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August 18, 1997

**RE: Baby Gold Jewelry, Inc., BG14K-B0400 and Eight Others**
Control No. 60-406-8815(W)

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Dear Mr. Weingram:

This is in response to your letter dated August 22, 1996, addressed to David Levy, Attorney-Advisor, Visual Arts Section, appealing on behalf of your client, Baby Gold Jewelry, Inc., the Copyright Office's refusal to register BG14K-B0400, BO315, BO314, EO203, EO210, EO204, BO311, BO431, and BO440 (hereinafter "BG14K-BO400 and Eight Others"). We apologize for the delay in our response. The works in this appeal consist of nine jewelry designs. Your letter was forwarded to the Copyright Office Board of Appeals.

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The Copyright Office Board of Appeals has examined the claims and considered all correspondence from your firm regarding these claims. After carefully reviewing the claims, the Board of Appeals affirms the Examining Division's decision to refuse registration because the jewelry designs consist of common shapes or symbols which do not contain copyrightable subject matter, and which are also not combined in a way that adds to the copyrightability of the works.

**Administrative Record**

The Copyright Office received the applications for registration of these works on September 26, 1994. In a letter dated December 12, 1994, Visual Arts Examiner John Ashley notified you that the Copyright Office could not register the nine jewelry designs, because they lack the artistic or sculptural authorship to support a copyright claim. The letter stated that familiar shapes, symbols and designs are not registrable, and that minor variations or combinations of basic geometric shapes do not support a copyright registration.

In a letter dated April 12, 1995, you appealed the Office's refusal to register BG14K-B0400 and Eight Others. In your letter, you asserted that the jewelry's overall shape and arrangement rendered the works copyrightable. You cited the statement in Copyright Office Circular 1 that the section 102(a) "categories" of copyrightable works should be viewed broadly. You quoted Trifari, Krussman & Fischel, Inc. v. Charel Co., Inc., et al., 134 F. Supp. 551 (S.D.N.Y. 1955), to the effect that a work need not be strikingly unique or novel if it reflects a distinguishable variation from what has gone before. You listed each submitted item with a description of each individual work.

On March 11, 1996, the Copyright Office issued a second refusal to register BG14K-B0400 and Eight Others. In the letter, Visual Arts Section attorney David Levy agreed that sculptural works constitute a class of works that fall within the area of copyrightability under section 102 of the Copyright Act. Here, the use of Form VA is correct and the description "jewelry design" is appropriate, Mr. Levy explained, but the jewelry designs do not contain the original authorship necessary to support a registration. The Office distinguished Trifari as involving a jewelry design of greater complexity than the Baby Gold works. As Mr. Levy noted, all nine jewelry items here consist of uncopyrightable public domain elements. He cited case law including Forstmann Woolen Co. v. J.W. Mays, Inc., 89 F.Supp. 964 (E.D.N.Y. 1950), and Bailie v. Fisher, 258 F.2d 425 (D.C. Cir. 1958).

You made your second request for reconsideration in a letter dated August 22, 1996. You enclosed an affidavit of your own expert testimony asserting the originality and copyrightability of the Baby Gold jewelry, and declared that the jewelry has comparable creativity to artists of the Minimalist or Dada periods. You asserted that common geometric shapes, or familiar symbols and designs, can support a registration, and that the determination of what is the requisite "minimal" amount of original copyrightable expression is not within the purview of the Copyright Office.

**Categories of Copyrightable Works**

In your correspondence, you cited a statement from Copyright Office Circular 1 to the effect that the "categories" of copyrightable works described in section 102(a) of the Copyright Act should be viewed broadly. The statement in Circular 1, however, is merely intended to guide applicants in selecting the most appropriate registration form. In this instance, the works in question clearly fall within the category of pictorial, graphic or sculptural works, but the jewelry designs submitted here do not contain sufficient original authorship to support a registration.

**Familiar Shapes and Designs**

Works of jewelry are copyrightable where they represent the "original, tangible expression of an idea rather than merely pleasing form dictated solely by functional considerations." Trifari, 134 F. Supp. at 553. Such works are registrable as pictorial, graphic and sculptural works under section 102(a)(5) of the copyright law. Again, the Office agrees with Trifari that copyrighted matter "need not be strikingly unique or novel," but that case held that an author must "contribute more than a merely trivial variation" of public domain elements, "something recognizably his own." 134 F. Supp. at 553. Accord, Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951).

In your letter, you asserted that the jewelry designs here under consideration contain identifiable and original copyrightable authorship, independent of known shapes, designs and functional influence.

The Board of Appeals, however, affirms the Examining Division's assessment that these designs represent familiar shapes and symbols, or uncopyrightable ideas, that are not combined or arranged in any way that adds copyrightable authorship. Specifically, the small chains, simple spherical beads, small heart shapes, and simple hoops that exhibited here are not copyrightable, and are not combined in a way that rises to the level of copyrightable authorship.

Under Copyright Office regulations, familiar symbols and designs are not copyrightable. 37 C.F.R. §202.1. This principle is supported by numerous judicial decisions. See John Muller & Co. v. New York Arrows Soccer Team, Inc., 802 F.2d 989 (8th Cir. 1986) (logo of four angled lines forming arrow with the word "Arrows" in cursive script held not copyrightable); Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc., 634 F. Supp. 769 (W.D.Pa. 1986) (envelopes printed with solid black stripes and a few words such as "priority message" or "gift check" did not exhibit minimal level of creativity necessary for copyright registration); Jon Woods Fashions, Inc. v. Curran, 8 U.S.P.Q. 2d (BNA) 1870 (S.D.N.Y. 1988) (upholding Register's decision that fabric design of striped cloth with grid of squares was not copyrightable); Bailie v. Fisher, 258 F.2d 425 (D.C. Cir. 1958) (cardboard star with circular center for photographs, and two folded flaps allowing star to stand for display, not a work of art within the meaning of 17 U.S.C. §5(g) (1909); and Forstmann Woolen Co. v. J.W. Mays, Inc., 89 F. Supp. 964 (E.D.N.Y. 1950) (nothing artistic about way in which plaintiff's name or legend "100 % Virgin Wool" appeared on label, and no originality displayed in form or representation of fleurs de lis).

**Creativity Comparable to Minimalist Art**

You asserted in your correspondence and affidavit that these works exhibit as much copyrightable authorship as works of artists of the Minimalist or Dada periods. However, aesthetic value or representations of particular art theories do not determine copyrightability. Relative artistic merit is not material or relevant in determining copyrightablity. Trifari, Krussman & Fischel, Inc. v. Charel Co., 134 F. Supp. at 552. Whether a work is copyrightable rests solely on the nature and quantity of the fixed expression reflected in the work.

**Discretion of Copyright Office**

Finally, you argued in your correspondence that determining what is a minimal amount of copyrightable expression is not in the purview of the Copyright Office. Section 410(a) of the current Copyright Act vests the Register with the power to examine and determine whether material deposited constitutes registrable matter. 17 U.S.C. §410(a) (1994). Section 410(b)

states that "[i]n any case in which the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited does not constitute copyrightable subject matter or that the claim is invalid for any other reason, the Register shall refuse registration..." Id. §410(b). Considerable weight is given to an agency's interpretation of its regulations, and the Register's discretion in this regard is clearly recognized by the courts. The Copyright Act "establishes a wide range of selection within which discretion must be exercised by the Register in determining what he has no power to accept." Esquire v. Ringer, 591 F.2d 796, 805-06 (D.C. Cir. 1978), cert. denied, 440 U.S. 908 (1979) (quoting Bouve v. Twentieth Century-Fox Film Corp., 122 F.2d 51, 53 (D.C. Cir. 1941)). Accord, Custom Chrome, Inc. v. Ringer, 35 U.S.P.Q. 2d 1714 (D.D.C. 1995); Jon Woods Fashions Inc. v. Donald Curran, 8 U.S.P.Q. 2d (BNA) 1870 (1988); John Muller & Co. Inc. v. New York Arrows Soccer Team, Inc., 802 F.2d 989 (8th Cir. 1986); 1 Nimmer on Copyright §2.08 [B][1].

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

This letter constitutes final agency action.

Sincerely,

Nanette Petruzzelli

Nanette Petruzzelli
Acting General Counsel
for the Appeals Board
U.S.Copyright Office

Edward R. Weingram, Esq.
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August 18, 1997

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Washington
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20559

February 5, 1997

**RE: Baby Gold Jewelry, Inc., BG14K-1987 and 9 OTHER TITLES**[1]
Control No. 60-406-8917 (W)

Dear Messrs. Weingram and Cohen:

This is in response to your letter dated August 22, 1996, addressed to David Levy, Attorney-Advisor, Visual Arts Section, appealing on behalf of your client, Baby Gold Jewelry, Inc., the Copyright Office's refusal to register BG14K-1987 and 9 Other Titles. The works consist of nine jewelry designs, and one work described as "Catalog – Arts & Photos." The catalog is a manual with color pictures displaying the jewelry works. Your letter was forwarded to the Copyright Office Board of Appeals.

The Copyright Office Board of Appeals has examined the claims and considered all correspondence from your firm regarding these claims. After carefully reviewing the claims, the Board of Appeals affirms the Examining Division's decision to refuse registration because the jewelry designs consist of common shapes or symbols which do not contain copyrightable subject matter, and which are also not combined in a way that adds to the copyrightability of the works.

**Administrative Record**

The Copyright Office received the applications for registration of these works on September 26, 1994. In a letter dated December 5, 1994, Visual Arts Examiner John H. Ashley notified Mr. Weingram that the Office could not register the nine jewelry designs because they do not exhibit the original and creative authorship required by law to support a

[1] In its initial letter refusing registration, the Office notified your office that it could not register "BG14K-1987" (the jewelry catalog) because it was published without copyright notice prior to the effective date of U.S. adherence to Berne, and without corrective registration within five years of publication. In your First Appeal of April 5, 1995, you indicated that you would respond to the allegation that the catalog was unregistrable due to publication without notice, but you actually appealed only the rejection of the other 9 works. In your Second Appeal of August 22, 1996, you did not mention the catalog or the notice issue. The Office has therefore closed the file with respect to the catalog. It is the catalog that is entitled "BG14K-1987;" the other titles which are the subject of this final appeal are: NNC1, NO948, RNC6, EO669PI, RO951, EO214, NO600, N700, and KO762.

copyright claim. The letter said that the design elements used are considered non-copyrightable and the overall designs are considered de minimis.

On April 5, 1995, Mr. Cohen appealed the Office's refusal to register the nine jewelry designs. He claimed that there existed "identifiable, artistic, copyrightable material in the jewelry designs." He quoted Tifari, Krussman & Fischel, Inc. v. Charel Co., 134 F. Supp. 551 (S.D.N.Y. 1955):

> That cab necklaces had previously been manufactured does not foreclose copyright of an article which in whole or in part consists of a cab [if] the author's artistic expression... reflects a distinguishable variation from what had gone before. The copyrighted matter need not be strikingly unique or novel.

Mr. Cohen listed each of the submitted items, describing each work individually, and argued that the works represented "original and creative authorship exercised independently of known designs and functional influence" and were "delicately designed" for young children.

On March 7, 1996, the Copyright Office issued its second refusal to register "BG14K-1987 and 9 Other Titles." The letter, drafted by Visual Arts Section Attorney Advisor David Levy, noted that words and short phrases; familiar symbols and designs (such as hoops, halos, and hearts); and elements such as finely beveled edges, smooth surfaces, or simple graduated steps, are not copyrightable. Mr. Levy noted that determination of copyrightability has nothing to do with the work's "aesthetic or commercial value," but with "whether there is sufficient creative authorship within the meaning of the copyright law and settled case law." Mr. Levy cited case law supporting the Office position, including Forstmann Woolen Co. v. J.W. Mays, Inc., 89 F. Supp. 964 (E.D.N.Y. 1950) (reproduction of standard fleur de lis could not support a copyright claimant without additional original authorship); and SCOA Indus., Inc. v. Famolare, Inc., 192 U.S.P.Q. 216 (S.D.N.Y. 1976) (troughs, lines and waves on shoe sole not separately identifiable and not independently existing or copyrightable). He said that, while the Office agrees with Trifari that a work need contain only a distinguishable variation from what has gone before, the "cabs" in that case were more complex than the works at hand because "each was surrounded by a narrow graduated rim of metal folded around and over parts of the cab."

On August 22, 1996, Mr. Weingram wrote to Mr. Levy, requesting reconsideration for a second time. He enclosed an affidavit of his own expert testimony asserting the originality and copyrightability of the jewelry works. He attached text from a modern art book, published by Harcourt Brace Jovanovich, concerning art that he held comparable to the works in question, and noted:

> [A]pplicant's Work is a Work of genius and artistic excellence in the same manner as the Works of Joseph Beuys, Al Held, Dorothea Rockburne and other artists exhibiting **Minimalist** expression... Clearly these Works have as much right to copyright protection as any of the Works of Al Held or Dorothea Rockburne...

Citing Held's South Southwest (a work of cubes and circles), and Rockburne's Velar Combination Series (a work with pencil traces creating crosses, triangle, bisections and other basic geometric forms), Mr. Weingram asserted that "common geometric shapes or familar shapes, symbols and designs can contain sufficient sculptural authorship to support a copyright registration." He further asserted that the determination of what is a "minimal" amount of original copyrightable expression does not fall within the purview of the Copyright Office.

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In your correspondence, you cited a statement from Copyright Office Circular 1 to the effect that the "categories" of copyrightable works described in section 102(a) of the Copyright Act should be viewed broadly. This statement in Circular 1, however, is merely intended to guide applicants in selecting the most appropriate registration application form. In this instance, the works in question clearly fall within the category of pictorial, graphic or sculptural works, but the jewelry designs submitted here do not contain sufficient original authorship to support a registration.

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In your letter, you asserted that the jewelry designs here under consideration contain identifiable and original copyrightable authorship, independent of known shapes, designs and functional influence.

However, the Board of Appeals affirms the Examining Division's assessment that these designs represent familiar shapes and symbols or uncopyrightable ideas. Moreover, the familiar shapes here were not combined or arranged in a way that adds copyrightable authorship. For example, familiar shapes such as hearts are not copyrightable, and mounting or dangling a stone or gem inside a heart does not constitute copyrightable authorship. Simple combinations of familiar shapes, such as inscribing a heart in the center of a cross, do not create a copyrightable design. Placing words or phrases, such as "Little Angel" with a halo, "Grandma Loves Me" with hearts, or "February" with a birthstone, on a jewelry item constitutes an uncopyrightable design where the simple combination of words and short phrases with a familiar symbol does not rise to the level of copyrightability. Simple or common ring shapes that broaden to display an engraved starburst or flower such as in RO951, or a smooth surface as in RNC6, are also not protectable by copyright. As stated in the Office's March 7, 1996 letter, elements such as finely beveled edges, smooth surfaces, or simple graduating steps do not reflect copyrightable, two-dimensional jewelry design.

Under Copyright Office regulations, familiar symbols and designs are not copyrightable. 37 C.F.R. §202.1. This principle is supported by numerous judicial decisions. See John Muller & Co. v. New York Arrows Soccer Team, Inc., 802 F.2d 989 (8th Cir. 1986) (logo of four angled lines forming arrow with the word "Arrows" in cursive script held not copyrightable); Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc., 634 F. Supp. 769 (W.D.Pa. 1986) (envelopes printed with solid black stripes and a few words such as "priority message" or "gift check" did not exhibit minimal level of creativity necessary for copyright registration); Jon Woods Fashions, Inc. v. Curran, 8 U.S.P.Q. 2d (BNA) 1870 (S.D.N.Y. 1988) (upholding Register's decision that fabric design of striped cloth with grid of squares was not copyrightable); Bailie v. Fisher, 258 F.2d 425 (D.C. Cir. 1958) (cardboard star with circular center for photographs, and two folded flaps allowing star to stand for display, not a work of art within the meaning of 17 U.S.C. §5(g) (1909); and Forstmann Woolen Co. v. J.W. Mays, Inc., 89 F. Supp. 964 (E.D.N.Y. 1950) (nothing artistic about way in which plaintiff's name or legend "100 % Virgin Wool" appeared on label, and no originality displayed in form or representation of fleurs de lis).

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