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December 17, 2003

Steven R. Gustavson, Esq.
Baker Botts, LLP
30 Rockefeller Plaza, 44th Floor
New York, NY 10112 - 4498

Re: MULTISTONE MAGICAL SETTING COLLECTION
Control Number: 60-901-8188(B)

Dear Mr. Gustavson:

The Copyright Office Board of Appeals has reviewed your second request to reconsider the Examining Division's refusal to register the work MULTISTONE MAGICAL SETTING COLLECTION on behalf of the claimant Mr. Sing Keung Lai. After reviewing all materials submitted in support of the claim, including the registration application and identifying materials deposited for the work, the Board has determined that the work cannot be registered because it does not contain the requisite amount of original artistic or sculptural authorship.

I. Administrative record

A. Initial submission and Office refusal to register

On March 15, 2001, the Copyright Office received your client's application for registration of an unpublished collection of jewelry designs. By letter dated June 12, 2001, Visual Arts Examiner John Martin advised Mr. Lai that the claim could not be registered because the collection lacks the artistic or sculptural authorship necessary to support a copyright claim. Letter from Martin to Lai of 6/12/2001 at 1. As the basis for his decision, Mr. Martin pointed out that artwork or sculpture must contain at least a minimum amount of original artistic material and that copyright does not protect familiar symbols, designs or minor variations of basic geometric shapes, lettering and typography. He noted that ideas or concepts which may be embodied in the work are also not protected by copyright. Id. at 1.

B. First request for reconsideration

On October 10, 2001, you requested reconsideration of that decision, asserting that registration of this collection should be made based on its original combination of multiple design elements. Letter from Gustavson to Visual Arts Section of 10/10/2001 at 1-2. You observed that since the author of the designs maintains that they are designs of independent creation, the only question is whether the work "possesses at least some minimal degree of creativity," citing Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

Letter from Gustavson of 10/10/2001 at 1. Citing Diamond Direct, LLC v. Star Diamond Group, Inc., 116 F.Supp.2d 525, 528 (S.D.N.Y. 2000), you pointed out that "the quantum of originality necessary to invoke copyright protection is very small," and further cited Yurman Design, Inc. v. PAJ, Inc., 93 F.Supp.2d 449, 457-58 (S.D.N.Y. 2000), *rev'd on other grounds*, 262 F.3d 101 (2d Cir. 2001), and Weindling International Corp. v. Kobi Katz, Inc., 56 U.S.P.Q. 2d 1763, 1765 (S.D.N.Y. 2000) for the proposition that a combination of unoriginal jewelry design elements is capable of constituting an original design, even though the designs may be obvious in many respects. Letter from Gustavson of 10/10/2001 at 2.

Citing Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738 (9th Cir. 1971) (jeweled bee pin at issue), you acknowledged that copyright does not protect facts or ideas and you contrasted the idea or concept of a jeweled bee pin such as the one at issue in Kalpakian with a possible, copyrightable expression of that idea. You stated that the works contained in MULTISTONE MAGICAL SETTING COLLECTION are designs which are unique expressions of their underlying idea. You further stated that the different visual effects produced by the works at issue here are designs employing a "variety of types of prongs... in a multiplicity of positions and configurations." Finally, in citing Weindling, you referred to the fact that although the works at issue here might be commercial jewelry which may be designed in a "manner that is in many respects obvious," the ring designs evidence more than a flickering or trivial amount of intellectual labor and artistic expression and should be registered. Letter from Gustavson of 10/10/2001 at 2.

C. Examining Division response to first request for reconsideration

Attorney-Advisor Virginia Giroux, by letter dated February 12, 2002, advised you that the Examining Division could not register the copyright claim in the collection of jewelry designs because none of the works in the collection contained a sufficient amount of original and creative sculptural authorship to support registration. Letter from Giroux to Gustavson of 2/12/02 at 1. In setting out the principles governing registration, Ms. Giroux cited Feist [499 U.S. at 363] for the principle that a work must "possess more than a *de minimis* quantum of creativity." Ms. Giroux also cited Nimmer on Copyright, 2.01[B], for support in positing a category of works in which the quantum of creativity is too slight to sustain copyright. Letter from Giroux of 2/12/02 at 2. She pointed out that the Office examines a work to determine the presence of copyrightable authorship in its individual elements *per se* or in the combination of individual elements. Citing 37 C.F.R. 202.1, Ms. Giroux pointed out that common geometric shapes, such as squares, ovals, and rectangles, or minor variations of these simple shapes, are in the public domain and are not copyrightable. Letter from Giroux of 2/12/02 at 1. She also stated that, "[a] prong, no matter what its shape, is a functional aspect of the design of a piece of jewelry and is generally not protectible." Id. at 1-2. Ms. Giroux analyzed the prongs holding the stones in the works included in this collection as being functional and, that any sculptural aspect of the prongs within the designs were common shapes, too simple and unadorned to be considered copyrightable. Id. at 2.

Agreeing with your reference to Diamond Direct and Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903), for the proposition that even a slight amount of original authorship will suffice to sustain copyright, she nevertheless concluded that the sculptural and design features embodied in the designs in the collection at issue here, as well as the arrangement and combination of those features, fail to meet even the low threshold of copyrightability as that threshold was confirmed by the Feist decision. Ms. Giroux further cited Atari Games Corp. v. Oman, 979 F.2d 242 (D.C. Cir. 1992) in stating that the Office views a work of authorship in its entirety, "with individual noncopyrightable elements judged not separately but rather in their overall inter-relatedness within the work as a whole." Letter from Giroux of 2/12/02 at 3. She concluded, however, that even under this standard, the combination of the few design elements in the works included in this collection does not rise to the level of copyrightable authorship. Id. Ms. Giroux also distinguished the work involved in Weindling International Corp. v. Kobi Katz, Inc., 56 U.S.P.Q.2d 1763 (S.D.N.Y. 2000) from the works in the collection at issue here and, after describing the Kobi Katz bridge ring, concluded that it consisted of authorship consistent with the Feist standard whereas the works at issue here do not.

In her explanation of the general principles governing registration, Ms. Giroux accepted your assertion that the variety of the types of prongs used may provide different visual effects but pointed out that this fact did not, in itself, make the works at issue here copyrightable. She explained that "the effect or impression that a work conveys suggests some aspect of mental activity that goes to the mind of the viewer rather than to the composition of the work itself." In other words, the viewer's impression of the work—the aesthetic impact—does not automatically render a work copyrightable. She pointed out that while the artistic or sculptural elements of a work may be selected and arranged in a variety of ways, the possibility of design choices does not determine the copyrightability of the resultant expression. Ms. Giroux concluded that there are no graphic or sculptural features, either alone or in combination, that can sustain a copyright registration for the collection in question. Letter from Giroux of 2/12/2002 at 3.

D. Second request for reconsideration

On June 11, 2002, you again requested reconsideration [second appeal] of the refusal to register the claim in MULTISTONE MAGICAL SETTING COLLECTION. Letter from Gustavson to Board of Appeals of 6/11/02. You reemphasized the arguments made in the first request for reconsideration and you addressed the points made in Ms. Giroux's letter. You noted the agreement between the Office's position and your position regarding the level of originality and creativity necessary for copyright protection, but you disagreed with respect as to whether your client's work reaches that necessary threshold. Letter from Gustavson of 6/11/2002 at 1-2, again citing Feist and Diamond Direct. You emphasized that the particular design features at issue, even though they may be simple and unadorned and may possess few sculptural elements, are still unique expressions of the idea of multiple square / rectangular gemstones arranged in square or rectangular configurations. You described the works at

issue here as having a "variety of types of prongs in a multiplicity of positions and configurations, providing very different visual effects from previous designs." You further stated that the designs in question need not be ornate, inasmuch as it is originality and creativity, not a wealth of detail and complications that constitute copyrightable authorship. Letter from Gustavson of 6/11/02 at 1.

Disagreeing with Ms. Giroux's comparison, you further disputed whether Kalpakian and Yurman involved jewelry designs which were more complex in authorship than that in the instant works, and you again argued that while the prongs themselves and the stones *per se* may not be copyrightable, it is the "combination into an original design that has its overall distinctive feel" which entitles the works in question to registration. You cited Weindling in support of this position. Letter from Gustavson of 6/11/02 at 2. Finally, you reemphasized the importance of the concept of "overall distinctive feel" and again cited Weindling to state that the Weindling court's judgment of copyrightability of the ring in question there was premised upon the court's analysis of the "markedly different visual effect" of the rings at issue there from the visual effect of other rings. You concluded that that it is the different visual effect on the viewer "that is crucial to a determination of originality" and that such analysis focusing on the appearance of the jewelry should lead to a determination of copyrightability for the works at issue here. Letter from Gustavson of 6/11/02 at 2.

The Board of Appeals has reviewed the application as well as all material submitted in support of the registration at both the first and second levels of reconsideration and has found that this work, a collection of jewelry designs, does not exhibit the necessary quantum of creativity necessary to sustain registration. Our reasoning follows.

II. Decision

A. Description of works

Before proceeding with our discussion of the works, we take the opportunity to describe the jewelry designs included in this unpublished collection.

The works as they are shown in the deposited drawings consist of a prong setting which holds within it a configuration of stones. The base of the prong setting is "U"- shaped and, as seen in the deposit drawings submitted for registration, holds either four or nine stones is a square configuration. The tabs, or tips, of the prong setting which tips overlap and secure the outer four corners of the stone configuration, are themselves either oval, a minor variation of oval, rectangular, or square in their shaping.

B. The Feist standard

The fundamental basis of copyright protection is a work's originality. Originality has two components: independent creation and a certain minimum amount of creativity. Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 347 (1991). The Copyright Office applies the Feist principle in its consideration of whether a work is copyrightable. In the instant case, we assume the independent creation of the works by the author and claimant, Sing Keung Lai. Thus, it is the second prong of the Feist principle which we address. As both you and Ms. Giroux have already noted, the requisite quantum of creativity necessary for copyright is "very low." Letter from Gustavson of 6/11/02 at 1, citing Feist, 499 U.S. at 345. The Supreme Court has stated, however, 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." Feist at 363. There can be no copyright in works in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." Id. at 359. And, a work that reflects an obvious arrangement fails to meet the low standard of minimum creativity required for copyrightability. Id. at 362-363. An example would be alphabetical listings in the white pages of telephone books which the Supreme Court characterized as "garden variety...devoid of even the slightest trace of creativity." Id. at 362.

Even prior to Feist, Copyright Office registration practices following settled precedent recognized that some works of authorship contain only a *de minimis* amount of authorship and, thus, are not copyrightable. See Compendium of Copyright Office Practices, Compendium II, section 202.02[a] (1984). With respect to pictorial, graphic and sculptural works, the class to which the jewelry designs in MULTISTONE MAGICAL SETTING COLLECTION belong, Compendium II states that a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." Id. at 503.02[a]. Compendium II recognizes that it is not aesthetic merit, but the presence of creative expression that is determinative of copyrightability. Section 503.01 states:

> The registrability of a work does not depend upon artistic merit or aesthetic value. For example, a child's drawing may exhibit a very low level of artistic merit and yet be entitled to registration as a pictorial work.

Further, Section 503.02[a] states:

> [R]egistration cannot be based upon the simplicity of standard ornamentation such as chevron stripes, the attractiveness of a conventional fleur-de-lys design, or the religious significance of a plain, ordinary cross. Similarly, it is not possible to copyright common geometric figures or shapes such as the hexagon or the ellipse, a standard symbol such as an arrow or a five-pointed star. Likewise, mere coloration cannot support a copyright even though it may enhance the aesthetic appeal or commercial value of a work. ... The same is true of a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations."

We note your reference to, and Ms. Giroux's agreement with you concerning, Diamond Direct, LLC v. Star Diamond Group, Inc., 116 F. Supp. 2d 525 (S.D.N.Y. 2000), citing Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903) , 251 (1903) in support of the principle that the amount of originality and creativity needed for copyright protection is very low. We point out again, however, that something more than a trivial variation of elements found in the public domain must be present in a work. Feist at 363. *See also* Alfred Bell & Co., Ltd. v. Catalda Fine Arts, Inc., 191 F.2d 99, 102-103 (2d Cir. 1951): the Second Circuit cited its own precedent in stating the broad principle that works containing public domain or common elements must present a "distinguishable variation" and that an author must contribute "something more than a 'merely trivial' variation" in order to secure copyright protection.

In response to Ms. Giroux's analysis of the jewelry in question as being "too simple and unadorned to be considered copyrightable works of art," [Letter from Giroux of 2/12/02 at 2], you have stated that the designs are "unique expressions of the idea of multiple square rectangular gemstones featured in square or rectangular configurations." You further argue that the "variety of types of prongs are in a multiplicity of positions and configurations...;" that the designs are "original, in part because of the unexpectedly different treatment of the borders of the multiple stones;" and that "a wealth of detail and complications" are not needed to sustain copyright– all that is needed is originality and creativity. Letter from Gustavson of 6/11/02 at 1-2. We agree that a work need not be complex, ornate or otherwise complicated in its authorship composition in order for it to enjoy copyright. Again, Feist laid to rest the notion that more than a modicum of creativity was needed. The authorship present in the jewelry designs included in this collection does not, however, meet the Feist requirement. We do not disagree with your statement that the designs are "expression." All expression, however, is not necessarily copyrightable expression. As we have cited above, Compendium II, section 503.02[a], speaks of the need for more than a "simple combination of a few standard symbols." And, concerning sculptural authorship, the Compendium, section 503.02[b] states in a similar vein that:

> Copyrightability is based upon the creative expression of the author, that is, the manner or way in which the material is formed or fashioned. Thus, 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.* [emphasis added]

C. The work in its entirety

We recognize that the jewelry works at issue here are fixed expression and, as such, may possibly be copyrightable. When we examine the composition of the authorship, however, we find that composition to be, in Ms. Giroux's words, "too simple and unadorned" to justify registration. The choice of four or nine identically-shaped stones being positioned within a prong setting having a "U"-shaped base with that setting's holding the stones, juxtaposed in a square, in place by a simple oval or rectangular or V-shaped prong tab or tip represents an overall authorship too minimal to sustain registration: a small number of same-sized stones, arranged in a square, and held in place by a prong setting which itself is U-shaped in its base, or bottom portion, with simple common-shaped tabs extending in the four corners of the square to hold the stones. The few elements involved in these jewelry designs and the common, simple– even trivial– arrangement of the constitutive elements of the jewelry designs all argue for refusing registration. We recognize the principle stated in the precedent you have cited, Diamond Direct, that "a work that is entirely a collection of unoriginal material nevertheless may be copyrighted if the material is selected, coordinated or arranged in an original fashion. While component parts are not entitled to copyright protection simply by virtue of their combination into a larger whole, copyright may protect the particular *way* in which the underlying elements are combined– if the particular method of combination is itself original." 116 F. Supp. 2d at 528. (emphasis in original). We do not, however, consider the particular way– a way that is essentially commonplace and lacking in any distinguishing sculptural or design variation from the common and routine– in which the few elements chosen for the jewelry designs in question to be sufficiently original to sustain registration.

Speaking further to the overall designs in question here, we take this opportunity to point out that the Office's examining practices incorporate the principle that the use of public domain elements, of commonly known and/or geometric shapes, and of familiar symbols may yet result in a copyrightable work as long as the overall resulting design, taken in its entirety, constitutes more than a trivial variation of the constitutive elements. In Knitwaves, Inc. v. Lollytogs, Ltd., 71 F.3d 996 (2d Cir. 1996), the court, although considering the appropriate infringement test for a design on clothing, articulated a copyrightability analysis in terms of the overall pattern that was infringed in that case, pointing out that "[W]hat is protectible then is 'the author's original contributions,' [citing Feist at 350]-- the original way in which the author has 'selected, coordinated and arranged' [citing Feist at 358] the elements of his or her work." 71 F.3d at 1004. *See also* Atari Games Corp. v. Oman, 979 F.2d 242 (D.C. Cir. 1992). We comment specifically regarding Atari that, although the Office had initially refused to register the work in question in Atari, the Office did, upon reconsideration, register the videogame work at issue in recognition of the overall audiovisual authorship, composed of several individual elements– a series of related images with sound– which, taken together, were sufficient. The 1992 Atari decision, which remanded the case to the district court with instructions to return the registration application to the Copyright Office for reconsideration, referred to the need for finding a "'distinguishable variation in the arrangement and manner

of presentation' of public domain elements." 979 F.2d at 246, citing Reader's Digest Ass'n v. Conservative Digest, Inc., 821 F.2d 800, 806 (D.C. Cir. 1987). In the jewelry designs are issue here, the U-shaped prong setting for the four or nine gemstones, arranged in a square, with the prong tips or tabs shaped as a "V," an oval, a minor variation of an oval, or a rectangle, does not, in the opinion of the Board, represent authorship which is a distinguishable variation of the individual, non-copyrightable elements in the manner of arrangement of those elements. Further, the Board has determined that the placing together of the four or nine gemstones in a square is not a sufficient variation on the commonplace use of gemstones as the center of a ring or other jewelry design. Thus, the original contribution of the author, Sing Keung Lai, is insufficient in its entirety to merit registration.[1]

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[1] We take this opportunity to address several cases which you have cited in your requests for reconsideration. Again, we describe the deposit drawings for the works in question as showing a square configuration of identical gemstones, set one next to the other, within a positioning of prong holders / tabs at the four points of the square configuration of stones. This design essentially is a minor variation on commonplace and simple jewelry configurations and stands in contrast to the authorship constituting the jewelry works at issue in Kalpakian and Yurman. The jeweled bee pin which the plaintiff in Kalpakian argued had been copied by the defendant was a "pin in the shape of a bee formed of gold encrusted with jewels." 446 F.2d at 739. The plaintiff's pin had been registered but the court found that the defendant's bee pin did not infringe the plaintiff's copyright: a copyright "bars use of the particular expression of an idea in a copyrighted work but does not bar use of the 'idea' itself." 446 F.2d at 741. The expression of the plaintiff's pin, a sculpted bee covered with jewelry stones, was sufficient to sustain copyright in Kalpakian but a competing pin which depicted the same object, a bee, albeit in a similar manner, was held by the court not to infringe the rights in the fixed expression of the plaintiff's bee pin. The bee pin in question in Kalpakian is a work representing more than the *de minimis* quantum of creativity found in the jewelry designs in question in this reconsideration request.

The jewelry designs in question in Yurman consisted of "silver, gold, cable twist and cabochon cut colored stones." 262 F.3d at 109. In that case, the court found that the jewelry designs in question were copyrightable because of the "way Yurman has recast and arranged those constituent elements." 262 F.3d at 110. The Board does not find such original recasting and arrangement, sufficient under Feist, to sustain registration for the jewelry designs in the MULTISTONE MAGICAL SETTING COLLECTION. Finally, we again refer to Diamond Direct. Although the court there found it unnecessary to analyze and determine copyrightability because the copyright claim failed, despite similarity of ideas, for lack of substantial similarity in expression between the plaintiff's and the defendant's competing jewelry, we point out that the works at issue in Diamond Direct were ring designs having in common a "ballerina-style base or 'skirt' of tapered baguettes with a multi-tiered, rounded off cluster of tightly-packed small stones." 116 F. Supp. 2d at 527. Although the court declined to probe the work's copyrightability, the court did note the general principle

1. The prongs

You have asserted that "[a] variety of types of prongs are in a multiplicity of positions and configurations, providing very different visual effects from previous designs, which have used continuous borders on such multiple stones." Letter from Gustavson of 6/11/2002, at 1. As Ms. Giroux noted, however, the prongs, whatever their shape, are functional components of the designs. Letter from Giroux of 2/12/02 at 1 - 2. The jewelry designs in question contain a prong setting, each of which is an integral aspect of the functioning structure of a gemstone setting because the prong settings serve the purpose of holding or securing the gemstones in place. As functional components of the designs, the shape of the prongs is subject to copyright if and only to the extent that they possess either physically separable or conceptually separable authorship. Physical separability means that the pictorial, graphic, or sculptural features can be physically separated by ordinary means from the utilitarian item, such as lamp components from a sculptural lamp base of a Balinese dancer, or a pencil sharpener shaped like an antique car. However, since the overall shape of a useful article is not copyrightable, the test of physical separability is not met by the mere fact that the housing of a useful article is detachable from the working parts of the article. Compendium II, section 505.04. Upon examination of the prongs in question here, the Board did not find any physically separable authorship in any of the prong settings.

Conceptual separability means that the pictorial, graphic, or sculptural work, while physically inseparable by ordinary means from the utilitarian item, is nevertheless clearly recognizable as a pictorial, graphic, or sculptural work which can be visualized on paper, for example, or as a free-standing sculpture, as another example, *independent of the shape* of the article, i.e., the artistic features can be imagined separately and independently from the useful article without destroying the basic shape of the useful article. Compendium II, section 505.03. Further examples include the carving on the back of a chair or pictorial matter engraved on a glass vase.

Again, upon examination, the Board did not find any conceptually separable authorship in any of the prong settings. This means that none of the prong shapes, and by "prongs" we mean the supporting "U" structure as well as the individual prong tabs or tips, is registrable, consisting as each does of their shape alone, containing no other artistic or sculptural content that can be identified apart from their shape. Although we have categorized

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confirmed in Feist: "While no precise verbal formulation can capture it, there is some irreducible minimum beneath which a work is insufficiently original to find protection." 116 F. Supp.2d at 528, citing John Muller & Co., Inc. v. New York Arrows Soccer Team, Inc., 802 F.2d 989, 990 (8th Cir. 1986). Again, the works before the Board are insufficiently original to sustain copyright registration.

the prong settings as useful and, in themselves, possessing no separable features which would sustain registration, we nevertheless have included the outline or shape of the prong settings, including the tabs or tips which secure the stones, in our defining of the overall jewelry design and configuration of the works in question. As previously explained, the overall designs fail to meet the required level of creativity demanded by Feist.

2. "Overall distinctive feel" of the designs

Citing Weindling International Corp. v. Kobi Katz, Inc., 56 U.S.P.Q.2d 1763, 1765 (S.D.N.Y. 2000), you argue that it is the "combination into an original design that has its overall distinctive 'feel'" that is determinative of copyrightability. Letter from Gustavson of 6/11/2002, at 2. Again, we agree that an original combination of elements, each of which individually is unoriginal, i.e., uncopyrightable, may be copyrightable if that combination meets the minimal standards of creativity. However, we do not find any creativity in the particular combination of elements presented here. Again, Compendium II, section 503.02[a] states that a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations is not copyrightable; section 503.02[b] of the Compendium states that the mere bringing together of two or three standard forms or shapes with minor linear or spatial variations is not copyrightable.[2]

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[2] We cite Satava v. Lowry, 323 F.3d 805 (9th Cir. 2003). The Ninth Circuit, in deciding the extent of copyright protection for a glass-in-glass sculpture, considered the work– a combination of unprotectible elements– in terms of Feist, stating that, "although the amount of creative input by the author required to meet the originality standard is low, it is not negligible." 323 F.3d at 810. The court held 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. at 811, citing Feist at 358: "[T]he principal focus should be on whether the selection, coordination, and arrangment are sufficiently original to merit protection."

We point out that there are only a few elements involved in the authorship of the works in question here– the "U"- shaped base of the setting, the identically-sized stone used four or twelve times within the work, the placing of the identical stones in a square and the prong tabs or tips, the tabs or tips reflecting the common shape of a "V," an oval, a slight variation on an oval, and a rectangle. The combination of these few and commonplace elements in a pattern that reflects a usual or commonplace jewelry design of center jewel stone[s] held by prong tips [in this case, placed for purposes of holding the stones at the four points of the square structure of the stones], is not sufficient under Feist for registration.

While we recognize that some courts addressing copyrightability speak in terms such as the "look and feel" of a work, or "different visual effects," we can ascertain no standard by which the Office can be expected to judge originality and creativity based upon a work's "feel." *See* 4 M. & D. Nimmer, Nimmer on Copyright, 13.03[A][1][c] (2003) (criticizing the use of "feel" as an "amorphous referent" that "invites an abdication of judicial analysis"). Invoking a work's "feel" is no substitute for articulating an objective analysis of the work's original and creative elements, both individually and as a whole. Indeed, Weindling, the case which you cite for the proposition that copyright may be based on "overall distinctive feel," 56 U.S.P.Q.2d at 1765, did not simply accept the proposition that the work in question was copyrightable on that basis. The court referred to "overall distinctive feel" in its characterization of Kobi Katz's assertion of the basis for copyrightability. Id. However, ultimately the court analyzed the various aspects of the jewelry design in question as part of its analysis of copyrightability. Id. at 1765-77.

Conclusion

Feist confirms that it is possible for the selection and combination of elements in a work to be copyrightable even when the individual elements, standing alone, would not be. 499 U.S. at 363. The Board of Appeals has reviewed the jewelry design works at issue here in their entirety and did not confine its review to examination of the works' individual elements as they exist separately. Again, we refer you to the Atari principle that any analysis of authorship should focus on the work as a whole [above, at 7]. Having applied Feist's guideline as well as Atari's principle that the authorship of a work must be judged in its entirety, it is the Board's determination that the overall sculptural and artistic features of the jewelry designs in question in the MULTISTONE MAGICAL SETTING COLLECTION do not represent more than a *de minimis* quantum of creativity and, thus, cannot be registered.

For the reasons stated in this letter, the Copyright Office Board of Appeals affirms the Examining Division's refusal to register MULTISTONE MAGICAL SETTING COLLECTION. This decision constitutes final agency action in this matter.

Sincerely,

N. Petruzzelli

Nanette Petruzzelli
Chief, Examining Division
for the Board of Appeals
United States Copyright Office