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August 28, 2002

Charles L. LaPolla, Esq.
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1180 Avenue of the Americas
New York, NY 10036-8043

Re: BV JEWELS USA, INCORPORATED
Copyright Control Number: 60-714-8659 (O)

Dear Mr. LaPolla:

The Copyright Office Board of Appeals has reviewed your request for reconsideration of the Office's refusal to register the work submitted by your client, BV Jewels USA, Inc. The Appeals Board reviewed Marquise Look Bracelet.

The Board has determined that the above-referenced work cannot be registered. The design elements contain de minimis amounts of originality and do not rise to the level of copyrightability.

Administrative Record

On December 21, 1998 , the Copyright Office received application, deposits and fees for one work by BV Jewels USA, Incorporated; the work was described as jewelry design.

In a letter dated May 25, 1999, the Office notified you that registration for Marquise Look Bracelet was denied because it lacked the artistic or sculptural authorship necessary to support a copyright claim in jewelry design. Also, copyright examiner Joy Mansfield noted that copyright does not protect a familiar shape, symbol or design, typographic ornamentation, lettering, or mere variations in coloring.

First Appeal

In a letter received July 9, 1999, addressed to the Visual Arts Section of the Copyright Office, you sought reconsideration of the refusal to register Marquise Look Bracelet, arguing that jewelry is subject to copyright and that the Marquise Look Bracelet possesses creative designs that are conceptually separable from the utilitarian functions of the work. You also argued that the Marquise Look Bracelet is not merely a copy of common shapes, and that it contains more than a modicum of creativity and possesses sufficient originality to be registered under the Copyright Act.

Second Refusal to Register

On September 9, 1999 Attorney-Advisor Virginia Giroux of the Examining Division responded to your request for reconsideration of the refusal to register Marquise Look Bracelet.

Ms. Giroux agreed that costume jewelry can be the subject of copyright protection, assuming it meets the requirements of originality and creativity. She also explained that the Copyright Office does not view jewelry as a useful article and, therefore, it was not necessary to determine whether design elements are conceptually separable.

Ms. Giroux agreed that the standard for creativity is low, but concluded that the Marquise Look Bracelet did not meet even that low threshold. She wrote that the braided, spiral design of the bracelet is a familiar design and that stones are not copyrightable elements.

Second Appeal

You replied in a letter received January 19, 2000, the substance of which was identical to your letter requesting the First Appeal, requesting reconsideration of the Office's refusal to register Marquise Look Bracelet. You sought reconsideration of the refusal to register Marquise Look Bracelet, arguing that jewelry is subject to copyright and that the Marquise Look Bracelet possesses creative designs that are conceptually separable from the utilitarian functions of the work. You also argued that the Marquise Look Bracelet is not merely a copy of common shapes, and that it contains more than a modicum of creativity and possesses sufficient originality to be registered under the Copyright Act.

Final Refusal to Register

The Appeals Board agrees that costume jewelry may be subject to copyright protection. Moreover, works of jewelry generally are not considered to be useful articles; therefore, there is no need for the Board to address your arguments that the bracelet

exhibits physically and conceptually separable authorship.

The Board agrees with you that only a modicum of creativity is necessary for copyrightable expression. Feist Publications v. Rural Telephone Service Co., 499 U.S. 340 (1991). However, as the court observed in Feist,"as a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity." 499 U.S. 363, 340. And not all jewelry designs contain sufficient creative expression to support a copyright. DBC of New York, Inc. v. Merit Diamond Corp., 768 F. Supp. 414 (S.D.N.Y. 1991). The Board has determined that Marquise Look Bracelet fails to meet the requisite standard of creativity.

With respect to pictorial, graphic & sculptural works, the class within which Marquise Look Bracelet would fall (*see* 17 U.S.C. §102(a)(5)), the Compendium of Copyright Office Practices, Compendium II (1984) ("Compendium II") has long recognized this principle, stating that a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." Compendium II, §503.02(b)(1984). The Compendium recognizes that it is not aesthetic merit, but the presence of creative expression that is determinative of copyrightability, *id.*, and that "registration cannot be based upon standard designs which lack originality, such as common architecture moldings, or the volute used to decorate the capitals of Ionic and Corinthian columns. Similarly, it is not possible to copyright common geometric figures or shapes in three-dimensional form, such as the cone, cube, or sphere. The mere fact that a work of sculpture embodies uncopyrightable elements, such as standard forms of ornamentation or embellishment, will not prevent registration. However, the creative expression capable of supporting copyright must consist of something more than the mere bringing together of two or three standard forms or shapes with minor linear or spatial variations." *Id.* *See* also section 202.1(a) of the Copyright Office regulations, 37 C.F.R. §202.1(a) ("familiar symbols or designs" are "not subject to copyright and applications for registration of such works cannot be entertained").

This principle has been supported by numerous judicial decisions. *See* Jon Woods Fashions, Inc. v. Curran, 8 USPQ2d 1870 (S.D.N.Y. 1988) (upholding Copyright Office's refusal to register design consisting of striped cloth over which was superimposed a grid of 3/16" squares); John Muller & Co., Inc., v. New York Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986) (logo consisting of four angled lines forming an arrow, with the word "arrows" in cursive script below, found not copyrightable); Magic Market, 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); 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 claim without original authorship).

The Board adopts Ms. Giroux's description of the jewelry design:

> The jewelry design in question, repetitive in nature, consists of a series of two half-beads or diamonds in a marquis setting, each surrounded by a narrow elongated S-shaped rim of gold which appears to spiral around the entire length of the bracelet in such a manner that it creates a braided effect. The combination of the narrow rims of gold and the braided design they seem to create is a familiar helix design, or a minor variation thereof, in common usage.

You have not challenged this description of the bracelet, nor have you offered your own description.

Neither the helix design, nor the placement of the two gems between each repetition of the gold-rimmed helix, exhibits the creativity required for a copyright in a work of art. Moreover, the Board cannot accept your contention that "some of the stones themselves have been cut into unique configurations and placed in an unusual arrangement." You have not described the "unique configurations" into which the stones have been cut or the "unusual arrangement" of the stones, nor are they discernable from the photograph which you submitted as identifying material.

The Board is thus left to evaluate a claim to copyright in what appears to be a bracelet consisting of a simple spiral or helix of gold wire wrapped around pairs of gems. This simple combination of simple elements is insufficient to support a copyright registration. An "aggregation of well known components [that] comprise an unoriginal whole" cannot support a claim to copyright. Florabelle Flowers, Inc. v. Joseph Markovits, Inc., 296 F. Supp. 304 (S.D.N.Y. 1968); DBC, 768 F. Supp. at 415 ("DBC's gestalt theory that the whole is greater than the sum of its parts is rejected by the great weight of evidence indicating that these two rings are, on the whole, not exceptional, original, or unique").

The jewelry cases that you have cited do not alter this conclusion. The Board does not quarrel with the propositions of law announced in those cases and upon which you rely, but those propositions do not require a finding of copyrightability here.

Although Trifari Krussman & Fishel, Inc. v. Charel Co., Inc., 134 F. Supp. 551 (S.D.N.Y. 1955), states that copyrighted matter "need not be strikingly unique or novel," Trifari also held that an author must "contribute more than a merely trivial variation" of public domain elements, "something recognizably his own," and the court found the jewelry in that case to be copyrightable because it found that "plaintiff has contributed something substantial of its own to the prior art." 134 F. Supp. at 553. The passage from

PPS, Inc. v. Jewelry Sales Representatives, Inc., 392 F. Supp 373 (S.D.N.Y. 1975), that you quote relates to the well-known idea-expression dichotomy, *see* 17 U.S.C. §102(b), but offers no guidance on the issue of copyrightability. Moreover, the descriptions of the jewelry and other works involved in those cases either reveal jewelry involving more creative authorship than can be found in Marquise Look Bracelet, *see, e.g.*, PPS, or do not provide sufficient information to assist the Board in determining whether they involved jewelry that exhibited more or less creativity than Marquise Look Bracelet. *See, e.g.*, Trifari.

You also rely upon some cases involving works other than jewelry in support of your argument that the bracelet exhibits sufficient creativity, but those cases involved different types of works and offer no support for the claim of copyright in Marquise Look Bracelet. In Blazon, Inc. v. Deluxe Game Corp., 268 F. Supp 416 (S.D.N.Y. 1965), the court observed that the defendant simply failed to submit proof of originality to overcome the presumption of originality that resulted from the issuance of a certificate of copyright registration. The court did not discuss the degree of creativity in the defendant's model hobby horse. F.W. Woolworth Co. v. Contemporary Arts, Inc., 193 F.2d 163 (5th Cir. 1951), involved sculptures of dogs. Although the copyrightability of the sculptures does not appear to have been contested, the court observed that the "shape, ... proportion, form, contour, configuration, and conformation" of the sculptures constituted the "something irreducible" that the plaintiff "may copyright." 193 F.2d at 164. Those observations tell us nothing about whether your client's bracelet exhibits sufficient creativity to qualify for copyright protection. Alva Studios, Inc. v. Winninger, 177 F. Supp. 265 (S.D.N.Y. 1959), "[a]rguably, relied on a 'sweat of the brow'' rationale, which has now been discarded." 1 M.&D. Nimmer, Nimmer on Copyright, §3.03[C][3] at p. 3-20.7 n. 118 (2002).

Conclusion

For the reasons stated above, the Copyright Office Board of Appeals concludes that Marquise Look Bracelet cannot be registered for copyright protection. This decision constitutes final agency action.

Sincerely,

David O. Carson
General Counsel
for the Appeals Board
United States Copyright Office