United States Copyright Office
Library of Congress · 101 Independence Avenue SE · Washington, DC 20559-6000 · www.copyright.gov

August 14, 2013

John D. Gugliotta
4199 Kinross Lakes Parkway
Suite 275, P.O. Box 506
Richfield, OH 44286

Re: Diamond Horseshoe Bracelet
Correspondence ID: 1-AX3RG5

Dear Mr. Gugliotta:

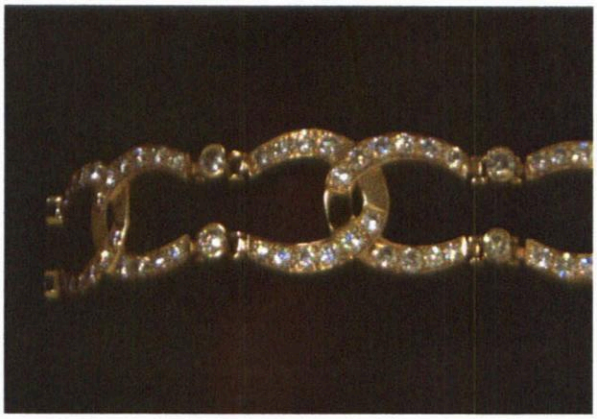
The Review Board of the United States Copyright Office (the "Board") is in receipt of your second request for reconsideration of the Registration Program's refusal to register the work entitled: *Diamond Horseshoe Bracelet*. You submitted this request on behalf of your client, Arthur Strozewski, on March 28, 2012. I apologize for the delay in the issuance of this determination. After periods of inaction, staff departures and budgetary restrictions, the Register of Copyrights has appointed a new Board and we are proceeding with second appeals of registration refusals as expeditiously as possible.

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

Diamond Horseshoe Bracelet (the "Work") is a jewelry bracelet comprised of diamond-covered horseshoe shapes. Each "link" in the bracelet is comprised of two interlocking horseshoe shapes, set sideways and overlapping at their centers. The open ends of the horseshoes in each "link" join with the open end of a horseshoe from another link. The horseshoe shapes are pavé with diamonds, except for at the point where one shape interlocks with another. Diamonds also appear at the point where the open ends of the horseshoe shapes join.

The below image is a photographic reproduction of the Work from the deposit materials:



II. ADMINISTRATIVE RECORD

On September 13, 2011, the United States Copyright Office (the "Office") issued a letter notifying Arthur Strozewski (the "Applicant") that it had refused registration of the above mentioned Work. *Letter from Registration Specialist, Larisa Pastuchiv, to John Gugliotta* (September 13, 2011). In its letter, the Office indicated that it could not register the Work because it lacks the authorship necessary to support a copyright claim. *Id.*

In a letter dated October 6, 2011, you requested that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusal to register the Work. *Letter from John Gugliotta to Copyright RAC Division* (October 6, 2011) ("First Request"). Your letter set forth your reasons as to why the Office improperly refused registration. *Id.* 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" and again refused registration. *Letter from Attorney-Advisor, Stephanie Mason, to John Gugliotta* (February 17, 2012).

Finally, in a letter dated March 28, 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 John Gugliotta to Copyright R&P Division* (March 28, 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 1-3. Specifically, you claim that the Applicant's selection and arrangement of the individual elements that comprise the Work possesses a grade of creative authorship that is not present when the elements are evaluated independently. *Id.* In support of your argument, you direct the Board's attention to five examples of registered works that incorporate horseshoe shapes into jewelry designs. *Id.* at 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 Work*

After carefully examining the Work, and applying the legal standards discussed above, the Board finds that *Diamond Horseshoe Bracelet* fails to satisfy the requirement 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: "familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring." *Id.* Here, the Applicant's Work is comprised of the following elements: (1) a series of common horseshoe shapes; and, (2) several diamonds of similar shape and size. Consistent with section 202.1(a), these "familiar symbols or designs" are prohibited from copyright registration. *Id. see also Feist*, 499 U.S. at 363. Thus, we conclude the Work's constituent elements do not qualify for protection 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 jewelry designs comprised of combinations of unprotectable elements may be eligible for copyright registration. However, in order to be accepted, such designs 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 noncopyrightable elements judged not separately, but in their overall interrelatedness within the work as a whole). Viewed as a whole, the Applicant's Work consists of the simple interlocking and linking together of diamond-covered horseshoe shapes. The creative authorship involved in this basic, repetitive pairing of unprotectable shapes is, at best, *de minimis*. *See, eg., Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 498-99 (S.D.N.Y. 2005) (agreeing with the Board's decision to reject a similar design involving an interlocking letter "C"). Likewise, the Applicant's decision to pave the surface of the shapes in small, unprotectable gemstones fails to meet the threshold for copyrightable authorship. *Feist,* 499 U.S at 359; *see also Atari Games,* 888 F.2d at 883. Accordingly, we conclude that the Work, as a whole, lacks the requisite "creative spark" necessary for registration. *Feist,* 499 U.S at 359; *Satava*, 323 F.3d at 811.

The Board is not persuaded by your argument that the Office has registered five works similar to the one in contention. When evaluating works for purposes of registration, each work is examined independently and on its own merits. The Office is not required to compare a submission to works that have already been registered; nor is it required to search its deposit archive to determine whether a work similar to a submission has already been registered. *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

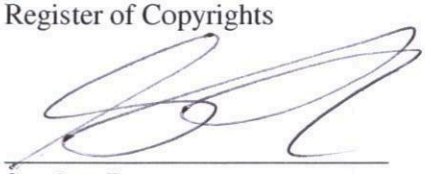
495, 499 (S.D.N.Y. 2005) (indicating the Office "does not compare works that have gone through the registration process"). Again, each work submitted for registration is evaluated on its own merits, with the Office applying the relevant statutory and regulatory guidelines. The fact that an individual examiner might have accepted a work for registration that, arguably, is not more creative than the Work at issue, does not require the Board to accept a work that it finds to include *de minimis* authorship.

In sum, the Board finds that the Applicant's selection and arrangement of the elements that comprise the Work lack a sufficient level of creativity to make the Work registerable 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: *Diamond Horseshoe Bracelet*. This decision constitutes final agency action on this matter. 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

BY: 

Stephen Ruwe
Copyright Office Review Board