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OFFICE

June 23, 1997

Re: Fluted Band and Remount Sopris Collection
Control Number 60-414-4742(K)

Single Stone Mesh Summit Collection
Control Number 60-414-6577(S)

LIBRARY
OF
CONGRESS

Dear Mr. DuBoff:

This letter concerns the works FLUTED BAND AND REMOUNT SOPRIS COLLECTION and SINGLE STONE MESH SUMMIT COLLECTION which your client, Scott Keating, wishes to register with the Copyright Office. The applications, deposits, and correspondence between you and the Copyright Office were reviewed by the Copyright Office Appeals Board in response to your requests that the Office reconsider its decisions that the collections did not contain copyrightable works. The Board concludes that the above referenced works can not be registered because they do not contain sufficient original authorship to support copyright registration.

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Fluted Band and Remount Sopris Collection

The Copyright Office received a VA application to register the jewelry designs/ three-dimensional sculptures included in the FLUTED BAND AND REMOUNT SOPRIS COLLECTION from Scott Keating on May 26, 1995. The deposited photographs depicted seven rings.

The Office sent a letter dated August 31, 1995, to Mr. Keating explaining that the collection could not be registered because the works within it lacked the artistic or sculptural authorship necessary to support a copyright claim. The jewelry shown in the photographs deposited consisted of familiar designs and shapes which could not be registered under 37 C.F.R. §202.1.

In a letter dated December 18, 1995, you, as representative of Scott Keating, requested reconsideration of the Office's refusal to register the collection. You claimed that the pieces in the FLUTED BAND AND REMOUNT SOPRIS COLLECTION exhibited "the requisite degree of individuality to render them appropriate material for protection" [your letter of December 18, 1995 at 1] and asserted that the

works contained sufficient original sculptural authorship to support registration. You also claimed that the arrangement and combination of elements in the rings comprised copyrightable authorship, citing several cases as support, including Reader's Digest v. Conservative Digest, Inc., 821 F.2d 800 (D.C. Cir. 1987); Amplex Mfg. Co. v. ABC Plastic Fabricators, Inc., 184 F.Supp. 285 (E.D. Pa. 1960); Rundstadler Studios, Inc. v. MCM Limited Partnership, 768 F.Supp. 1292 (N.D. Ill. 1991); Pantone, Inc. v. A.I. Friedman, Inc., 296 F.Supp. 545 (S.D.N.Y. 1968); Atari Games Corp. v. Oman, 979 F.2d 242 (D.C. Cir. 1992); and North Coast Industries v. Jason Maxwell, Inc., 972 F.2d 1031 (9th Cir. 1992).

The Office responded to your first request for reconsideration in a letter dated September 16, 1996, from David Levy, Attorney-Advisor of the Visual Arts Section. After reviewing the works and your arguments supporting registration, the Office concluded that it could not register the jewelry collection. The items in the collection consisted of double circular bands with square stones attached at certain intervals; under 37 C.F.R. § 202.1, these items, consisting of familiar symbols and designs and their combinations, are not copyrightable. Our September 16, 1996, letter also indicated that any subtleties added to these works to make them distinctive or individual did not rise to the level of authorship necessary to support a copyright registration. The Office agreed with your assertion that under Feist Publications v. Rural Telephone Service Co., 499 U.S. 340 (1991), the requisite level of creativity for copyright protection is low, but explained that the works in the collection submitted did not meet the Feist standard.

In addition, the Office noted that the works involved in Reader's Digest (arrangement and layout of design elements of magazine cover contains authorship that is copyrightable as "original work of authorship"), Atari (modest degree of creative authorship embodied in video game was copyrightable), and Pantone (arrangement and combination of bars of color in color matching system entitled to copyright protection) all embodied more complex arrangements or designs of uncopyrightable elements that those in the FLUTED BAND collection.

You submitted a second request for reconsideration, dated December 6, 1996. Again you asserted that Feist supported your claim that the jewelry collection contained enough creativity to support a copyright registration, adding that jewelry works have "long been recognized as an art form." Your letter of December 6, 1996 at 3.

The Appeals Board's Decision

Works of jewelry are copyrightable when they represent the "original, tangible expression of an idea rather than merely pleasing form dictated solely by functional considerations." Trifari, Krussman & Fischel, Inc. v. Charel Co., 134 F. Supp. 551, 553 (S.D.N.Y. 1955). Such works may be registrable as pictorial, graphic and sculptural works under section 102(a)(5) of the 1976 Copyright Act. Copyrighted matter "need not be strikingly unique or novel" to support a registration, 134 F. Supp. at 553; and relative artistic merit is not material or relevant in determining copyrightability. Id. at 552. However, the court in Trifari held that an author must "contribute more than a merely trivial variation" of public domain elements, "something recognizably his own" to sustain registration. Id. Accord, Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951). Whether a work is copyrightable rests solely on the nature and quantity of the fixed expression reflected in the work.

Copyright Office regulations state that familiar symbols and designs are not copyrightable. 37 C.F.R. §202.1. This principle is supported by judicial decision. For example, in John Muller & Co. v. New York Arrows Soccer Team, Inc., 802 F.2d 989 (8th Cir. 1986), the appeals court held not copyrightable a logo consisting of four angled lines forming an arrow with the word "Arrows" in cursive script. The Eighth Circuit agreed with the Copyright Office that the logo design in question there lacked the minimal creativity necessary to support a copyright. In Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc., 634 F.Supp. 769 (W.D.Pa. 1986), the court held that envelopes printed with solid black stripes and a few words, such as "priority message" or "gift check" did not exhibit the minimal level of creativity necessary for copyright registration. In Magic Marketing the district court cited NIMMER, in recognizing the distinction between the concept of **originality** which, in the copyright setting, means that a work is the product of independent creation and the concept of **creativity**, which addressed the particular nature, composition, and configuration of a work. "There is a narrow class of cases where even admittedly independent efforts may be deemed too trivial or insignificant to support copyright protection," 634 F. Supp. at 771, quoting 1 NIMMER ON COPYRIGHT 2.01[B] at 2-13 (1985).

The 1991 Supreme Court ruling in Feist Publications v. Rural Telephone Service Co., 499 U.S. 340 (1991) confirmed the low standard for determining the copyrightability of a work. The ruling also explicitly recognized, however, that some works, such as white-page, alphabetical listings of phone books, failed that low standard for copyrightability. And, pre-Feist, case law indicated that not all works of the visual arts met the low threshold for copyrightability. See, e.g., John Muller & Co. supra; Durham Industries, Inc. v. Tomy Corp., 630 F.2d 905 (2d Cir. 1980); Sherry Mfg. Co.

v. Towel King of Florida, 753 F.2d 1565 (11th Cir. 1985); Towle Mfg. Co. v. Godinger Silver Art Co., 612 F. Supp. 986 (S.D.N.Y. 1986).

The Board also reviewed the cases you cited in support of your arguments in requests for reconsideration, and distinguished the works at issue in those cases from the jewelry in the FLUTED BAND AND REMOUNT SOPRIS COLLECTION. In Reader's Digest v. Conservative Digest, Inc., 821 F.2d 800 (D.C. Cir. 1987), the design at issue embodied an arrangement of design elements consisting of a selection of blocks/rectangles reflecting a several-color scheme with text elements woven within the block design and not following any standard layout structure which qualified the magazine cover as a work of copyrightable authorship. In contrast, the rings in FLUTED BAND AND REMOUNT SOPRIS COLLECTION appear to be double circular bands with a mounting containing a stone placed at fairly regular intervals along the band, and, in one case, a large basically rectangular stone with a smaller similar-shaped stone to each side. Such familiar shapes and their combination do not embody sufficient original authorship, in whole or as separate elements, to sustain a registration.

In Amplex Mfg. Co. v. ABC Plastic Fabricators, Inc., 184 F.Supp. 285 (E.D. Pa. 1960), the court found copyrightable an arrangement of public domain elements (typeface lettering of a particular size set on a dark background) that embodied a "distinguishable variation in the arrangement and manner of presentation...." Id. at 288. The collection of rings in question here does not reflect a sufficiently "distinguishable" arrangement of familiar elements which consists of a circular band with several square or rectangular stones and which does not rise to the level required by settled case law, including Feist, to allow the collection to be registered.

Rundstadler Studios, Inc. v. MCM Limited Partnership, 768 F.Supp. 1292 (N.D. Ill. 1991), concerned a sculpture consisting of 39 pieces of rectangular glass. The court found the copyright claim in the work to be valid. Referring to Feist, the court noted that to be copyrightable, a work must be independently created and must embody sufficient creativity. The Appeals Board does not disagree that FLUTED BAND was independently created. Also, the Board agrees that a combination of standard shapes may embody a minimal level of creativity required for copyright protection. In Rundstadler, the court found that the arrangement and composition of the 39 glass pieces of the work expressed more than a trivial degree of original authorship, and that the work was copyrightable. Analyzing the FLUTED BAND collection, the Appeals Board could not find comparably complex copyrightable expression in the arrangement and composition of the common shapes and features of the rings.

The court in Pantone, Inc. v. A.I. Friedman, Inc., 294 F.Supp. 545 (S.D.N.Y. 1968) recognized the copyrightability of a booklet that contained pages showing color shade variations together with the formulae for duplicating them and the plaintiff's serial numbers. This arrangement was deemed to embody more than a trivial variation, combination, and arrangement of public domain colors, and was, therefore, judged to be subject to copyright protection. The rings in the FLUTED BAND collection, again, do not express sufficient design authorship, beyond a simple combination of commonly-shaped elements, to sustain registration. The Appeals Board agrees with the Pantone court that novelty is not the standard used to examine a work for copyrightable expression, and agrees that the threshold level of original authorship which must be expressed in a work is low. But the authorship in the individual rings in this collection is de minimis and cannot be registered.

In Atari Games Corp. v. Oman, 979 F.2d 242 (D.C. Cir. 1992), the court referred to the Supreme Court's articulation that "the requisite level of creativity [for copyrightability] is extremely low" Id. at 243 (citing Feist Publications v. Rural Telephone Service Company, 111 S.Ct. 1282, 1287 (1991)), and reversed and remanded the case to the district court with instructions to return the matter of Atari's application for copyright registration for the video game BREAKOUT to the Register of Copyrights for reconsideration consistent with the Appeals Court's opinions, inter alia, that: 1) simple geometric shapes and coloring alone are not copyrightable, and 2) copyrightable works must contain a "minimal creative spark" to be registered, and 3) when they do "make that grade," such works must be registered when the applicant so requests. The Appeals Board, again, applying the Feist standard to the FLUTED BAND rings, has determined that the jewelry in the collection consists of simple geometric shapes where the combination and arrangement of such shapes, resulting in common geometric designs and being few in number, does not rise to the level of protectible authorship.

North Coast Industries v. Jason Maxwell, Inc., 972 F.2d 1031 (9th Cir. 1992) held that the copyrightability of a color box geometric pattern design was an issue to be decided by a jury and the Ninth Circuit did not rule on the copyrightability of the particular design before it.

Single Stone Mesh Summit Collection

The issue concerning registration of this collection is also whether the individual jewelry works in the collection embody more than de minimis authorship. The Appeals Board thoroughly reviewed the record in the case of the SINGLE STONE MESH SUMMIT COLLECTION and determines that the works can not be registered

because the works in the collection do not embody sufficient original copyrightable authorship.

The Copyright Office received an application to register SINGLE STONE MESH SUMMIT COLLECTION as a work of jewelry design/sculpture on May 10, 1995. The collection contained bracelets, necklaces, and a ring, each comprised of gold ropelike banding within which a single stone was set. Each stone is bordered by a thin line circling the stone or by a thin strip of stones.

In a letter dated August 16, 1995, the Office notified the claimant that the works could not be registered because they lacked the artistic or sculptural authorship needed to support registration. The letter also noted that works embodying only familiar shapes or designs could not be registered without additional original authorship. 37 C.F.R. § 202.1.

In a letter dated December 8, 1995, you responded, requesting reconsideration of the Office's rejection. You claimed that items in the SINGLE STONE MESH SUMMIT COLLECTION exhibited "the requisite degree of individuality to render them appropriate material for protection." You cited the Feist case for the proposition that the level of creativity required for copyrightability is low. You also cited cases referenced above in the discussion of FLUTED BAND AND REMOUNT SOPRIS COLLECTION, including Reader's Digest, Rundstadler, Pantone, Amplex and North Coast, to argue that, although individual elements of a work may not be copyrightable, combinations of elements may be distinctive enough to be registered.

The Office responded in a letter dated September 20, 1996, describing the works in question and explaining again that the works consisted of familiar symbols and designs which cannot be registered under 37 C.F.R. § 202.1. Any subtleties added to the three-dimensional works to make them attractive did not rise to the level of authorship required to support a copyright registration, nor was the arrangement of the individual elements in the pieces copyrightable. The Office agreed that under the Feist case the requisite level of creativity for copyright protection is low, but noted that the jewelry works did not meet the Feist standard. In addition, the Office distinguished cases you cited in your correspondence as involving works that embodied original authorship in their overall arrangements and combinations of common elements such that they represented a sufficient level of copyrightable authorship.

In your letter of December 6, 1996, asking for a reconsideration of the Office's refusal to register Single Stone Mesh Summit, you repeated the points you raised in your request for reconsideration of Fluted Band and Remount Sopris Collection.

The Appeals Board's Decision

The jewelry in this collection does not embody sufficient original authorship under settled case law to support copyright registration. The Board, as in the Sopris Collection, considered whether the works in the collection could be registered for any individual elements or for their overall arrangement and combination of elements, and found that the works in the collection did not embody sufficient copyrightable authorship. Again, the individual jewelry pieces in the Stone Mesh Summit Collection consist of ropelike bands containing a stone setting which stone is bordered by a straight line or strip of solid color or of small stones. Again, these pieces consist of simple shapes and common designs which are not copyrightable in themselves or within their overall combination. See Jon Woods Fashions, Inc. v. Curran, 8 U.S.P.Q. 2d 1870 (S.D.N.Y. 1988) in which the court upheld the Register's refusal regarding a fabric design consisting of a combination of stripes arranged with a grid of squares. In John Muller [see above], the combination consisted of four angled lines depicting an arrow outline combined with the word "Arrows." In Magic Marketing [see above], the combination for which copyright protection was sought consisted of a number of black stripes on an envelope's surface combined with a few works. All of these cases represent simple combinations or arrangements of familiar or common shapes and symbols closely analogous to the jewelry designs in the works at issue here.

Please see our discussion above of the cases which you cited in support of registration. Prevailing case law affirms the standards recognized by the Office that at least a minimal degree of creativity must be embodied in a work to enable it to be registered and, in addition, simple geometric shapes and symbols and their simple variations are not copyrightable elements. The SINGLE STONE MESH SUMMIT COLLECTION was examined for the presence of sufficient authorship and we must once again refuse registration.

The jewelry works that make up both of these collections may be attractive and may be commercial successful; however, the Appeals Board has concluded that the collections contain de minimis authorship because they consist of simple combinations of familiar shapes and, thus, are not registrable.

The Appeal Board's decisions regarding FLUTED BAND AND REMOUNT SOPRIS COLLECTION and SINGLE STONE MESH SUMMIT COLLECTION constitute final agency action.

Sincerely,

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June 23, 1997