LIBRARY
OF
CONGRESS

COPYRIGHT
OFFICE

101 Independence
Avenue, S.E.

W[redacted]gton, D.C.
20559-6000

March 8, 1999

Robert W. Payne, Esq.
LaRiviere, Grubman & Payne
P.O. Box 3140
Monterey, CA 93942

Re: Flashing Gold and Silver Stars as Earring and Pins
Control No. 60-403-387-6(L)

Dear Mr. Payne:

The Copyright Office Board of Appeals has reviewed your second appeal for registration of your client's jewelry design. Upon reviewing the claim and the arguments outlined in your letters, the Board of Appeals has determined that the works are made up of a combination of common elements which, alone or in combination, lack sufficient creativity on which to base a copyright registration.

Administrative Record

On April 15, 1994, copyright registration applications were submitted for three distinct jewelry designs: 1) Flashing Christmas Tree-Shaped, Transparent-Colored Plastic Tree Earrings; 2) Flashing Gold Profile Moon Face as Earrings and Pin; and 3) Flashing Gold and Silver Stars as Earrings and Pin. The first two designs were registered, but the examiner did not register the third work because it lacked "the original artistic or sculptural authorship necessary for copyright protection," noting that copyright does not protect "minor variations or combinations of basic geometric shapes." (Letter from William Briganti to E. David LaRiviere dated June 24, 1994).

Nearly three years later, on March 20, 1997, you filed a request for reconsideration of the Office's earlier refusal to register, arguing that the work contained original and creative features beyond its basic five-pointed, molded star shape. Specifically, you contend that three additional, asymmetrically placed openings in the

shape of smaller five-pointed stars from which random, flashing light is emitted, and the choice of color, provide the additional creative elements which, alone and in combination, meet the level of originality that merit copyright protection.

Upon reconsideration of the claimant's application, the reviewing attorney again refused to register the work, noting that neither the basic star-shape of the pin and earrings nor the repetition of the familiar star-shape in an asymmetrical pattern constituted sufficient creativity to merit protection. She also discounted "the effect produced by the light color combination" on two separate grounds: 1) the production of light from the smaller star-shaped openings is an unprotectible idea, method, or process; and 2) to the extent that the star-shaped openings serve a utilitarian function, they are not copyrightable.

De Minimus Authorship

Costume jewelry may be a "work of art" subject to copyright protection, Trifari, Krussman & Fishel, Inc. v. Charel Co., 134 F. Supp. 551 (S.D.N.Y. 1955); but not all jewelry designs contain sufficient creative expression to support a copyright. DBC of New York, Inc. v. Merit Diamond Corp., 768 F. Supp. 414 (S.D.N.Y. 1991). No registration is possible where the work consists solely of elements which are incapable of supporting a copyright claim. Uncopyrightable elements include geometric figures or symbols, such as a hexagon, an arrow, and a five-pointed star. U.S. Copyright Office Compendium of Copyright Office Practices, Compendium II ("Compendium II") § 503.02(b) (1984). Bailie v. Fisher, 258 F2d 425 (D.C. Cir. 1958); DBC of New York, Inc. v. Merit Diamond Corp., 768 F. Supp. 414 (S.D.N.Y. 1991).

The only design element in the earrings and pin is the five-pointed star, albeit utilized in a simple, asymmetrical, repetitive pattern. A simple, repetitive pattern of a common shape, however, lacks the requisite minimal level of creativity needed to meet the decidedly low level of creativity needed to support your claim. In order to sustain a copyright, the creative expression must consist of something more than the mere bringing together of two or three standard forms or shapes with minor linear or spatial variations. Compendium II § 503.02(b). *See also* John Muller & Co. v. N.Y. Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986) (upholding Register's refusal to register a simple logo consisting of four angled lines which form an arrow and the word "Arrows" in cursive script below the arrow); Jon Woods Fashions, Inc. v. Curran, 8 U.S.P.Q. 2d 1870 (S.D.N.Y. 1988) (upholding Register's decision that fabric design consisting of striped cloth over which is superimposed a grid of 3/16" squares, even though "distinctly arranged or printed," did not contain a minimal amount of original artistic material to merit copyright protection); Homer Laughlin China Co. v. Oman, 22 U.S.P.Q. 2d 1074 (D.D.C. 1991) (upholding Register's determination that there was insufficient creative

authorship in "Gothic" chinaware design pattern to merit copyright protection).

Furthermore, the choice of the gold or silver color for the star-shaped earrings and the addition of the flashing white lights to emulate the twinkling of a star are rather commonplace, and therefore add nothing original or creative to the design of the earrings.

Consequently, the Board of Appeals concludes that these design elements, either alone or in combination, do not rise to the minimal level of creativity needed to support a copyright. The Board therefore affirms the Examining Divisions's decision to refuse to register this claim.

This letter constitutes final agency action.

Sincerely,

David O. Carson
General Counsel
for the Appeals Board
United States Copyright Office