United States Copyright Office
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July 17, 2013

Gray-Robinson, P.A.
Attn: Daniel C. Crilly
401 East Las Olas Boulevard, Suite 1850
Fort Lauderdale, Florida 33301-2209

Re: OCEAN CITY HOOK BRACELET
Correspondence ID: 1-5WMUWR

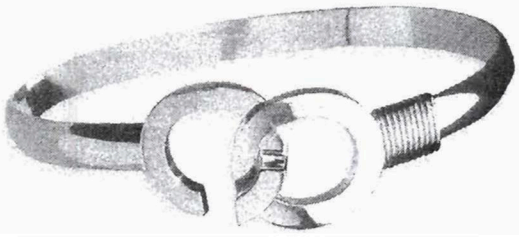
Dear Mr. Crilly:

The Review Board of the United States Copyright Office ("Board") is in receipt of your second request for reconsideration of the Registration and Recordation Program's refusal to register the work entitled *Ocean City Hook Bracelet*. You submitted this request on behalf of your client, Montesino International Corp., on December 22, 2010. I apologize for the lengthy delay in the issuance of this determination. After periods of inaction, staff departures, and budgetary restrictions, the Register of Copyrights has appointed a new Review Board and we are proceeding with second appeals of registration refusals as expeditiously as possible.

The Board has examined the application, the deposit copy, 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 and Recordation 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

Ocean City Hook Bracelet ("Work") is a jewelry design comprised of a simple, flat band with a circular shape resembling the letter "O" affixed to one end of the band and a circular shape resembling the letter "C" affixed to the opposite end of the band. The "O" and "C" elements are capable of interlocking to form the clasp of a bracelet. A series of ten adjacent rings or wraps are attached to the portion of the band where the circular design element resembling an "O" meets the band. The below image is a photographic reproduction of the Work from the deposit material:



II. ADMINISTRATIVE RECORD

On March 17, 2010, the United States Copyright Office ("Office") issued a letter notifying Montisino International Corp. ("Applicant") that it had refused registration of the above mentioned Work. *Letter from Registration Specialist Guy Messier to Daniel Crilly* (March 17, 2010). 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 June 15, 2010, you requested that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusal to register the Work. *Letter from Daniel Crilly to Copyright RAC Division* (June 15, 2010). Your letter set forth the reasons you believed 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 sculptural authorship upon which to support a copyright registration" and again refused registration. *Letter from Attorney-Advisor Virginia Giroux-Rollow to Daniel Crilly* (September 23, 2010) (emphasis original).

Finally, in a letter dated December 22, 2010, 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 Daniel Crilly to Copyright R&P Division* (December 22, 2010) ("Second Request"). In support of your position that the work should be registered, you offer two primary arguments:

First, you argue that 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). In support of this argument, you claim that the Applicant carefully selected and combined the individual elements that comprise the Work to give the Work a meaning that is not present when the elements are evaluated independently. Specifically, you assert that the Applicant's claim of copyright is directed to the unique arrangement of an "originally-created fishing net" and an "originally-created fish hook" to form "a work of applied art" suggestive of "the extremely popular sports fishing industries" in Ocean City, Maryland and Ocean City, New Jersey. In addition to *Feist*, your argument references the following cases: *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101 (2nd Cir. 2001); *Atari Games Corp. v. Oman*, 888 F.2d 878 (D. D.C. 1989); *Weindling Int'l Corp. v. Kobi Katz, Inc.*, 56 U.S.P.Q.2d 1763 (S.D.N.Y. 2000); and *Knitwaves, Inc. v. Lollytogs, Ltd.*, 71 F.3d 996 (2nd Cir. 1995), among others. *Second Request* at 2-3.

Second, you argue that the sculptural features of the Work can be identified separately from, and are capable of existing independently of, the functional or utilitarian aspects of the Work's clasping mechanism. Your argument references the following cases: *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 993-94 (2d Cir. 1980); *Carol Barnhart, Inc. v. Econ. Cover Corp.*, 773 F.2d 411, 419 (2d Cir. 1985); *Pivot Point Int'l, Inc. v. Charlene Prods., Inc.*, 372 F.3d 913, 931 (7th Cir. 2004); and *Brandir Int'l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1145 (2d Cir. 1987). *Second Request* at 4-5.

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 minimus* 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").

Of course, some combinations of common or standard design elements may contain sufficient creativity, with respect to how they are juxtaposed or arranged, to support a copyright. *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"). However, not every combination or arrangement will be sufficient to meet this grade. Ultimately, the determination of copyrightability in the combination of standard design elements rests on whether the selection, coordination, or arrangement was done in such a way as to result in copyrightable authorship. *Id.*

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*, 262 F.3d at 109. However, as noted, the mere simplistic arrangement of non-protectable elements does not automatically establish the level of creativity necessary to warrant protection. To illustrate, 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) (holding "[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.") (internal citations omitted) (emphasis 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. 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 *Ocean City Hook 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 circular shape resembling the letter "O"; (2) a circular shape resembling the letter "C"; (3) a series of ten adjacent rings or wraps; and, (4) a simple flat band. Regarding the "O" and "C" shaped elements, these characters are unprotectable "lettering" or "variations of typographic ornamentation." *Id.*; *see also Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 498-99 (S.D.N.Y. 2005). Regarding the "rings" and "band" elements, these common shapes are unprotectable "familiar symbols or designs." 37 C.F.R. § 202.1(a); *see also Feist*, 499 U.S. at 363. Accordingly, none of the Work's constituent elements are copyrightable, and hence registerable 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 above, the Board accepts the principle that combinations of geometric shapes may be eligible for copyright protection, provided they contain some distinguishable variation in the selection, coordination, or arrangement of elements that is not so obvious or minor that the "creative spark is utterly lacking or so trivial as to be nonexistent." *Feist,* 499 U.S at 359; *see also Atari Games,* 888 F.2d at 883. The Work, however, whether viewed as a combination of its constituent elements; or, as an "originally-created fishing net" and an "originally-created fish hook," lacks the requisite creative spark. The design is, at best, a simple variation of common shapes, ineligible for protection under the Copyright Act. *See Feist* 499 U.S. at 359; *see also Satava v. Lowry*, 323 F.3d at 811.

Finally, the Board has considered the separability argument you make in your second request for reconsideration of registration. *Second Request* at 4-5. We conclude that, because neither the Work as a whole, nor its constituent elements, possess sufficient creativity to warrant registration, we need not analyze whether the Work is a useful article or whether its design elements are separable from a utilitarian function. *See Esquire, Inc. v. Ringer,* 591 F.2d 796, 800 (D.C. Cir. 1978), *cert. denied,* 440 U.S. 908 (1979) (finding although works which may be useful articles themselves, or are incorporated into a useful article, are eligible for protection, such protection only extends to the pictorial, graphic, or sculptural features that can be identified separately from, and are capable of

existing independently of, the utilitarian aspects of the article.) As explained above, the Work lacks sufficient creativity for copyrightability. Thus, even if assessed independently under a separability analysis, the Work would not warrant registration.

In sum, the Board finds that both the individual elements that comprise the Work, as well as the Applicant's selection, organization, and arrangement of those elements lack the sufficient level of creativity to make them registerable under the Copyright Act.

IV. CONCLUSION

For the reasons stated herein, the United States Copyright Office Review Board affirms the refusal to register the work entitled, *Ocean City Hook Bracelet*. 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