United States Copyright Office
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July 26, 2013

Crowell & Moring LLP
Attn: Terence P. Ross
1001 Pennsylvania Avenue, NW
Washington, DC 20004

Re: JEWELRY BRACELET DESIGN JB 1163
Correspondence ID: 1-2GJ679

Dear Mr. Ross:

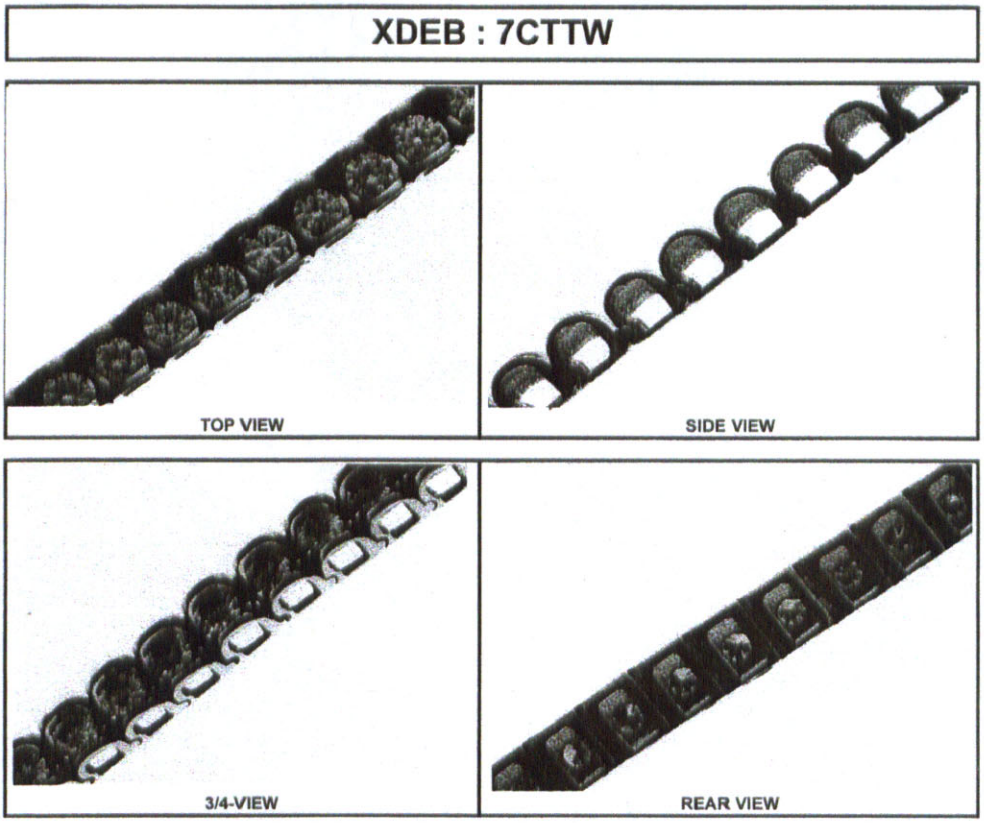
The Review Board of the United States Copyright Office (the "Board") is in receipt of your second request for reconsideration of the Registration Program's refusal to register the work entitled: *Jewelry Bracelet Design JB 1163*. You submitted this request on behalf of your client, Brilliant Jewelers/MMJ, Inc. (the "Applicant"), on October 30, 2009. I apologize for the lengthy delay in the issuance of this determination. After periods of inaction, staff departures, and budgetary restrictions, the Register of Copyrights has appointed a new Board and we are proceeding with second appeals of registration refusals as expeditiously as possible.

The Board has examined the application, the deposit copies, and all of the correspondence in this case. After careful consideration of the arguments in your second request for reconsideration, the Board affirms the Registration Program's denial of registration of this copyright claim. The Board's reasoning is set forth below. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action on this matter.

I. DESCRIPTION OF THE WORK

Jewelry Bracelet Design JB 1163 (the "Work") is a "line" or "tennis" bracelet made up of a series of forty-two identical round-cut diamonds set in a channel along the top of the bracelet. The channel is comprised of gold links, with each diamond resting inside its own link. All but three of the links are identical. The sides of each link form a modified upside-down "U" shape. The link's interior walls are tapered so that they grow thicker as they slope toward the bottom of the stone. This tapering creates a reflective dish in which the diamond is held in place by a "nick" setting. The bottom of each link is a hollow square, through which the bottom of the diamond is visible.

The below image is a photographic reproduction of the Work from the deposit materials:



II. ADMINISTRATIVE RECORD

On February 2, 2009, the United States Copyright Office (the "Office") issued a letter notifying the Applicant that it had refused registration of the above mentioned Work. *Letter from Copyright Office Registration Division to Gary Fletcher* (February 2, 2009). In its letter, the Office indicated that it could not register the Work because it "lacks the authorship necessary to support a copyright claim." *Id.*

In a letter dated April 2, 2009, the Applicant requested that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusal to register the Work. *Letter from Gary Fletcher to Copyright RAC Division* (April 2, 2009) ("First Request"). The letter set forth the reasons the Applicant believed the Office improperly refused registration. *Id.* Upon reviewing the Work in light of the points raised in the letter, the Office concluded that the Work "does not contain a sufficient amount of original and creative sculptural authorship upon which to support a copyright registration" and again refused registration. *Letter from Attorney-Advisor, Virginia Giroux-Rollow, to Gary Fletcher* (June 30, 2009).

Finally, in a letter dated October 30, 2009, you requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Work. *Letter from Terence Ross to Copyright R&P Division* (October 30, 2009) ("Second Request"). In arguing that the Office improperly refused registration, you claim the Work includes at least the minimum amount of creativity required to support registration under the standard for originality set forth in *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). *Second Request* at 5-10. In support of this assertion, you claim that the Work contains two original elements, both of which are sufficiently creative to warrant copyright protection: (1) a series of thirty-nine upside-down "U" shaped links; and, (2) the general sculpting of the Work's "channel walls."

You also argue that the Applicant carefully selected and combined the individual elements that comprise the Work to give the Work a meaning that is not present when the elements are evaluated independently. *Id.* Specifically, you assert that the Applicant's combination of the two "original elements" described above, with several additional, common design elements, creates a "distinctive look" that is worthy of copyright protection. *Id.* at 7-8.

Two declarations are attached to your *Second Request*. The first is the declaration of Vivienne Becker. *Second Request* at Exhibit E. Ms. Becker's declaration indicates that she is a "jewelry historian, author, journalist, creative consultant, and commentator on fine jewelry." *Id.* The second is the declaration of Pamela J. Romano. *Second Request* at Exhibit F. Ms. Romano's declaration indicates that she is an expert with twenty-five years experience in the "fine jewelry" business. *Id.* Both experts assert that, based on their considerable experience in the fine jewelry industry, there is a great deal of creativity and originality in the Work.

III. DECISION

A. *The Legal Framework*

All copyrightable works must qualify as "original works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a). As used with respect to copyright, the term "original" consists of two components: independent creation and sufficient creativity. *See Feist*, 499 U.S. at 345. First, the work must have been independently created by the author, *i.e.*, not copied from another work. *Id.* Second, the work must possess sufficient creativity. *Id.* While only a modicum of creativity is necessary to establish the requisite level, the Supreme Court has ruled that some works (such as the telephone directory at issue in *Feist*) fail to meet this threshold. *Id.* The Court observed that "[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity." *Id.* at 363. It further found that there can be no copyright in a work in which "the creative spark is utterly lacking or so trivial as to be nonexistent." *Id.* at 359.

The Office's regulations implement the long-standing requirements of originality and creativity set forth in the law and, subsequently, the *Feist* decision. *See* 37 C.F.R. § 202.1(a) (prohibiting registration of "[w]ords and short phrases such as names, titles, slogans; familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering, or coloring"); *see also* 37 C.F.R. § 202.10(a) (stating "[i]n order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form").

Of course, some combinations of common or standard design elements may contain sufficient creativity, with respect to how they are juxtaposed or arranged, to support a copyright. Nevertheless, not every combination or arrangement will be sufficient to meet this grade. *See Feist,* 499 U.S. at 358 (finding the Copyright Act "implies that some ways [of selecting, coordinating, or arranging uncopyrightable material] will trigger copyright, but that others will not"). Ultimately, the determination of copyrightability in the combination of standard design elements rests on whether the selection, coordination, or arrangement is done in such a way as to result in copyrightable authorship. *Id.*; *see also Atari Games Corp. v. Oman*, 888 F.2d 878 (D. D.C. 1989).

Case law recognizes instances in which jewelry has enjoyed copyright protection for "the artistic combination and integration" of constituent elements that, considered alone, are unoriginal. *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 109 (2d Cir. 2001). However, as noted, the mere simplistic arrangement of non-protectable elements does not automatically establish the level of creativity necessary to warrant protection. To illustrate, the Eighth Circuit upheld the Copyright Office's refusal to register a simple logo consisting of four angled lines which formed an arrow and the word "Arrows" in a cursive script below the arrow. *See John Muller & Co.*, 802 F.2d 989 (8th Cir. 1986). Likewise, the Ninth Circuit held that a glass sculpture of a jellyfish that consisted of elements including clear glass, an oblong shroud, bright colors, proportion, vertical orientation, and the stereotypical jellyfish form did not merit copyright protection. *See Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003). The court's language in *Satava* is particularly instructional:

> [i]t is true, of course, that a combination of unprotectable elements may qualify for copyright protection. But it is not true that any combination of unprotectable elements automatically qualifies for copyright protection. Our case law suggests, and we hold today, that a combination of unprotectable elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.

Id. (internal citations omitted) (emphasis in original).

Finally, Copyright Office Registration Specialists (and the Board, as well) do not make aesthetic judgments in evaluating the copyrightability of particular works. They are

not influenced by the attractiveness of a design, the espoused intentions of the author, the design's uniqueness, its visual effect or appearance, its symbolism, the time and effort it took to create, or its commercial success in the marketplace. *See* 17 U.S.C. § 102(b); *see also Bleistein v. Donaldson*, 188 U.S. 239 (1903). The fact that a work consists of a unique or distinctive shape or style for purposes of aesthetic appeal does not automatically mean that the work, as a whole, constitutes a copyrightable "work of art."

B. *Analysis of the Work*

After carefully examining the Work and applying the legal standards discussed above, the Board finds the following: (1) the pair of individual elements you single out as eligible for copyright protection lack sufficient creativity to warrant registration; and, (2) the Applicant's combination and arrangement of the aforementioned elements with other uncopyrightable elements also fail to satisfy the requirement of creativity.

1. Individual Elements

The Board finds that the two sets of elements you single out as providing a minimum amount of creative expression are no more than simple variations of "familiar symbols or designs" that do not rise above a *de minimis* quantum of creativity. *See Feist*, 499 U.S. at 359; *see also* 37 C.F.R. §§ 202.1(a), 202.10(a).

The first set of elements that you deem creative is the series of thirty-nine repetitive gold links that connect the top of the Work with the bottom of the Work. *Second Request* at 6. Each link has the shape of a standard, upside-down "U." The "U" is modified so that one of its sides has a small protrusion, and the other has a small indentation of the same size. We find that this minor departure from what is otherwise a basic geometric shape is not sufficiently creative to warrant registration. *See Feist*, 499 U.S. at 359; *see also* 37 C.F.R. §§ 202.1(a), 202.10(a). Your argument that the links are "unique," as well as your expert's assertion that the links' shape represents an "entirely new concept" are unpersuasive. *Second Request* at 6. As noted, the Board does not assess "novelty" or "uniqueness" in determining whether works contain the requisite minimal amount of original authorship. *See* 17 U.S.C. § 102(b); *see also Bleistein*, 188 U.S. 239. Thus, we conclude that the Applicant's trivial variation of the upside down "U" shape is not sufficiently creative to warrant copyright protection.

The second set of elements that you deem creative is the sculpting the Applicant has done on each segment of the channel walls. *Second Request* at 6-7. Specifically, the way the Applicant has "tapered" the walls into a "concave form" that creates a "reflective dish" for a diamond to sit in. *Id.* We find that this basic concave carving is a simple variation of a familiar design and that any authorship in the resulting "reflecting dish" is, at best, *de minimis*. *See Feist*, 499 U.S. at 359; *see also* 37 C.F.R. §§ 202.1(a), 202.10(a). Indeed, the Applicant's own expert, Ms. Becker, indicates in her declaration that the use of "dished" reflective mounts is a common element of jewelry, dating back to the Victorian era. *Declaration of Vivienne Becker* at 7. Further, your assertion that the Applicant's sculpturing

of the channel walls is demonstrative of "graceful" and skilled shaping is unpersuasive as it relates to your argument of sufficient creativity. Although it might be true that a considerable amount of ingenuity and artistic skill went into carving the Work's channel, the Board does not take into account the time and effort it took to create a work in determining whether the work contains the requisite minimal amount of original authorship. *See* 17 U.S.C. § 102(b); *see also Bleistein*, 188 U.S. 239. Thus, we conclude that the "sculpturing of the channel" is not sufficiently creative to warrant copyright protection.

2. The Work As A Whole

The Board finds that the Applicant's combination and arrangement of the Work's constituent elements lack a sufficient level of creativity to make the Work registerable under the Copyright Act.

The Board accepts the principle that combinations of familiar geometric shapes in a jewelry design may be eligible for copyright protection. *See Yurman Design*, 262 F.3d at 109. However, in order to be accepted for registration, such combinations must contain some distinguishable variation in the selection, coordination, or arrangement of their elements that is not so obvious or minor that the "creative spark is utterly lacking or so trivial as to be nonexistent." *Feist,* 499 U.S at 359; *see also Atari Games,* 888 F.2d at 883. Here, the Applicant claims that its selection and arrangement of the following elements meet this grade: the Work's upside-down "U" shaped sides (discussed above); the Work's tapered, concave channel carvings (also discussed above); the simple, "raised walls" at the top of the Work's channel; the Work's use of a standard "nick" setting to secure its diamonds; and the basic, repetitive square-shaped design featured on the Work's bottom. *Second Request* at 8.

We find that the Applicant's basic combination of these ordinary elements (two common shapes, a standard stone placement and setting, and simple "raised walls") lacks the requisite "creative spark" for copyrightability. *See Feist*, 499 U.S. at 359. Specifically, we find that the Work, as a whole, consists of a mere trivial variation in the arrangement of familiar geometric shapes and common jewelry design elements. *See* 37 C.F.R. § 202.1(a) (prohibiting registration of common geometric shapes such as an upside-down "U" and a square)*; see also Declaration of Vivienne Becker* at 7 (indicating the use of "dished" or concave carvings are a common element of jewelry, dating back to the Victorian era; and, suggesting that a "nick" setting is a common method for securing stones to jewelry). Thus, we find the work, as a whole, is unregisterable under the Copyright Act.

Your argument that the design embodied in the Work is "trend setting" and constitutes an evolutionary step in the history of line bracelets does not add to your claim of copyrightability. The Board does not evaluate the level of creativity in sculptural authorship by analyzing the historical context of the particular type of sculptural work at issue. *See* 17 U.S.C. § 102(b); *see also Bleistein*, 188 U.S. 239. Nor does it take into account a work's general novelty or uniqueness. *Id.* Thus, the mere fact that the Work differs substantially

from pre-existing "line" or "tennis" bracelet designs does not bear upon our determination that the Work is not copyrightable.

Likewise, your argument that the Work is so aesthetically appealing that it has inspired "knock-offs" does not add to your claim of sufficient creativity. As noted, the Board does not assess attractiveness, aesthetic appeal, or commercial success in determining whether a work contains the requisite amount of creative authorship. *See* 17 U.S.C. § 102(b); *see also Bleistein*, 188 U.S. 239. Thus, the mere fact that the Work is desirable and that others have sought to mimic its design elements does not impact our determination that the Work is unregisterable.

In sum, the Board finds that both the Work's individual elements, and the manner in which the Applicant has arranged those elements, express only a *de minimis* quantum of creativity and are therefore unregisterable under the Copyright Act.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the work entitled: *Jewelry Bracelet Design JB 1163.* This decision constitutes final agency action on this matter. 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

BY:

William J. Roberts, Jr.
Copyright Office Review Board