United States Copyright Office
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September 11, 2013

Designs by Madeleine Ann
Attn: Madeleine Kubicek
211 Crest Avenue
Tarrytown, NY 10591-4329

Re: Chainmaille a la Madeleine Ann Convertible Necklace-Glasses Holder
Correspondence ID: 1-DGI2DB

Dear Ms. Kubicek:

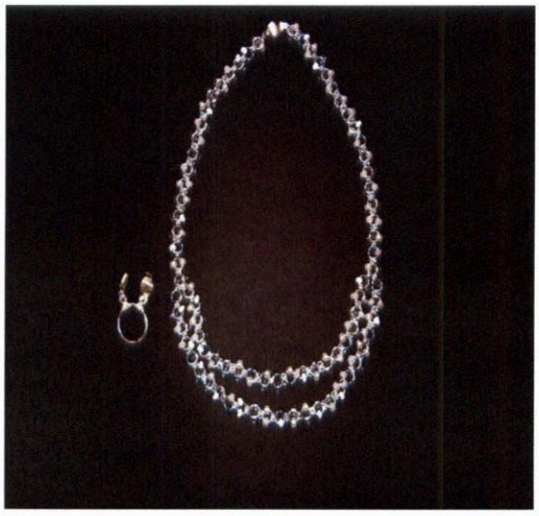
The Review Board of the United States Copyright Office (the "Board") is in receipt of your second request for reconsideration of the Registration Program's refusal to register the work entitled: *Chainmaille a la Madeleine Ann Convertible Necklace-Glasses Holder*. You submitted this request on November 12, 2012.

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

Chainmaille a la Madeleine Ann Convertible Necklace-Glasses Holder (the "Work") is a jewelry chain designed to function as both a necklace and an eye-glass holder. The Work's chain consists of one full length of links combined with one half length of links to form a "semi-double" strand. The Work's links consist of a series of single metal loops connected together by pairs of smaller loops. Each larger loop has at least one, in most cases two, glass or plastic beads or stones attached to it. The Work's glasses-holder feature consists of a round metal loop that fastens to the Work's clasping mechanism. The below image is a photographic reproduction of the Work from the deposit materials:





II. ADMINISTRATIVE RECORD

On March 30, 2012, the United States Copyright Office (the "Office") issued a letter notifying you that it had refused registration of the above mentioned Work. *Letter from Registration Specialist, Larisa Pastuchiv, to Madeleine Kubicek* (March 30, 2012). In its letter, the Office stated that it could not register the Work because it lacks the authorship necessary to support a copyright claim. *Id.*

In a letter dated April 20, 2012, you requested that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusal to register the Work. *Letter from Madeleine Kubicek to Copyright RAC Division* (April 20, 2012) ("First Request"). Upon reviewing the Work in light of the points raised in your letter, the Office concluded that the Work "does not contain a sufficient amount of original and creative artistic or sculptural authorship in either the treatment or arrangement of its elements" and again refused registration. *Letter from Attorney-Advisor, Stephanie Mason, to Madeleine Kubicek* (August 24, 2012).

Finally, in a letter dated November 19, 2012, 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 Madeleine Kubicek to Copyright R&P Division* (November 19, 2012) ("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 2. In support of this argument, you claim that the Work is a unique and "genuine" convertible jewelry design. *Id.* at 1-2. You also compare the Work to other works you have created, some of which have been accepted for copyright registration. *Id.* at 1-3.

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").

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. *See Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101 (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. *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).

To be clear, the mere simplistic arrangement of unprotectable elements does not automatically establish the level of creativity necessary to warrant protection. For example, 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 Works*

After carefully examining the Work, and applying the legal standards discussed above, the Board finds that *Chainmaille a la Madeleine Ann Convertible Necklace-Glasses Holder* fails to satisfy the requirements of creative authorship.

First, the Board finds that none of the Work's constituent elements, considered individually, are sufficiently creative to warrant protection. As noted, 37 C.F.R. § 202.1(a), identifies certain

elements that are not copyrightable. These elements include: "[w]ords and short phrases such as names, titles, slogans; familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering, or coloring." *Id.* Here, the Work includes the following elements: (1) several small and large metal loops linked together to form a standard necklace chain; (2) several round glass or plastic beads or stones; (3) a basic necklace clasping mechanism; and, (4) a round metal loop that fastens to the clasping mechanism. Consistent with the above regulations, these elements (metal loops, plastic or glass beads or stones, and a jewelry clasp) are all familiar, public domain shapes and/or designs that are ineligible for copyright protection. *See Id.* (prohibiting the registration of basic symbols or designs). Accordingly, we conclude the Works' constituent elements do not qualify for registration under the Copyright Act.

Second, the Board finds that the Work, considered as a whole, fails to meet the creativity threshold set forth in *Feist*. 499 U.S. at 359. As explained, the Board accepts the principle that combinations of unprotectable elements may be eligible for copyright registration. However, in order to be accepted, 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." *Id.*; *see also Atari Games,* 888 F.2d at 883 (finding a work should be viewed in its entirety, with individual uncopyrightable elements judged not separately, but in their overall interrelatedness within the work as a whole). Viewed as a whole, the Work consists of an ordinary necklace chain that is comprised of linked loops, decorated with ornamental beads or stones, and features a single metal loop that attaches to and hangs from its clasping mechanism. This simple combination of an unprotectable chain, an unprotectable hoop and clasp, and unprotectable beads or stones is too basic to qualify for copyright registration. Specifically, we find that the authorship involved in adding ornamental beads to a standard necklace chain and adding a simple metal loop to a necklace clasping mechanism is at best, *de minimis*, and fails to meet the threshold for copyrightable authorship. *Feist,* 499 U.S. at 359; *see also Atari Games,* 888 F.2d at 883.

Your assertions that the Work is unique, genuine, and novel in the world of wearable art do not add to your claim of sufficient creativity. *Second Requests* at 1-2. As discussed above, the Board does not assess a design's attractiveness, uniqueness, visual effect or appearance in determining whether a work contains the requisite minimal amount of original authorship necessary for registration. *See* 17 U.S.C. § 102(b); *see also Bleistein*, 188 U.S. 239. Thus, even if accurate, the mere fact that the Work consists of a novel, aesthetically appealing arrangement of familiar shapes and designs would not qualify it as copyrightable.

Finally, regarding your argument that the Office has registered works, owned by you, that are similar to the ones in contention, the Office has a policy of not comparing works that have been previously registered or refused registration. Each claim of copyright is examined on its own merits, with the Office applying uniform standards of copyrightability throughout the examination process. Because copyrightability involves a mixed question of law and fact, differences between any two works can lead to different results. Thus, the fact that an individual examiner might have previously registered a work that is, arguably, less original than the work at issue does not require the Board to reverse the denial of a work that we find lacks sufficient creative authorship. *See Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q.2d (BNA) 1074, 1076 (D.D.C. 1991) (where the court stated that it was not aware of "any authority which provides that the Register must compare works when determining whether a submission is copyrightable."); *accord, Coach, Inc. v. Peters*, 386 F. Supp.2d 495, 499 (S.D.N.Y. 2005) (indicating the Office "does not compare works that have gone through the registration process."). While we appreciate you bringing perceived inconsistencies in the

application of Office regulations to our attention, we will not compare the Work at issue with prior registrations in our review of your requested reconsideration of refusal.

In sum, the Board finds that both the individual elements that comprise the Work, as well as the selection, organization, and arrangement of those elements lacks the sufficient level of creativity to make the Work eligible for registration 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: *Chainmaille a la Madeleine Ann Convertible Necklace-Glasses Holder*. 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