



The Register of Copyrights of the United States of America

United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000 · (202) 707-8350

January 18, 2017

Roberta Jacobs-Meadway, Esq.
Eckert Seamans Cherin & Mellott, LLC
Two Liberty Place
50 South 16th Street, 22nd Floor
Philadelphia, PA 19102

Re: Second Request for Reconsideration for Refusal to Register Plain Thorn Bracelet with Logo, Plain Thorn Ring with Logo, Pave Thorn Bracelet with Logo, and Pave Thorn Ring with Logo; Correspondence ID: 1-18RFMF5

Dear Ms. Jacobs-Meadway:

The Review Board of the United States Copyright Office (“Board”) has considered Eli Eldad Niv’s (“Niv”) second request for reconsideration of the Registration Program’s refusal to register jewelry design claims in the works titled Plain Thorn Bracelet with Logo, Plain Thorn Ring with Logo, Pave Thorn Bracelet with Logo, and Pave Thorn Ring with Logo (“Works”). After reviewing the applications, deposit copies, and relevant correspondence, along with the arguments in the second request for reconsideration, the Board affirms the Registration Program’s denials of registration.

I. DESCRIPTION OF THE WORKS

The Works are four separate jewelry designs:

1. The Plain Thorn Bracelet with Logo consists of three braided strands of metal resembling thorny branches.
2. The Plain Thorn Ring with Logo consists of three braided strands of metal resembling thorny branches.
3. The Pave Thorn Bracelet with Logo consists of three metal strands resembling thorny branches; each strand contains diamonds in a pave setting.
4. The Pave Thorn Ring with Logo consists of three metal strands resembling thorny branches; each strand contains diamonds a pave setting.

Reproductions of the Works are included as Appendix A.

II. ADMINISTRATIVE RECORD

On July 7, 2014, and July 8, 2014, Niv filed four applications to register copyright claims in the Works. In an April 23, 2015 letter, a Copyright Office registration specialist refused to register the claims, finding that they “lack[ed] the authorship necessary to support copyright claims.” Letter from Ivan Proctor, Registration Specialist, to Roberta Jacobs-Meadway, Esq. (Apr. 23, 2015).

In a letter dated June 5, 2015, Niv requested that the Office reconsider its initial refusal to register the Works. Letter from Roberta Jacobs-Meadway, Esq., to U.S. Copyright Office (June 5, 2015) (“First Request”). After reviewing the Works in light of the points raised in the First Request, the Office re-evaluated the claims and again concluded that the Works “do not contain a sufficient amount of original and creative authorship to support copyright registrations” because the Works “only feature one or two basic elements in a simple combination” and those “features are not combined in any way that differentiates them from their basic shape and design components.” Letter from Stephanie Mason, Attorney-Advisor, to Roberta Jacobs-Meadway, Esq. (Sept. 15, 2015).

In a letter dated October 27, 2015, Niv requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Works. Letter from Roberta Jacobs-Meadway, Esq., to U.S. Copyright Office (Oct. 27, 2015) (“Second Request”). In that letter, Niv argued that the Office mischaracterized the Works as having only two strands, stating that instead they each have three strands and as such showed more creativity “because a 2 strand twist requires less creativity than a 3 strand interlaced braid giving the appearance of a climbing vine.” Second Request at 8. Niv argued that the greater number of options a jewelry designer has to choose from when creating a piece of jewelry, the more likely that the resulting work will be copyrightable. *See* Second Request at 8 (citing *Matthew Bender & Co. v. W. Pub. Co.*, 158 F.3d 674, 683 (2d Cir. 1998)). Niv also argued that because the Works are “a less natural interpretation of the thorny stem” they “embody sufficient creativity to support registration.” Second Request at 8-13 (citing *Cosmos Jewelry Ltd. v. P Sun Hon Co.*, 470 F.Supp.2d 1072 (C.D. Cal. 2007)).

III. DISCUSSION

A. *The Legal Framework - Originality*

A work may be registered if it qualifies as an “original work[] of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102(a). In this context, the term “original” consists of two components: independent creation and sufficient creativity. *See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). 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.* Only a modicum of creativity is necessary, but the Supreme Court has ruled that some works (such as the alphabetized telephone directory at issue in *Feist*) fail to meet even this low 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 virtually nonexistent.” *Id.* at 359.

The Office’s regulations implement the longstanding requirement of originality set forth in the Copyright Act and described in the *Feist* decision. *See, e.g.*, 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”); *id.* § 202.10(a) (stating “to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form”). 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 test. *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”). A determination of copyrightability in the combination of standard design elements depends 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.C. Cir. 1989).

A mere simplistic arrangement of non-protectable elements does not demonstrate the level of creativity necessary to warrant protection. For example, the United States District Court for the Southern District of New York upheld the Copyright Office’s refusal to register simple designs consisting of two linked letter “C” shapes “facing each other in a mirrored relationship” and two unlinked letter “C” shapes “in a mirrored relationship and positioned perpendicular to the linked elements.” *Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 496 (S.D.N.Y. 2005). Likewise, the Ninth Circuit has held that a glass sculpture of a jellyfish consisting of clear glass, an oblong shroud, bright colors, 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 language in *Satava* is particularly instructive:

It is true, of course, that a *combination* of unprotectable elements may qualify for copyright protection. But it is not true that *any* combination of unprotectable elements automatically qualifies for copyright protection. 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).

Finally, Copyright Office registration specialists (and the Board) do not make aesthetic judgments in evaluating the copyrightability of particular works. *See* COMPENDIUM (THIRD) § 310.2. The attractiveness of a design, the espoused intentions of the author, the design’s visual effect or appearance, its symbolism, the time and effort it took to create, or the design’s commercial success in the marketplace are not factors in determining whether a design is copyrightable. *See, e.g., Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

B. Analysis of the Works

After carefully examining the Works and applying the legal standards discussed above, the Board finds that the Works do not contain the requisite authorship necessary to sustain a claim to copyright.

Each of the Works employs the commonplace design of three braided strands of metal resembling thorny branches using a standard braiding technique. Two of the Works incorporate a commonplace pave diamond setting into the thorny metal branches. In all cases, the braided strands of metal result in a simple arrangement of a common design that is not subject to copyright protection. *See* COMPENDIUM (THIRD) §§ 313.4(B) (noting that “jewelry designs that contain only a trivial amount of authorship” are *de minimis* and uncopyrightable); 908.2 (“The Office will not register pieces that, as a whole, do not satisfy [the] requirement [of being sufficiently creative or expressive] such as mere variations on a common or standardized design . . . designs made up of only commonplace design elements arranged in a common or obvious manner[;] [c]ommon *de minimis* designs include . . . commonly used designs, settings, and gemstone cuts.”). Niv argues that the Registration Program mischaracterized the Works as having only two strands, instead of three, and as such, overlooked the Works’ added creativity “because a 2 strand twist requires less creativity than a 3 strand interlaced braid giving the appearance of a climbing vine.” Second Request at 8 (citing Letter from Ivan Proctor, Registration Specialist, to Roberta Jacobs-Meadway, Esq. (Apr. 23, 2015)). But that the Works have three strands does not make the authorship any less obvious, *de minimis* and commonplace, as demonstrated by the numerous illustrations of the thorny branch jewelry genre submitted by Niv in the Second Request letter. *See* COMPENDIUM (THIRD) § 908.2; Second Request at 7-13.

Niv also argues that the greater number of options a jewelry designer has to choose from when creating a piece of jewelry, the more likely that the resulting work will be copyrightable. In support, Niv cites *Matthew Bender & Co. v. W. Pub. Co.*, 158 F.3d 674, 683 (2d Cir. 1998) (“*Bender*”), in which the Second Circuit stated that “[a]s a general principle, the greater the amount of material from which to select, coordinate, or arrange, the more likely it is that a compilation will be protectable.” *See* Second Request at 8. The *Bender* court, however, was addressing the copyrightability of *compilations*, where the copyrightability inquiry turns on whether there was sufficient selection, coordination and arrangement of pre-existing material. In any case, the *Bender* court acknowledged that “[t]he creative spark is missing where: (i) industry conventions or other external factors so dictate selection that any person composing a compilation of the type at issue would necessarily select the same categories of information; . . . or (ii) the author made obvious, garden-variety, or routine selections.” *Bender*, 158 F.3d at 682. Furthermore, in the context of the kind of authorship at issue here, the Board does not take into account how many options were available to an author when determining the copyrightability of the work. *See* COMPENDIUM (THIRD) § 310.8 (“[T]he Office will not consider possible design alternatives that the author may have considered when he or she created the work . . . It is not the variety of choices available to the author that must be evaluated, but the actual work that the author created.”).

Here, while the claimed authorship in the Works is “jewelry design,” and not compilation, there are only a limited number of ways that thorny branches can be expressed. While the Board does not categorically dismiss all thorny branch-themed jewelry as uncopyrightable, any such authorship must satisfy the standard of creativity for copyright, which the Works do not. A result to the contrary “would effectively accord protection to the idea” of thorny branch jewelry. COMPENDIUM (THIRD) § 313.3(B); 17 U.S.C. 102(b) (“In no case does copyright protection for an original work of authorship extend to any ideas.”); *see also Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971) (holding that a “jeweled bee pin” was an idea that defendants were free to copy).

Niv compares the Works to other “thorn based jewelry designs” that have been found to be copyrightable. Specifically, Niv points to *Cosmos Jewelry Ltd. v. Po Sun Hon Co.*, 470 F.Supp.2d 1072 (C.D. Cal. 2007), stating that the design at issue in that case was based on thorns that “strongly resemble[e] thorny stems as they appear in nature.” Niv urges that the Works at issue here are even more creative, as they represent “a less natural interpretation of the thorny stem” and thus “embody sufficient creativity to support registration.” Second Request at 8-13.

The work at issue in *Cosmos*, however, demonstrated significantly more creativity than the Works at issue here. The *Cosmos* court determined that the copyrightable aspects of that work included, *inter alia*, “the minute characteristics of the blossom petals, the arrangement of blossoms and other flourishes in different variations on the ‘multi-blossom’ [jewelry].” 470 F.Supp.2d at 1082. In contrast, the Works at issue are not similarly replete with detailed and complex arrangements. Instead, the Plain Thorn Bracelet with Logo and the Plain Thorn Ring with Logo each consist of three simply braided strands of metal resembling thorny branches. As to the Pave Thorn Bracelet with Logo and the Pave Thorn Ring with Logo, the simple addition of a basic pave diamond setting does not alter this analysis.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the copyright claim in the Work. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action in this matter.

BY:



Regan A. Smith

Copyright Office Review Board

Appendix A



















