COPYRIGHT
OFFICE

LIBRARY
OF
CONGRESS

ashington
D.C.
20559

May 14, 1997

Dear Mr. Collen:

This is in response to your letter of July 5, 1996, requesting a second review or reconsideration of the Copyright Office refusal to register claims to copyright in the designs on the watch straps, titled DJELLABAH and NIGHT. Upon careful examination of the works and analysis of the applicable law regret that we have no alternative but to again refuse registrations.

Administrative Record

On April 30, 1991, the claimant, Swatch SA, through its attorney, Jess M. Collen of the firm McGlew and Tuttle, submitted applications Form VA for the "artwork applied to watch and strap", entitled DJELLABAH and NIGHT.

In a letter dated December 27, 1991, Examiner, Peter Vankevich, refused to register the works because they lacked "the artistic authorship necessary to support a copyright registration.

Some four years later, Ms. Grasso, Counsel's secretary, telephoned Examiner Debby Weinstein and inquired about the status of these claims. Ms. Weinstein asked Ms. Grasso to send photocopies of the applications and replacement photos showing watches and the watchbands in questions.

In a letter dated March 7, 1996, Attorney Advisor Dave Levy reconsidered the original rejections and confirmed the rejections on the ground that the particular designs in these works - the maze and the herringbone pattern - are familiar symbols and designs in the public domain and, hence, uncopyrightable.

In your above mentioned July 5, 1996 letter, you, as the applicant's attorney, requested a reconsideration of the refusal; however, you offered no supportive legal authorities or arguments. We regret that the Board must again refuse registration for the following reasons.

The works in questions are useful articles - watch straps. The Copyright law protects pictorial, graphic, and sculptural works. 17 U.S.C. 102(a)(5). Such works include works of artistic craftsmanship insofar as their form but not their utilitarian aspects are concerned. Moreover, the design of a useful article is considered a pictorial, graphic, or sculptural work "only if, and only to the extent, that such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." 17 U.S. C. 101(1994). The legislative history confirms that this separability may be physical or conceptual, See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 55(1976).

Assuming that the design aspects of the work are separable, either physically or conceptually, the design must reflect a certain amount of original creative authorship in the form of pictorial, graphic, or sculptural expressions. The Board concludes that although, at least conceptually, the two-dimensional design on the straps reflects the necessary separability, the designs themselves are **de minimis authorship,** incapable of sustaining copyright registration.

The design on the watch strap for DJELLABAH is that of a standard maze configuration; and for NIGHT, the design is that of a standard herringbone pattern. Both the herringbone pattern and the maze are familiar symbols or designs which are in the public domain and, thus, are not copyrightable under the copyright regulations, 37 C.F.R. 202.1, and according to the relevant decisional law.

Simple stylistic variations of standard designs may be aesthetically pleasing and valuable commercially, but they do not provide a basis upon which to support a copyright claim. In Norma Ribbon & Trimming, Inc. v. Little, 51 F. 3d 45 (5th Cir. 1995), the Court found that ribbon flowers were in the public domain and plaintiffs could not be afforded copyright protection because they failed to show a "substantial variation" from common ribbon flower configurations. Id. at 47. See also John Muller & Co. v. New York Arrows Soccer Team, 802 F. 2d 989 (8th Cir. 1986); Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc., 634 F. Supp. 769 (W. D. Pa. 1986); Forstmann Woolen Co., v. J. W. Mays, Inc., 89 F. Supp. 964 (E.D.N.Y. 1950).

The Board concludes that these designs do not constitute the necessary variation from the familiar herringbone and maze designs. Like the flowers in **Norma Ribbon,** these are public domain designs or symbols which would require some **variation** to meet the requisite creativity level. Although the variation need not reflect a high degree of creativity, the variation must at least be distinguishable from the public domain design

configuration. Feist Publications v. Rural Telephone Service Co., 499 U.S. 340, 362 (1991).

Further, courts have held that it is not an abuse of discretion by the Copyright Office to deny registration for lack of original creative authorship. See Homer Laughlin China Co. v. Oman, 22 U.S.P.Q. 2d 1074 (D.D.C. 1991) wherein the court held that the Register's refusal to register GOTHIC, a china pattern design, because it was a familiar design lacking the minimally necessary original creative authorship, was not an abuse of administrative discretion.

For the reasons stated in this letter, we are affirming the refusal to register the aforementioned works and are closing the file in this case. This decision constitutes the final agency action on this matter.

Sincerely,

Nanette Petruzzelli

Nanette Petruzzelli
Acting General Counsel
for the Appeals Board
U.S. Copyright Office

MCGLEW AND TUTTLE, P.C.
Scarborough Station
Scarborough, NY 10510-0827
ATTN: Jess M. Collen

r:\ey\collen
May 14, 1997