COPYRIGHT
OFFICE

April 24, 1998

RE: **Jewelry Designs #1474CEG and three others**
Control No. 60-512-9132(E)

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Dear Ms. Mirman:

I am writing on behalf of the Copyright Office Board of Appeals in response to your letter dated August 29, 1997, appealing a refusal to register four jewelry designs on behalf of your client, Edwin Pearl, Inc. The letter was addressed to the Board and constituted the second appeal of the refusal to register works entitled: "1474CEG; 3089CE2G; 3064n12; and 1474BG."

The Board has examined the claims and considered all correspondence from your firm concerning these claims. After carefully reviewing the claims, the Board affirms the Examining Division's decision to refuse registration because the jewelry designs do not contain any copyrightable subject matter.

Administrative Record

The Copyright Office received applications for registration of these works, with a request for special handling due to prospective litigation, on September 30, 1996. In a letter dated Oct. 1, 1996, Visual Arts examiner Geoffrey Henderson refused registration on the ground that the designs lacked a minimum amount of original artistic material. The examiner concluded that "copyright does not protect familiar symbols and designs, minor variations of basic geometric shapes, or mere variations in coloring."

By letter dated October 23, 1996, you appealed the refusal to register, asserting that Feist Publications v. Rural Telephone Service Co., 499 U.S. 340 (1991), and Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989 (2nd Cir. 1980), had established that only a minimum level of creativity was necessary to support a copyright claim in a work of jewelry. You asserted that the jewelry designs in this case possessed the requisite level of minimum creativity based on authorship consisting of heartshapes, original textured surface, and arrangement

of studs and prongs, which when applied to the surface of the jewelry created an original impression.

The Examining Division affirmed the decision of the Examiner to refuse registration of the four jewelry designs in a letter by Attorney Advisor David Levy dated January 17, 1997. Although the Examining Division agreed with your position that Feist, *supra*, and Kieselstein-Cord, *supra*, established a "very low" requisite level of creativity, it concluded that even under that low standard, the works in this case could not support a copyright. The artistically disposed elements or combinations of elements were merely simple combinations of public domain elements.

In a letter dated August 29, 1997, a second appeal was submitted to the Board of Appeals. The appeal again asserted that the decision of Kieselstein-Cord, *supra*, established that jewelry designs are proper subject matter of copyright if the designs "possess the 'minimal degree of creativity' needed to support a copyright registration." Your letter asserts that the four designs in this case meet this threshold because of the *expression inherent in the granulation* process used to create the artistic landscape of these works. As evidence of the originality of the designs, you enclose representations of other jewelry designs incorporating a granular design which have been recognized in scholarly discussions of jewelry designs. Finally, you enclose an affidavit from Joyce Jonas expressing her opinion as to the artistic merit of these four works.

Categories of Copyrightable Works

Your appeal letter states that "[i]t has been clearly established that jewelry designs are works of art subject to copyright protection." We agree that section 102(a) of the copyright law does identify "pictorial, graphic, and sculptural works" as a category of authorship, and jewelry designs embodying copyrightable expression may qualify for protection under this section. However, as your appeal letter acknowledges, jewelry designs must possess a minimum degree of creativity *to secure copyright protection. Not all jewelry designs meet this standard. See* DBC of New York, Inc. v Merit Diamond Corp., 768 F.Supp. 414 (S.D.N.Y. 1991).

Familiar Shapes and Designs

Copyright Office regulations state that familiar symbols and designs are not copyrightable. 37 CFR § 202.1; Compendium of Copyright Office Practices, Compendium II, § 202.02(j) (1984). This principle is supported by

judicial decision. In DBC of New York, the court held that DBC's jewelry designs were not copyrightable under this rule because they consisted of shapes in the public domain. In Jon Woods Fashions Inc. v. Curran, 1988 U.S. Dist. LEXIS 3319, 8 U.S.P.Q.2d 1870, 1871-72 (S.D.N.Y. 1988), the court upheld the refusal to register a fabric design, quoting § 202.1 and noting that the features of the fabric (a combination of stripes and a grid) that the plaintiff sought to protect were "familiar symbols." *See also* John Muller & Co. v. New York Arrows Soccer Team, Inc., 802 F.2d 989 (8th Cir. 1986) (upholding refusal to register logo that lacked the minimal creativity necessary to support a copyright and noting that a "work of art" or a "pictorial, graphic or sculptural work ... must embody some creative authorship in its delineation of form"). Nor can an "aggregation of well known components [that] comprise an unoriginal whole" support a claim to copyright. Florabelle Flowers, Inc. v. Joseph Markovits, Inc., 296 F. Supp. 304 (S.D.N.Y. 1968).

The 1991 Supreme Court ruling in Feist Publications, v. Rural Telephone Service Co., 499 U.S. 340 (1991) confirmed the low standard for *determining the copyrightability of a work. The ruling also explicitly* recognized, however, that some works, such as white-page, alphabetical listings of phone books, failed that low standard for copyrightability. Pre-Feist case law indicated that not all works of the visual arts met the low threshold for copyrightability. *See, e.g.*, John Muller & Co. *supra*; Durham Industries, Inc. v. Tomy Corp., 630 F.2d 905 (2d Cir. 1980); Sherry Mfg. Co. v. Towel King of Florida, 753 F.2d *1565 (11th Cir. 1985); Towle Mfg. Co. v. Godinger Silver Art Co., 812 F. Supp.* 986 (S.D.N.Y. 1986).

Your appeal letter asserts that your client is not attempting to protect "dots and dashes" or the "heart-shaped" design element, but rather protection is sought for "the elements, as they are uniquely applied to the surface of the *jewelry." Processes are not subject to copyright protection. See* Norma Ribbon & Trimming, Inc. v. Little, 51 F.3d 45 (5th Cir. 1995). We know of no case authority holding that the application of familiar symbols to a surface, without more, constitutes copyrightable expression. "Dots and dashes" likely could be arranged in a way which created pictorial expression capable of supporting a copyright claim. The pictorial image of an archer on page 263 of the pictures you included in your appeal letter could serve as such an example. Alternatively, many simple elements could be combined to create a original arrangement which might support a copyright, such as the jeweled pin also depicted on page 263. In contrast, your client's designs contain neither pictorial expression nor an original combination of sufficient complexity to support a copyright claim.

Copyrightability of the granulation process.

In urging that your client's jewelry contains the requisite creativity to support a copyright claim, your appeal letter relies heavily on the granulation process used by your client. Moreover, it appears that your reference to "uniquely applfying]" design elements to the surface of the jewelry, discussed above, is simply an allusion to this granulation process. In support of your argument, you have submitted reproductions of designs identified in scholarly publications on the issue. In addition, you have submitted an affidavit from Joyce Jonas expressing her opinion as to the artistic merit of your client's designs.

As your appeal letter acknowledges, the granulation process was not original with your client. The process has been used for many centuries by jewelry designers around the world. Visually, granulation is merely a series of dots, and as a designing technique it has wide application throughout the jewelry industry. However, in order for a given jewelry design using granulation to support a copyright claim, the work must embody expression of original authorship that rises above merely trivial variations of copyright elements, whether alone or in combination, and is not in the public domain. *See* L.Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 490 (2nd Cir.) (en banc), cert.denied, 429 U.S. 857 (1976), *citing* Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2nd Cir. 1951). Your client's jewelry designs do not contain sufficient originality to support a copyright claim. The granulation technique used in manufacturing the jewelry does not constitute authorship, and we can discern no authorship in the manner in which the granules are applied to the surfaces of these particular items of jewelry.

With your appeal letter you have enclosed reproductions of designs identified in scholarly publications as using a granulation process. In reaching registration decisions, the Copyright Office does not compare submitted copies with other designs in the prior art. In any event, virtually all of the jewelry designs identified in the scholarly publication contained many more design elements than your client's designs. Moreover, many contain recognizable sculptural and/or pictorial elements. Many of these designs might well support a copyright registration if they were submitted to this Office, but these examples are not close analogies to your client's works.

The affidavit of Joyce Jonas does express the opinion that these jewelry designs are copyrightable. To the extent that Ms. Jonas bases her conclusion on your client's technical skill in creating these designs, technical skill alone is not sufficient to support a copyright claim because processes are not copyrightable. *See* 17 U.S.C. §102(b). To the extent that Ms Jonas bases her conclusion on identifying original sculptural elements, we simply disagree. The

elements of the jewelry designs in this case are familiar symbols and designs which cannot support a copyright claim.

For the reasons stated above, no registration can be made for these works.

This letter constitutes final agency action.

Sincerely,

David O. Carson
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for the Appeals Board
U.S. Copyright Office

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