

THE COURT: Now, where is that?

MR. FROST: It is 202.8.

THE COURT: (Reading) "202.8. Works of Art
7 (Class G) -- (a) In General. This class includes works of artistic craftsmanship, in so far as their form but not their mechanical or utilitarian aspects are concerned,

such as artistic jewelry, enamels, glassware, and tapestries, as well as all works belonging to the fine arts, such as paintings, drawings and sculpture. Works of art and models or designs for works of art are registered in Class G on Form G, except published three-dimensional works of art which require Form GG."

MR. KRAUS: It is the first paragraph Your Honor read.

THE COURT: You mean the first sentence?

MR. KRAUS: Yes, Your Honor. It includes works of artistic craftsmanship, in so far as their form but not their mechanical or utilitarian aspects are concerned. And the Seventh Circuit Court said that once you put up a use that is utilitarian, then it cannot be copyrighted; it must be patented as a design patent. And the design patent laws have been in force since 1842. That is a hundred and ten years. Since that time, design patents have been issued by the Patent Office for things of this character.

Your Honor will appreciate one important point, which is this, that when a person files ^{for} a design patent, he sends in the drawing of the object he desires to be patented, and the Patent Office examiner examines the design to see several things: Is the design new; is it original; does it involve invention? If the Patent Office examiner concludes all of those three things in the affirmative, then a design

patent is issued to cover the product identified in the design patent..

I handed to Your Honor at the noon hour a book of patents, a book of design patents, showing that that has been the practice since 1842, for one hundred and ten years. The Supreme Court, in the Miller-Gorham case to which Your Honor referred, ten years ago, and also in the recent decision of the Court of Appeals, said that is the way to protect articles of this kind -- by means of design patents.

Your Honor read the regulations of the Copyright Office. The regulations, as I interpret them, and as the Court of Appeals of the Seventh Circuit has interpreted them, specifically exclude things of this character which have mechanical or utilitarian aspects.

Now, Your Honor, I want to refer briefly to this: The plaintiff in this case is a lamp manufacturer. They created these designs, presumably in 1950 and 1951, at the time they were engaged in the business of manufacturing electric table lamps.

Now, this is very significant. They cannot contend they are in the business of manufacturing statuettes. Of these six copyrights, they sold 7500 lamps embodying these figures, and they sold 10 statuettes, a total of 10 statuettes as against 7500 lamps.

Another important factor on that is this, that

when a person files a copyright in the Copyright Office, he must allege the date that it was published, that is, the date it was first placed on sale or publicly distributed. That is the date he must put on any copyright certificate.

In each and every one of these cases the dates they allege in the copyrights is the date that they sold electric table lamps, -- not when they sold statuettes. It is the date they sold electric table lamps. That is very significant, because when they registered it in the Copyright Office as a statuette, they were referring to the date they were selling them as electric table lamps. And we contend that is a fraud upon the Copyright Office.

Later in my summation, I will refer to that very question. That is very significant. They sold a total of 7500 lamps and 10 statuettes. The dates they allege in their copyrights, when they first published them, were the dates they referred to as the dates of sale of lamps. They did not sell the 10 statuettes until months after they had first sold them as lamps. And I contend that is a fraud upon the Copyright Office, because they were supposed never to put in the dates when they sold them as lamps. If they sold them as statuettes, that is what they should have put in; but they did not. They referred to the sale of lamps.

THE COURT: Now, I understand your point, and I understand the other side. I suppose we should take such

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testimony as is necessary, although I do not imagine a great deal is necessary.

MR. KRAUS: That is in the interrogatories, Your Honor. They admit these facts in the answers to the interrogatories.

MR. FROST: Your Honor, I think we can proceed with the testimony and conclude it very quickly.

THE COURT: Very well. I think it should not take very much time, because either the facts are not disputed, or very much the greater part you have already had testified to or stated in the interrogatories.

MR. KRAUS: That is right, Your Honor.

THE COURT: You can get that in at the appropriate time.

MR. KRAUS: Since the Expert case, in Chicago, the Court of Appeals of the Second Circuit, in Alfred Bell and Co. vs. Catalda, C.C.A. 2nd, 191 Fed. (2d) 99 --

THE COURT: Is that on your brief?

MR. KRAUS: I beg your pardon?

THE COURT: That is not on your brief, is it?

MR. FROST: It is not on our brief, and we do not think it is the least bit pertinent.

THE COURT: Give me that again, please.

MR. KRAUS: Alfred Bell & Co. vs. Catalda, 191 F. (2d) 99. They were discussing the difference between

patents and copyrights, and they refer to the Stein case. What they say is: "See also Stein vs. Expert Lamp Mfg. Co. 188 Fed. (2d) 611."

Now, this is an important point. I have here a photostatic copy of the United States Code Annotated, 1951.

THE COURT: Why bother with that?

MR. KRAUS: I just thought I would lead up. I have a photostatic copy of it.

THE COURT: Is that different from the 1952 edition? That is what we can use; and I have it right before me.

MR. KRAUS: This is on page 15. It might be on a different page there.

THE COURT: You find this on pages 332 and 333 in the bound 1952 copy of 17 U.S. C.A.

MR. KRAUS: I do not have that, Your Honor, I am sorry to say. Does Your Honor want me to read that part of it?

THE COURT: No; I have it.

MR. KRAUS: And the decision by the Court of Appeals, Fourth Circuit, a little over a year ago --

THE COURT: You referred to that a moment ago?

MR. KRAUS: Yes.

THE COURT: Give me the reference to that.

MR. KRAUS: I do not think I gave Your Honor the reference to it, but I have it here. The Court of Appeals of the Fourth Circuit discussed the question of design patents.

Well, here it is. It is Glen Raven Knitting Mills vs. Sanson Hosiery Mills, 189 Fed. (2d) 845, a decision of the Court of Appeals for the Fourth Circuit, rendered May 11, 1951. On page 849 the Court of Appeals stated:

"Statutes have protected design patents since 1842."

Then, it goes on: "The present Act, passed in 1902, authorizes the issuance of a design patent to 'Any person who has invented any new, original, and ornamental design for an article of manufacture.'"

Then they go on to cite the Gorham Co. v. White case, a decision of the Supreme Court.

We think the Gorham v. White case is very significant, because, since it was rendered, it has been followed by all the courts; and as recently as a year ago the Fourth Circuit followed the Gorham v. White case.

Here is what the Gorham v. White case holds, 81 U. S. 511, page 524:

"It is a new and original design for a manufacture, whether of metal or other material, a new and original design for a bust, statue, bas relief, or composition in alto or basso relieva; a new or original impression or ornament to be placed on any article of manufacture **** or a new or original shape or configuration of any article of manufacture - it is one or all of these that the law has in view. And the thing invented or produced, for which a patent is given, is that

which gives a peculiar or distinctive appearance to the manufacture, or article to which it may be applied, or to which it gives form."

Now, there is no question that in order to obtain a monopoly on the appearance of an article of manufacture, it must be done by means of a design patent issued by the Patent Office after examination has been made by the Patent Office as to originality, novelty and invention.

THE COURT: You are just arguing your case over again. These are supposed to be opening statements. I will take the testimony.

MR. KRAUS: There is not much testimony in the case.

THE COURT: I have your point, and I have the main cases you rely upon. We will now hear the testimony. Then, you will have a chance to argue.

All right, Mr. Frost, you may go ahead.

MR. FROST: This is a stipulation between the parties hereto with respect to exhibits. Will you mark this document, please, as Plaintiffs' Exhibit No. 14 for identification?

(Stipulation between the parties in re exhibits was marked Plaintiffs' Exhibit No. 14.)

MR. FROST: If Your Honor please, we have a stipulation, which I am introducing as Plaintiffs' Exhibit No. 14, which relates to the specimen submitted to the Copyright Office,

and the copyright specifically, and I would like to offer the copyright certificate upon the bases of that stipulation. First, I offer the copyright certificate.

(Certificate of Registration, No. 1723 - Class H, was marked Plaintiffs' Exhibit No. 1.)

MR. FROST: I would also like to offer Plaintiffs' Exhibit 1-A in evidence, which is the physical specimen submitted to the Copyright Office in support of Plaintiffs' Exhibit No. 1.

(Statuette, Ballet Dancer (without lamp fixture) was marked Plaintiffs' Exhibit 1-A.)

MR. FROST: I think it will save time if the Reporter will mark the actual exhibits during the recess.

I now hand you Certificate of Registration No. 1721, which I ask to be marked Plaintiffs' Exhibit No. 2 for identification.

(Certificate of Registration, No. 1721 - Class H, was marked Plaintiffs' Exhibit No. 2 for identification.)

MR. FROST: I have here Certificate of Registration No. H-1717-Class H, which I offer as Plaintiffs' Exhibit No. 3 for identification.

(Certificate of Registration, No. H-1717-Class H. was marked Plaintiffs' Exhibit No. 3 for identification.)

MR. FROST: I have here Certificate of Copyright

Registration, H-1724, which I offer as Plaintiffs' Exhibit No. 4 for identification.

(Certificate of Registration, No. 1724 - Class H, was marked Plaintiffs' Exhibit No. 4 for identification.)

MR. FROST: I have here Registration Certificate C-I-H 1738, which I would like to have marked as Plaintiffs' Exhibit No. 5 for identification.

(Certificate of Registration, No. 1738, Class H, was marked Plaintiffs' Exhibit No. 5 for identification.)

THE COURT: How many papers have you that go with each article?

MR. FROST: Each article has one copyright registration certificate which was issued upon the basis of that article. We have six registrations, and we have six articles.

THE COURT: Is the article filed along with each paper?

MR. FROST: Yes, Your Honor.

THE COURT: The statuette itself has a given number. It is a little confusing from this form.

MR. FROST: We have stipulated, Your Honor.

THE COURT: I mean in the Copyright Office.

MR. FROST: In the Copyright Office the physical structure is submitted with the application for registration; and the document which you have before you is the copyright

certificate issued upon the basis of the application and upon the basis of the physical specimen submitted to the Copyright Office.

THE COURT: Is the physical specimen numbered the number up at the top?

MR. FROST: That is the registration number. We have to prove by other testimony, ordinarily, that the deposit in the Copyright Office corresponds to that number. In this case that has been stipulated; so we do not have to take that time, Your Honor.

THE COURT: In other words, with each one of these there is a statuette which was filed in the Copyright Office that bears the same number as this certificate bears?

MR. FROST: Yes, Your Honor.

I have Certificate of Registration No. 1737 that I would like to have marked as Plaintiffs' Exhibit No. 6 for identification.

(Certificate of Registration No. 1737 - Class H, was marked Plaintiffs' Exhibit No. 6 for identification.)

MR. FROST: I would like to offer in evidence Plaintiffs' Exhibits Nos. 1 to 6, inclusive, and 1-A to 6-A, inclusive, the latter being the actual physical specimens corresponding to those sent to the Copyright Office in support of each of the respective copyright certificates.

(Plaintiffs' Exhibits Nos. 1 to 6, inc., and 1-A to 6-A, inc., were then marked Plaintiffs' Exhibits 1 to 6, inc., and 1-A to 6-A, inc.)

THE COURT: You have an extra woman there, haven't you?

MR. FROST: We will read the testimony of the Register of Copyrights, who will identify those, Your Honor.

Now, Mr. Endicter, will you take the stand, please.

THE UPON---

WILLIAM ENDICTER,

was called as a witness for and on behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

THE CLERK: Will you please state your name for the record.

THE WITNESS: William Endicter.

DIRECT EXAMINATION

Q (By Mr. Frost) Where do you live?

A In Baltimore.

Q And your occupation?

A Lamp manufacturer.

Q Under what name do you do business?

A June Lamp Manufacturing Company.

Q Is that a partnership?

A That is right.

Q Who are the partners?

A Myself and Emanuel L. Mazer.

Q And you are the defendants in this cause?

A That is right.

Q How long has the partnership been in business?

A Approximately four years.

Q Prior to that time you were in the lamp manufacturing business?

A That is right.

Q Now, Mr. Endicter, I show you Plaintiffs' Exhibit 1-B for identification, and ask you if this is a product that you have sold?

A Yes.

THE COURT: I don't believe you have given the number so that it can be identified. You just said "this".

MR. FROST: Let the record show it is Plaintiffs' Exhibit 1-B which I have in my hand.

THE WITNESS: That is a female curved ballet dancer. May I qualify that answer, Your Honor?

THE COURT: Yes.

THE WITNESS: In the deposition taken on these figures there was some question in my mind as to whether that was absolutely the figure we had manufactured, and it could have been one that could have been put out by another manufacturer. I have mentioned something about the finial not being the type we had ever used.

THE COURT: The finial?

THE WITNESS: The little part on top that holds the shade in place.

Just so that the testimony in this particular case and in the deposition will coincide, I might answer "yes", but with that qualification.

Q (By Mr. Frost) They are similar, aside from the finial? This is your lamp?

A Yes.

MR. FROST: I have here a male curved ballet dancer statuette which I would like to have marked as Plaintiffs' Exhibit 2-B for identification.

THE COURT: I am wondering why you are marking them for identification, every one of them. Why shouldn't they be put in evidence? You gave them numbers.

MR. FROST: But they have not been offered in evidence beyond that.

THE COURT: I thought you gave them numbers, Nos. 1 to 6, inclusive; and then those that are paired off with them as alleged infringing numbers you gave as 1-A to 6-A, inclusive. Isn't that what you did a moment ago?

MR. FROST: Yes, we used those numbers.

THE COURT: Then, just ask the witness if he manufactures the alleged infringing articles.

MR. FROST: 1-B, and so on, are the infringing

articles.

THE COURT: 2-B, 3-B, and so on?

MR. FROST: Yes.

THE COURT: Why not have the witness step over there and tell it all in one answer. I don't see that we need to spend a lot of time on that.

MR. KRAUS: We will admit that they are.

MR. FROST: In view of that admission, I think I can offer in evidence Plaintiffs' Exhibits 1-B to 6-B, inclusive. I would suggest that they can be marked during the recess.

THE COURT: 1-B to 6-B, inclusive, represent the alleged infringing articles?

MR. FROST: Exactly.

THE COURT: And 1 to 6, inclusive, represent Plaintiffs'?

MR. FROST: Exactly, Your Honor.

THE COURT: That corresponds, in form, to the consecutive 1-A, 2-A, and so on, is that right?

MR. FROST: Exactly, Your Honor.

THE COURT: Then, can't you ask a general question as to whether or not he manufactures the 2-B's, and so on, through 6-B?

Q (By Mr. Frost) Mr. Endicter, do you manufacture the exhibits here identified as Plaintiffs' Exhibits 1-B to

6-B, inclusive?

A That is right.

Q Now, Mr. Endicter, would you call those California style numbers?

A Yes, I have.

MR. FROST: I hand you an invoice dated April 7, 1952, and ask that it be marked Plaintiffs' Exhibit No. 9 for identification.

(Invoice of Commercial Supply Co., to June Lamp Co., dated April 7, 1952, was marked Plaintiffs' Exhibit No. 9 for identification.)

Q (By Mr. Frost) Mr. Endicter, I hand you an invoice dated April 7, 1952, Plaintiffs' Exhibit No. 9 for identification, and ask you if you can identify it?

A That is right.

Q What is it?

A An invoice for merchandise sent to me by the Commercial Supply Company, of Chicago.

Q And you did receive that merchandise?

A That is correct.

Q And that merchandise corresponds to Plaintiffs' Exhibits 1-B and 2-B in this case? Is that correct?

A That is correct.

MR. FROST: I have a credit memorandum here dated June 30, 1952, that I would like to have marked as Plaintiffs' Exhibit No. 10 for identification.

(Credit Memorandum, June 30, 1952, from Commercial Supply Co., Chicago, was marked Plaintiffs' Exhibit No. 10 for identification.)

THE COURT: Can't all of those be stipulated? You are trying to prove the sale? Is that what you want to do?

MR. FROST: Yes, Your Honor. We can very quickly stipulate it.

MR. KRAUS: We so stipulate, Your Honor. We will stipulate the number of units sold of each.

MR. FROST: May the record show that a total of 144 Ballerinas were shipped to the defendant on or about April 7, 1952, and that on or about June 30, 1952, 114 of those Ballerinas were returned to the shipper; and that Plaintiffs' Exhibit No. 9 for identification is the invoice covering the shipment to the defendant, and Plaintiffs' Exhibit 10 for identification is the credit memorandum covering the shipment from the defendant back to the source?

THE COURT: You'd better mark those as exhibits and put them into the case.

MR. FROST: Will you mark those as Exhibits Nos. 9 and 10?

(Exhibits 9 and 10 for identification were then marked Plaintiffs' Exhibits 9 and 10.)

MR. FROST: And will you mark the invoice dated June 4, 1952, as Plaintiffs' Exhibit No. 11.

(Invoice of Commercial Supply Co.,
to June Lamp Company, June 4, 1952,
was marked Plaintiffs' Exhibit No.
11.)

MR. FROST: Let the record show further that on June 4, 1952, there were shipped to this defendant 36 of the numbers here identified as Plaintiffs' Exhibit 5-B and Plaintiffs' Exhibit 6-B, and 36 of the numbers here identified as Plaintiffs' Exhibits 3-B and 4-B; and Plaintiffs' Exhibit No. 11 is the invoice covering that shipment.

Will you so stipulate, Mr. Kraus?

MR. KRAUS: Yes.

MR. FROST: I offer in evidence Plaintiffs' Exhibits 9 to 11, inclusive.

MR. KRAUS: I think I should make this observation, that this defendant received 144 of the first units and shipped back 114 to the manufacturer who made them for him. Therefore, he is only charged with a total of 30. I just wanted to get the figures correct.

THE COURT: That has nothing to do with what is in controversy?

MR. KRAUS: No, Your Honor, except that in the Copyright Office I think the parties are supposed to prove the number sold and the profit at the time the case goes on.

Q (By Mr. Frost) Mr. Endicter, have you sold products to the Highland Furniture Company?

A Yes.

Q And that is the Highland Furniture Company of Baltimore?

A Yes.

Q And the products you sold include the Exhibit 2-B here in the courtroom? Is that correct?

A That is correct.

Q By the way, Mr. Endicter, are you financing the defense of this suit?

A Do I have to answer that, Your Honor?

THE COURT: I did not hear the question.

Q (By Mr. Frost) Are you financing the defense of this suit?

MR. KRAUS: I object. We will admit that the defense of the case is being financed by the Chicago Company. They are paying the expenses of it.

THE COURT: You asked if he sold some of these. Did you put in the number sold?

MR. KRAUS: We stipulate he sold, of those that he bought, a total of 103 units all together.

THE COURT: Very well.

MR. FROST: That is all, Mr. Endicter.

MR. KRAUS: Your Honor, in the copyright case, as I understand it, the defendant is supposed to prove his profits. Does Your Honor want to hear any testimony as to what our profits were per piece? We sold 103 of them.

THE COURT: Yes, go ahead.

MR. KRAUS: I would say that, roughly, our profits were one dollar apiece.

Will plaintiff accept that as a statement? Or, I can ask the witness to prove that.

MR. FROST: Let's get the testimony on that.

CROSS-EXAMINATION

Q (By Mr. Kraus) With respect to these units, can you tell me what your profit was per lamp sold?

A Eighty-five cents per unit net profit.

Q Per lamp?

A Yes.

Q Did you sell any statuettes apart from lamps?

A No, I did not.

Q Every one you sold was wired electrically?

A That is right.

Q And had an electric socket?

A Yes.

Q And had a shade thereon?

A That is right.

Q And you sold a total of 120 units all together?

A 102.

MR. KRAUS: That is all.

THE COURT: Was this wholesale?

THE WITNESS: That is right, Your Honor.

THE COURT: What was the wholesale unit price?

THE WITNESS: The wholesale price, \$10.95 each, complete with shade.

MR. FROST: That is all, Mr. Endieter,

(Witness excused.)

MR. FROST: If the Court please, you will recall that on last Tuesday we had Mr. Stein here from California, and he was sick. I would like to read into the record a statement we received from Mr. Stein's doctor.

"TO WHOM IT MAY CONCERN:

"I have advised Mr. Ben Stein to return to Los Angeles immediately for treatment. He has been under my care for the last eight months, and it is imperative that I treat him personally."

If the Court please, we have stipulated that the testimony of Mr. Stein may be read this morning. I mean the testimony in the Detroit case may be read this afternoon, as taken on deposition. I would like to read a part of that testimony.

THE COURT: You did not take a separate deposition?

MR. FROST: No, sir. He left the night we talked to you, Your Honor.

THE COURT: How long will it take to read it?

MR. FROST: It will take ten minutes.

THE COURT: You mean it is just a few pages?

MR. FROST: Yes, sir.

THE COURT: If it is more than that, I can absorb it very much better by reading it myself.

MR. FROST: Then, I would suggest that we leave a copy of the transcript with the Reporter and mark it as to pages.

THE COURT: How many pages are there that you want to put into this case?

MR. FROST: Approximately eight or ten pages.

THE COURT: Are you agreed on that?

MR. KRAUS: I think they should introduce the whole thing.

THE COURT: How long is the deposition?

MR. FROST: This was testimony in open court, Your Honor. It totals something like thirty pages, the whole thing.

THE COURT: Very well. Put it all in. You need not read it now, but you can read it in your closing argument--both sides.

MR. FROST: Then, there is no need to read it now.

THE COURT: No. But you can summarize very briefly what you say it says, in support of your position.

MR. FROST: The testimony taken in the Detroit case of Mr. Stein explains how the organization got started from art work of his wife. It also explains how the statuettes

are made. It is Mr. Stein's testimony that a clay model is first prepared by his wife and that a waste mold is made on that model, and that thereafter the mold is removed and the second model, in plaster, made. The second model, in plaster, is used as the basis for a rubber mold. It is the rubber mold that was used for production purposes.

It is Mr. Stein's testimony that he takes the rubber mold, makes a few specimens for the Copyright Office, and then uses the same rubber mold for production purposes.

THE COURT: Just what is that -- plaster?

MR. FROST: It is plaster, Your Honor, with a plastic coating. And Mr. Stein describes that in his testimony.

Mr. Stein further testifies that it is the policy of his company to select statuettes in the form of that, without any lamp parts or to sell them as complete lamps. Both are on sale, although practically all the sales have been in the lamp form.

Just one other thing, Your Honor. Mr. Stein states a copyright notice is placed on the back part of the base of each number. I mention that because it is required by the Copyright Office.

Mr. Cohen, will you take the stand, please?

THE COURT: Is the business of this company confined to these Ballerina statuettes, or do they make a lot of other

types of statuettes?

MR. FROST: They have a line of approximately 100. All of them are the so-called California style statuettes. We will introduce in just a moment the catalog showing the complete line.

THEREUPON---

BENSON L. COHEN,

was called as a witness for and on behalf of the plaintiffs and, having been first duly sworn, was examined and testified as follows:

THE CLERK: Will you please state your name for the record?

THE WITNESS: Benson L. Cohen.

DIRECT EXAMINATION

Q (By Mr. Frost) Where do you live?

A Here in Baltimore.

Q What is your occupation?

A I am a manufacturer's representative.

THE COURT: I can't hear you.

THE WITNESS: I am a manufacturer's representative, Your Honor.

Q (By Mr. Frost) What manufacturers do you represent?

A My main lines are Reglor of California and Rablar Specialty Company of Chicago.

Q Where do you conduct your work, Mr. Cohen?

A In Baltimore, Washington, Philadelphia, Virginia, and West Virginia.

Q When did you first hear of Reglor of California?

A About the end of 1950 or the beginning of 1951.

Q When did you first start representing Reglor?

A About April of 1951.

Q How did that come about, Mr. Cohen?

A It came about through the recommendation of a dealer whose opinion I respect.

Q Are you familiar with the sales end of the lamp business?

A Yes.

Q Wholesale?

A Yes.

Q Retail?

A Yes.

Q Will you speak a little louder, please. Tell me, Mr. Cohen, do the Reglor numbers differ from others on the market?

A Yes.

Q In what respect, Mr. Cohen?

A Well, in the respect that the Reglor numbers have a grace and a flow to their figures that gives the viewer the impression of action.

THE COURT: When you say "numbers" you mean figures?

THE WITNESS: Figures, yes, sir.

Q (By Mr. Frost) Now, Mr. Cohen, with reference to the figures of this jury rail, I will ask you this question: Would the average consumer confuse each of the Plaintiffs' Exhibits 1-A to 6-A, inclusive, with Plaintiffs' Exhibits 1-B to 6-B, inclusive?

MR. KRAUS: I object to that. In the first place, this is not a case of unfair competition; this is a case of pure infringement. I don't know that that is appropriate,-- when you ask would it confuse him.

THE COURT: It is perfectly obvious to the naked eye to anybody who has fairly good eyesight that you have a pair of each item.

MR. FROST: Exactly, Your Honor.

THE COURT: On one you have the stand or socket for the lamp, and in the other make of it you do not have it.

MR. FROST: Exactly.

THE COURT: They are the same sort of thing. They are identical, aren't they?

MR. FROST: We think they are identical. In just a minute I will come to one difference that I think should be pointed out to Your Honor.

THE COURT: I see a different coloring on two or three.

MR. FROST: Yes, Your Honor; there is a difference

of coloring, and there are minor differences.

THE COURT: But, so far as the modeling goes, aren't they the same?

MR. FROST: They are the same, with four exceptions. In Plaintiffs' Exhibit 3-B, a tangerine has been put into the hand of the model. Otherwise, it is identical.

In Plaintiffs' Exhibit 4-B an accoordion has been put into the hand of the model. Otherwise, it is identical.

In the case of Plaintiffs' Exhibit 5-B, the top portion of the figure is taken from Plaintiffs' Exhibit 5-A. The bottom portion of the figure is taken from Plaintiffs' Exhibit 6-A.

THE COURT: A different pose?

MR. FROST: I would not put it in quite that way. They take half of Plaintiffs' Exhibit 5-A.

THE COURT: And the dress is different? That is true, isn't it?

MR. FROST: Not quite, Your Honor. You see the bottom half of Plaintiffs' Exhibit 6-A is identical.

THE COURT: I see now. I couldn't quite see what you meant.

MR. FROST: Now, I might just show you Plaintiffs' Exhibit 6-A, which has the top half.

THE COURT: Yes, I see.

MR. FROST: Otherwise, they are identical.

I have a folder entitled "Designed to Sell", which I would like to have marked Plaintiffs' Exhibit No. 12 for identification.

THE COURT: Why do you offer it for identification and then reoffer it? Why don't you ask him if he knows what it is and, if he does, then offer it in evidence? Why take so much time? We don't do things that way here. I don't mean to be too critical of you.

MR. FROST: I am glad to have you step it up, Your Honor.

Q (By Mr. Frost) Mr. Cohen, I hand you Plaintiffs' Exhibit No. 12, which is currently marked for identification, and ask you if you can identify it?

A Yes. This is a catalog issued by Reglor of California, covering lamps that we have to offer for sale, showing the pictures, style numbers, and prices of these lamps.

MR. FROST: I offer in evidence Plaintiffs' Exhibit No. 12.

(Catalog, "Designed to Sell" was marked Plaintiffs' Exhibit No. 12.)

Q (By Mr. Frost) Mr. Cohen, are the photographs in Plaintiffs' Exhibit No. 12 numbers of the Reglor line?

A Yes, sir.

Q Do you sell those numbers?

A Yes, I do.

Q Do you sell those numbers in the statuette form?

A I offer them for sale either way, or both ways, -- as lamps and as statuettes.

Q Is there anything in Plaintiffs' Exhibit No. 12 that refers to that?

A Yes; on the back of the catalog is printed the words "All Designs Available as Statutes Only less one-third of the price shown."

Q Mr. Cohen, have you ever sold any of the numbers as statues only?

A No, I have not.

Q Mr. Cohen, have you ever refused to make such a sale?

A No, I have not refused.

Q There has just been no demand? Is that correct?

A As a matter of fact, I have a prospect for the sale of figures alone at the moment, that is, figures without the lamps, statuettes alone.

Q Mr. Cohen, I hand you a document which appears to include an advertisement, and I will ask you if you can identify that.

A Yes.

Q What is it?

A It is an advertisement of lamps sold by June Lamp

Company, advertising these lamps identified in Court as 1-B and 2-B.

MR. FROST: I will ask that the document that the witness just identified be marked Plaintiffs' Exhibit No. 15. I am skipping a number. I offer that exhibit in evidence.

(Advertisement of lamps sold by
June Lamp Co. was marked Plaintiffs' Exhibit No. 15.)

Q (By Mr. Frost) Again referring to Plaintiffs' Exhibit No. 15, Mr. Cohen, the photographs shown in that exhibit, does that correspond to one of the numbers here in the courtroom?

A Yes, it does.

Q What one?

A It corresponds to our Reglor number --

Q Well, just give the number.

A It corresponds to that which you have in your hand.

Q Which is Plaintiffs' Exhibit 1-B?

A That is correct.

Q Now, Mr. Cohen, have Plaintiffs' Exhibits 1-B to 6-B, inclusive, been on sale in the Baltimore area?

A Yes, they have.

Q Have those sales damaged your business?

A Yes, they have.

MR. FROST: Your witness, Mr. Kraus.

Q (By Mr. Kraus) You have not sold any of plaintiffs'

products as statuettes, have you?

A I beg your pardon?

Q You testified you have not sold any of plaintiffs' products as statuettes?

THE COURT: He said he had not.

MR. KRAUS: That is all.

THE COURT: I asked you the question, Mr. Cohen, had you sold any as statuettes only.

THE WITNESS: I had not.

(Witness excused.)

MR. FROST: I would just like to read the deposition of the Register of Copyrights. I would like to have Mr. Cohen read it with me, if you don't mind, Your Honor. I would like to read the questions, and he can read the answers.

THE COURT: Read what?

MR. FROST: The deposition of the Register of Copyrights, which is admissible in this case by reason of Your Honor's order.

THE COURT: I don't know that you need to read it verbatim. I can look at it myself. You submitted it.

MR. FROST: It was attached to one of our briefs, as a matter of fact.

THE COURT: Yes.

MR. FROST: Would you like to have me summarize it,

or may we just proceed?

THE COURT: Yes, summarize it from your point of view, and Mr. Kraus can say anything about it that he wants to; or you can wait until all of the testimony is in.

MR. FROST: I would like to make the offer of all of the exhibits, in order to be sure I have them all. Then, that will be the end of our case.

THE COURT: You may summarize it.

In Re DEPOSITION OF ARTHUR FISHER

MR. FROST: If Your Honor please, the deposition of the Register of Copyrights is the deposition of the man in charge of the Copyright Office. It was taken last April, after the so-called Expert decision.

Mr. Arthur Fisher testified that, pursuant to the Copyright Code, he has issued regulations governing the conduct of business before the Copyright Office. He has identified as those regulations the paper we have in evidence here as Plaintiffs' Exhibit No. 7.

Mr. Fisher has testified that Section 202.8 of those regulations, which is encircled by him, governs the registration of copyrights to three-dimensional works of art.

Mr. Fisher has testified that the plaintiffs' interests, so far as he is concerned and so far as the Copyright Office is concerned, is as to the art, the artistic craftsmanship, and that it makes no difference that the

particular object may be applied to a useful purpose. In that respect, I would like to read just one specific question and answer. This is on page 9 of the copy of the deposition, three lines from the bottom of the page. Here is the question asked of Mr. Fisher:

"Would you register Plaintiffs' Exhibit No. 8 if you knew that it was to be used as a lamp base?"

And here (indicating) is Plaintiffs' Exhibit 8, Your Honor.

And here is Mr. Fisher's answer:

"As I have said before our problem is to determine whether the work submitted is a work of art. We make that determination and registration even though we may have reason to believe that the work of art may happen to be used for some other purpose."

Now, if Your Honor please, that concludes our case.

I would like to offer again Plaintiffs' Exhibits Nos.

15 1, 1-A, 1-B, 2, 2-A, 2-B, 3, 3-A, 3-B, 4, 4-A, 4-B, 5, 5-A, 5-B, 6, 6-A, 6-B, 7 --

THE COURT: Why are you offering them again? They are already in, are they not?

MR. FROST: Not all of them. Number 7, for example, has not been offered before. I have just a few more: I offer Nos. 8, 9, 10, 11, 12, 14 and 15. Exhibit 13 was omitted.

(Statuette, (White, Unpainted) was marked Plaintiffs' Exhibit No.8.)

(Other Exhibits referred on Page 56 marked elsewhere, as per index.)

MR. FROST: Now, if Your Honor please, I understand that the portions of the testimony of Mr. Stein in the Detroit case that were designated will be reproduced in the record as though taken on deposition; and that the same is true of the deposition of the Register of Copyrights.

THE COURT: You have all of those statuettes you just referred to as exhibits but 2, I believe. There are thirteen, I think, but I think you read off fifteen. Where are they?

MR. FROST: Plaintiffs' Exhibit 15 is the advertisement from the Baltimore newspaper, which I read off. Plaintiffs' Exhibit 13 has been omitted. Plaintiffs' Exhibit 14 is the stipulation.

THE COURT: You have no more statuettes, in other words?

MR. FROST: That is right, Your Honor. Those are all of the statuettes.

Did I fail to read number 7?

THE CLERK: You offered 7 and 8 as exhibits, but you have never put into the record what they are.

MR. FROST: Let the record show that Plaintiffs' Exhibit No. 7 is a copy of the regulations of the Copyright Office, identified by Mr. Fisher.

Plaintiffs' Exhibit No. 8 is a curved ballet dancer specimen corresponding to Plaintiffs' Exhibit 1-A and 1-B, and also identified by Mr. Fisher.

THE CLERK: Have you Plaintiffs' Exhibit No. 7?

MR. FROST: Plaintiffs' Exhibit No. 7 is attached to the deposition of the Register of Copyrights. If you wish, I can give you another one to mark.

THE CLERK: If you have another one, I would like to have that.

(Copy of Regulations of the Copyright Office was then marked Plaintiffs' Exhibit No. 7.)

THE COURT: Very well, Mr. Kraus.

MR. KRAUS: If the Court please, I will not put on any witness. I do not know what pages or portions of Mr. Stein's testimony are going to be reproduced, but for the purpose of this record on appeal --

THE COURT: It has all been put in.

MR. KRAUS: He said "certain pages." I didn't know what they were.

THE COURT: A little while ago it was said "all of it." I thought it was understood that all of it was to be in. I asked for a summary of what was in it.

MR. FROST: I thought that was the point, Your Honor. Certainly, we have no objection to reproducing it all.

Just to avoid confusion, I would like to make this

one statement, Mr. Kraus, that Exhibit No. 25 in the Detroit case is the same as Plaintiffs' Exhibit No. 12 in this case.

MR. KRAUS: Otherwise, it would be confusing.

There are just two exhibits that I would like to offer in evidence. I handed to Your Honor a certified copy of the petition for reconsideration in the District Court in Chicago, Civil Action 50-C 1479, together with the order of Judge La Buy, together with accompanying photostats of the statuettes registered in the Chicago Expert case, and I ask that it be identified as Defendants' Exhibit No. 1.

(Certified Copy of Petition for Reconsideration, in Case No. 50-C 1479, in U.S. District Court for Eastern District of Illinois, was marked Defendants' Exhibit No. 1.)

MR. KRAUS: As Defendants' Exhibit No. 2, Your Honor, I would like to offer in evidence the collection of design patents, as a representative group of design patents, issued by the United States Patent Office.

MR. FROST: If the Court please, we have no objection to that.

THE COURT: Very well. You may mark it.

(Book of Design Patents was then marked Defendants' Exhibit No. 2.)

MR. FROST: Have you concluded your case?

MR. KRAUS: Yes.

THE COURT: Is this the best copy you have? Is this

the clearest copy (indicating)?

16 MR. KRAUS: That is the copy the Court certified in Chicago. It is the only copy I have, Your Honor. I can have a positive print. But that (indicating) is the certified copy, issued by the Clerk's Office in Chicago.

THE COURT: The figures were different in the Chicago case, were they not?

MR. KRAUS: Yes; they were different figures; but the proposition was the same.

THE COURT: Very well.

What is the Planter's lamp, -- where they use a lamp and insert some flowers?

MR. KRAUS: Some foilage, or something.

(The case was then argued to the Court by counsel for the respective parties.)

I certify that the foregoing is a true and correct transcript of the proceedings in the above-entitled case.

Ray Farrell

Official Reporter