United States Copyright Office
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July 29, 2004

Barry L. Haley, Esq.
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1936 South Andrews Avenue
Fort Lauderdale, Florida 33316

Re: MOM TENNIS BRACELET
Copyright Office Control No. 61-200-8637 B

Dear Mr. Haley:

I write on behalf of the Copyright Office Board of Appeals ("Board") in response to your Second Appeal dated November 13, 2003 requesting reconsideration of a refusal to register a jewelry design entitled "Mom Tennis Bracelet." The Board has carefully examined the application, the deposit and all correspondence concerning this application, and affirms the denial of registration of this work.

I. DESCRIPTION OF WORK

The Mom Tennis Bracelet is a link bracelet comprised of two types of links. One type of link is a stylized letter "M." The other type of link is a circular letter "O." The centers of all of the "O" links feature clear stones, except that one particular "O" link features a blue stone in its center. The "M" and the "O" links alternate to form the entirety of the bracelet.



II. ADMINISTRATIVE RECORD

A. Initial Application and Office's Refusal to Register

On September 6, 2002, the Copyright Office ("Office") received a Short Form VA application from you on behalf of your client, Roger M. Bernsen, to register a jewelry design for a bracelet. In a letter dated November 21, 2002, Visual Arts Section Examiner Sandra D. Ware

refused registration of this work because she determined it lacks the creative authorship necessary to support a copyright claim. Letter from Ware to Bernsen of 11/21/02, at 1.

Citing *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991) and 17 U.S.C. § 102(a) (2003), Ms. Ware explained that the copyright law protects only original works of authorship, and that the term "original" means that the author independently created the work and that the work possesses at least a minimal degree of creativity. She continued to explain that a work of visual art must contain a minimum amount of pictorial, graphic or sculptural authorship. Ms. Ware noted, however, that copyright does not protect familiar shapes or designs, basic geometric shapes, words, short phrases such as names, titles, slogans, mere variations of typographic ornamentation, lettering or coloring, nor any idea, concept, system or process which may be embodied in a work. *Id.* (citing 37 C.F.R. § 202.1 (2003) and 17 U.S.C. § 102(b)). She further explained that the copyright law does not account for the aesthetic appeal or commercial value of a work, nor the amount of time and effort expended to create a work. *Id.* (citing *Feist* and *Bleistein v. Donaldson*, 188 U.S. 239 (1903)).

B. First Request for Reconsideration

In correspondence dated March 21, 2003, you requested reconsideration of the Office's refusal to register the subject bracelet. You maintained that this work does possess the requisite amount of originality and creativity to qualify for copyright registration. Letter from Haley to Ware of 3/21/03, at 1. Citing sections 101 and 102(a)(5) of the Copyright Act, you restated the legal principles that pictorial, graphic and sculptural works can qualify for copyright protection, and that these works include two-dimensional and three-dimensional works of fine, graphic and applied art including jewelry designs. You also restated the general proposition that originality means that an author independently created a work and that a work possesses at least some minimal degree of creativity. *Id* at 2. (citing *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101 (2d Cir. 2001)).

You argued that the subject bracelet is similar to the work at issue in *Yurman* in that "it is composed of an 'artistic combination and integration of common elements' more specifically, the particular way the elements are 'placed, balanced and harmonized'." *Id.* You continued that the arrangement and recasting of the common elements creates a unique arrangement. *Id.* You specifically noted that the design is "a fully three-dimensional 4 axis ever changing jewelry bracelet," that "one of the two links morphs as a double entendre round stone setting or English alphabetical letter 'O'," and that "the second link can be interpreted either as a 'W' or when shifted 180-degrees as an 'M'." *Id.* at 2-3. You contended that various observers will interpret the subject jewelry differently because of the changes in rotation and angles that occur when wearing the bracelet. *Id.* at 3.

You also set forth the basic legal propositions relating to the copyrightability of a sufficiently creative compilation based upon the selection, coordination and arrangement of common elements. You argued that the subject bracelet qualifies as such a compilation based on its "unique combination of words, letter font and style, metal color and varied gemstones." *Id.* at 4. You noted that the requisite level of creativity to sustain a copyright is extremely low, and that most works make the grade quite easily. *Id.* at 5 (citing *Yurman* and *Weindling Int'l Corp. v. Kobi Katz, Inc.*, 56 U.S.P.Q.2d 1763 (S.D.N.Y. 2000)). Finally, you noted that "commercial" jewelry is entitled to protection "although it may be designed in a manner that may be obvious in order to appeal to the great majority of purchasers whose tastes are conventional." *Id.*

C. Examining Division's Response to First Request for Reconsideration

In response to your request and in light of the points raised in your letter of March 21, 2003, Attorney Advisor Virginia Giroux of the Examining Division reexamined the application. She too determined that the subject jewelry design does not contain a sufficient amount of original and creative authorship upon which to support a copyright registration. As Ms. Giroux explained in a letter dated July 16, 2003, although jewelry designs can be copyrightable subject matter, all copyrightable works must contain a sufficient amount of creative expression to support a copyright registration, meaning that the authorship must constitute more than a trivial variation of public domain elements. Letter from Giroux to Haley of 7/16/03, at 1 (citing *Feist*, 499 U.S. at 345 and *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951)). Although she recognized that the requisite level of creativity is low, she also explained that there remains a category of works that fail to meet this standard. *Id.* at 3. Ms. Giroux noted that the requisite creativity can arise from a work's constituent elements alone or from the combination thereof. *Id.* at 1, 3.

After describing the subject bracelet, Ms. Giroux concluded that the "resulting design is de minimis involving public domain elements arranged in a rather simple and repetitive configuration." *Id.* at 2. She found that "neither the words 'MOM' or 'WOW' nor their arrangement coupled with the stones as embodied in this work meet even the low threshold for copyrightable authorship set forth in the *Feist* case." *Id.* at 3.

She explained that names, titles, words, short phrases, typographic ornamentation, lettering and gemstones per se are not copyrightable. *Id.* at 2 (citing 37 C.F.R. § 202.1 and *Compendium II: Compendium of Copyright Office Practices* § 503.02(a) and (b) (1984) ("*Compendium II*")). Therefore, she concluded the "MOM" or "WOW" motif is not copyrightable, regardless of the size, style, thickness or width of the letters. Ms. Giroux cited numerous cases in support of the proposition that words, letter, common shapes and minor variations thereof are not copyrightable in and of themselves. *Id.* (citing *John Muller & Co. v. New York Arrows Soccer Team, Inc.*, 802 F.2d 989 (8th Cir. 1986), *Magic Marketing, Inc. v. Mailing Serv. of Pittsburgh, Inc.*, 634 F.

Supp. 769 (W.D. Pa. 1986), *Forstmann Woolen Co. v. J.W. Mays, Inc.*, 89 F. Supp. 964 (E.D.N.Y. 1950), *The Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q. 2d 1074 (D.D.C. 1992), *Jon Woods Fashions, Inc. v. Curran*, 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988) and *DBC of New York, Inc. v. Merit Diamond Corp.*, 768 F. Supp. 414 (S.D.N.Y. 1991)). Ms. Giroux also distinguished several cases that you cited in which the subject jewelry embodied greater complexity and more creative design than the bracelet presently at issue. *Id.* at 3 (distinguishing *Weindling* and *Yurman*).

Finally, Ms. Giroux explained that in determining registerability, the Office does not consider the materials of which a work is made (*e.g.*, silver, gold or gemstones), the work's aesthetics, attractiveness, uniqueness, distinctiveness, visual effect, appearance, commercial success or alternative design possibilities, nor the time and effort expended in creating the work. *Id.* at 1, 4.

D. Second Request for Reconsideration

In correspondence dated November 13, 2003, you requested the Office to reconsider for a second time its refusal to register the copyright claim in the Mom Tennis Bracelet jewelry design. Letter from Haley to Board of 11/13/03, at 1. You reiterated the general legal principles that jewelry designs can qualify for copyright protection and that the basic requirements of copyright protection for a work of art are originality and creativity. *Id.* at 1-2. You argued that "a bracelet designer's individual portrayal of an idea in a sculptural form may be expressed by the way the bracelet links are connected, the forms of the individual links, the colors of the gemstones, the placement of the stones and the colors of the precious metals selected to cast that sculptural form." *Id.* at 2.

In discussing the concept of originality, you noted that although the subject bracelet design "may contain elements of previous works, the author has created a distinct combination work that can be recognized as 'his own' which is comprised of more than trivial variations on preexisting works." *Id.* at 3. You argued that the design is original in part because it "conveys a feel of a said sculpturally smooth, endless and timeless three dimensional motif that flows from various points of view," it includes two types of links as opposed to traditionally identical links, and it "is comprised of precious metal cube-like three dimensional links with strategically placed alternating diamonds and sapphires set in round (as opposed to the traditional oval) settings." *Id.* at 3-4.

You attached a declaration by gemologist appraiser Joseph E. Tenhagen in support of your argument that the subject jewelry design qualifies as original. This declaration states that the bracelet is "unlike any other previously designed tennis bracelet I have seen with its distinctive style, unique arrangement and overall composition," and that it "is a beautiful, original and very creative sculptural work of art." Tenhagen Decl. ¶¶ 4,5.

With respect to creativity, you reiterated the general proposition that the requisite level of creativity to sustain a copyright registration is very low. Letter from Haley to Board of 11/13/03, at 4 (citing *Weindling* and *Feist*). You argued that in making a determination of sufficient creativity, courts may consider the metal and gemstones used, the size and shape of the links as well as the overall visual impact of the work. *Id.* You cited *Maggio v. Liztech Jewelry*, 912 F. Supp. 216 (E.D. La. 1996) as evidence that courts can find copyrightability based on the combination of elements comprising a piece of jewelry. You contended that "the copyright office must look to the combination of elements, which entails examining the author's particular choices of shape, size, color and other methods of creating original combinations." *Id.* at 5. You reiterated the general proposition that uncopyrightable component parts can nevertheless create a copyrightable work if selected, coordinated or arranged in an original fashion, and noted that courts must look to the totality of the work and not simply to its individual elements. *Id.* (citing *Feist* and *Diamond Direct, LLC v. Star Diamond Group, Inc.*, 116 F. Supp. 2d 525, 528 (S.D.N.Y. 2000)).

You claimed that the Attorney Advisor examined only individual elements of the subject bracelet, rather than the arrangement or combination thereof. However, you also cited several references by the Attorney Advisor as to her conclusions with respect to the lack of creativity embodied in the combination and arrangement of the particular elements. *Id.* at 6. You repeated your conclusion at several instances that the subject bracelet embodies an original and creative sculptural arrangement, even though the style may be minimalist. *Id.* at 7. Specifically, you argued that sufficient creativity is expressed in the bracelet's "never ending pattern representing art in motion," the three-dimensional sculptures comprised of light colored precious metals and shaped in a cubed style with rounded edges which serve as links, the change in angle and rotation of the links when the bracelet is worn, and the multitude of ways in which the viewer can interpret the bracelet. *Id.* You noted that a work does not need to be complex or ornate to be copyrightable, and that the resulting simple design of the subject bracelet expresses the idea of infinity and timelessness. *Id.*

You distinguished several cases which the Attorney Advisor cited for the proposition that registration is not available for symbols, words and simple geometric patterns. You contended that the subject bracelet, portraying movement and timeliness, embodies more sculptural authorship than the works at issue in those cases. *Id.* at 8. Rather, you argued that the subject bracelet is more analogous to the registered minimalist ring at issue in *Weindling*. *Id.* You stated your beliefs that the Attorney Advisor had improperly distinguished the bracelet in *Yurman* from the subject MOM bracelet based on the amount of embellishments featured on the jewelry, and that greater complexity does not necessarily translate into greater authorship. *Id.*

Finally, you argued that the subject bracelet is "a quantum leap from past design protocols," and has "brought about . . . a significant advance, in that what was once flat and fixed is now round and moves." *Id.*

III. DECISION

A. Jewelry as Copyrightable Subject Matter

As you have properly noted, jewelry designs can be copyrighted as "pictorial, graphic, and sculptural works." 17 U.S.C. § 102(a)(5); *Compendium II, supra,* § 502; Letter from Haley to Board of 11/13/03, at 1-2. However, the fact that some jewelry designs can qualify for copyright protection does not mean that all jewelry designs necessarily will.

All copyrightable works, be they jewelry designs or otherwise, must also qualify as "original works of authorship." 17 U.S.C. § 102(a); *concurring* Letter from Haley to Board of 11/13/03, at 3. As used with respect to copyright, the term "original" consists of two components: independent creation and sufficient creativity. *Feist*, 499 U.S. at 345. First, the author must have independently created the work, *i.e.*, not copied it from another work. The Board accepts at face value your assertion on the subject copyright application that your client authored the subject work, and has no reason to doubt the validity of this assertion. Therefore, the first component of the term "original" is not at issue in the analysis set forth herein. Second, the work must possess sufficient creativity. For the reasons set forth below, the Board has determined that the subject jewelry design fails to possess the requisite amount of creativity, and therefore is not entitled to copyright registration.

B. Requisite Level of Creativity to Support a Copyright

1. Relatively Low Threshold

In determining whether a work embodies a sufficient amount of creativity to sustain a copyright claim, the Board adheres to the standard set forth in *Feist*, 499 U.S. at 345, where the Supreme Court held that only a modicum of creativity is necessary to support a copyright. You properly quote the Court for the proposition that the "requisite level of creativity is extremely low; even a slight amount will suffice." Letter from Haley to Board of 11/13/03, at 4 and 6 (citing *Feist*, 499 U.S. at 345 and *Weindling*, 56 U.S.P.Q. 2d at 1763).

However, the *Feist* Court also ruled that some works (such as the work at issue in that case) fail to meet the standard. The Court observed 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," 499 U.S. at 363, and that there can be no copyright in a work in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359; *see also,* 37 C.F.R. § 202.10(a) ("In order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form."); 1 Melville B. Nimmer

& David Nimmer, *Nimmer on Copyright* § 2.01(b) (2002) ("[T]here remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright.").

Even prior to the *Feist* Court's decision, the Office recognized the modest, but existent, requisite level of creativity necessary to sustain a copyright claim. *Compendium II* states, "Works that lack even a certain minimum amount of original authorship are not copyrightable." *Compendium II*, *supra*, § 202.02(a). With respect to pictorial, graphic and sculptural works, the class within which jewelry designs fall, *Compendium II* states that a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." *Compendium II*, *supra*, § 503.02(a).

Although the Board generally agrees with the cases you cite and the arguments you make with respect to the relatively low threshold of creativity necessary to sustain a copyright, the Board cannot agree with your conclusion that the subject bracelet meets this threshold, either by virtue of its constituent elements or their combination.

2. Individual Elements

In implementing the creativity threshold, the Office and courts have consistently found that standard designs, figures and geometric shapes are not sufficiently creative to sustain a copyright claim. *Compendium II*, *supra*, § 503.02(a) ("[R]egistration cannot be based upon the simplicity of standard ornamentation . . . . Similarly, it is not possible to copyright common geometric figures or shapes . . . ."); *Id.* § 202.02(j) ("Familiar symbols or designs, and mere variations of typographic ornamentation, lettering, or coloring, are not copyrightable."); *Id.* § 503.03(b) ("No registration is possible where the work consists solely of elements which are incapable of supporting a copyright claim. Uncopyrightable elements include common geometric figures or symbols, such as a hexagon, an arrow, or a five-pointed star . . . ."). *See also*, 37 C.F.R. § 202.1(a) ("[F]amiliar symbols or designs" are "not subject to copyright and applications for registration of such works cannot be entertained.").

Moreover, simply making minor alterations to these otherwise standard shapes will not inject the requisite level of creativity. *Catalda Fine Arts*, 191 F.2d at 102-03 (What "is needed to satisfy both the Constitution and the statute is that the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own.'"); *Compendium II*, *supra*, § 503.02(a) ("[Registration cannot be based upon] a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations.").

The constituent elements of the subject jewelry design are standard shapes which are within the public domain and not copyrightable in and of themselves. The two principle design elements are the "M" link and the "O" link. Being part of the English alphabet, both letters are inherently common shapes and therefore non-copyrightable. The fact that the letter links are three-

dimensional or relatively large in size does not by itself inject the requisite amount of creativity. *Cf,* Letter from Haley to Board of 11/13/03, at 4-5, 7. These particular letters might be thicker and bigger than the links of a traditional tennis bracelet counterpart, but it does not mean that they are more creatively designed. The Board recognizes that the "M" link is slightly stylized and features rounded edges, but as already discussed, minor variations to standard shapes will not support a copyright registration. Although you argue that the "M" link can also be viewed as a "W" when rotated 180 degrees, the same analysis applies and conclusion follows for either letter. Similarly, you argue that the "O" link can be viewed not only as a letter, but also as a circular setting. Unfortunately, a completely round bezel setting is itself familiar and common in jewelry design and therefore not subject to registration. You also argue that the selection of the light-colored precious metal of the links and the type and color of the gemstones contributes to the work's sufficient creativity. Letter from Haley to Board of 11/13/03, at 2-4, 7. However, the material of which a work is made is irrelevant to the copyrightability of the work, as is any particular color in and of itself. *See, Compendium II, supra,* § 503.02(a) ("Likewise, mere coloration cannot support a copyright even though it may enhance the aesthetic appeal or commercial value of a work."); 37 C.F.R. § 202.1(a) ("lettering or coloring" are "works not subject to copyright"). The bracelet's only other elements are the gemstones. As Ms. Giroux already noted, though, gemstones per se are not copyrightable. Letter from Giroux to Haley of 7/16/03, at 2.

You argue that even though the bracelet incorporates common elements, it is the artist's particular interpretation of these elements that can be copyrighted. Specifically, you state that copyright protects "the artist's individual sculptural expression of an idea," even if multiple artists choose to portray the same idea. Letter from Haley to Board of 11/13/03, at 2. The Board agrees, and the Office would register any number of tennis bracelets provided each met the originality and other statutory requirements. However, the difficulty in this situation is that although there exists an infinite number of ways to express a bracelet, there are a vastly limited number of ways to express an "M," "O" or the other particular elements embodied in the subject work. It is because of this limitation that the copyright law deems common shapes and designs, such as the ones incorporated into the subject bracelet, to be in the public domain and prohibits their registration.

Because none of the constituent elements of the subject bracelet are copyrightable in and of themselves, the only means by which the various non-protectable elements of the bracelet could possibly sustain a copyright would be if their particular combination or arrangement exhibited a sufficient level of creativity. Unfortunately, they do not.

3. Selection, Coordination and Arrangement of Constituent Elements

The Board agrees with your assertion that some combinations of unprotectable common or standard designs contain sufficient creativity with respect to how such elements are arranged to support a copyright registration. *See, Feist*, 499 U.S. at 358 (the Copyright Act "implies that

some 'ways' [of compiling or arranging uncopyrightable material] will trigger copyright, but that others will not"; determination of copyright rests on creativity of coordination or arrangement); Letter from Haley to Board of 11/13/03, at 5-6 (also citing *Diamond Direct*, 116 F. Supp. at 528).[1]

However, merely combining non-protectible elements does not automatically establish creativity where the combination or arrangement itself is simplistic. Similarly, the mere repetition of these various non-protectable elements is simply not sufficiently creative to support a copyright registration. "[T]he 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." *Compendium II, supra*, § 503.02(b). In contrast, the fatal flaw in the registerability of the subject bracelet is that it merely brings together a few unprotectable elements in a relatively simplistic manner.

The principle design element of the bracelet's arrangement is the alternating of two types of links in a straight line, a rather common-place arrangement especially for a tennis bracelet. The fact that this arrangement results in the repetition of the word "MOM" or "WOW" is immaterial, as words and short phrases are not protected by copyright. 37 C.F.R. § 202.1(a). Although the arrangement also includes the placement of a round stone in the center of each "O" link, such routine placement and the varying color of one of the stones do not sufficiently contribute to the bracelet's overall creativity. Simply put, the totality of the subject bracelet, with its unprotected elements embodied in a linear arrangement of alternating links with evenly-placed gemstones, does not rise to the admittedly low level of creativity necessary to support a copyright registration.

In support of your argument that works incorporating uncopyrightable elements may still meet the relatively low threshold of creativity based upon an original combination of such elements, you cite *Maggio v. Liztech Jewelry*, 912 F. Supp. 216 (E.D. La. 1996). While the Board does not dispute this general proposition, this case is factually distinguishable from the present circumstances and therefore does not advance your cause. In *Maggio*, the court examined jewelry pins consisting of chrome silhouettes of frogs, turtles, hummingbirds, cupids, knights, mermaids, firebirds and other figures embellished with copper wire as well as beading.[2] Considering there are a vast number of ways to express an animal or mythical subject, these

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[1]Although you utilize the term "derivative work," the Board understands your argument to be that works based on uncopyrightable elements (i.e., derived from such elements) can be protected by copyright if creatively arranged. The term "derivative work" is a term of art in copyright law which is not applicable to the present issues.

[2]The Board also notes that in that infringement proceeding, the *Maggio* court was examining the elements of the two pieces of jewelry to determine if they were substantially similar. The analysis of elements for substantial similarity purposes is not necessarily the same as the analysis of elements for registration purposes.

silhouettes inherently embody much more creative authorship than an alphabetical letter, the majority of whose parameters are pre-determined. These silhouettes were also combined with a creative fixation of various types of wire work and beading, as opposed to the bracelet's letter links which are combined simply with a gemstone in each alternating link. Therefore, the fact that the court found the pins to be copyrightable does not affect whether the subject bracelet should be registered.

You also quote *Weindling*, 56 U.S.P.Q.2d 1763, in support of your argument that the Office should consider the entire combination of a work's elements, not just the number of its embellishments. Again, the Office agrees with the general proposition, as evidenced by the fact that in that case, the Office did indeed issue a copyright registration for the subject finger ring design. However, the Office must individually evaluate each work submitted for registration to determine if it meets the minimal, but existent, statutory requirements. With respect to the jewelry design in *Weindling*, the ring's arrangement of public domain elements, including various shaped stones, suspended "bridge" placement and flared supports, was sufficiently creative to support a copyright, even though it may have been designed in a minimalist style. With respect to the bracelet presently at issue, though, the linear, alternating arrangement of two links resembling letters, even with the evenly interspersed gemstones, is not sufficiently creative. It is not the type or style of a piece of jewelry which determines its registerability, it is the tangible elements and/or how they are combined that are determinative. Regardless that the subject bracelet design incorporates minimalist elements, these elements are simply not brought together in any manner that could constitute sufficiently creative authorship.

Although you argue that Ms. Giroux cited cases inapplicable to the present situation, letter from Haley to Board of 11/13/03, at 8, the Board finds those cases to be more persuasive. Ms. Giroux cited numerous examples of situations where courts found to be uncopyrightable simple, repetitive arrangements of a few letters combined with some additional non-protectable elements. For example, she cited *John Muller & Co.*, 802 F.2d at 990 in which the Eighth Circuit upheld the Register's refusal to register a simple logo consisting of the stylized word "Arrows" written in cursive script accompanied by four angled lines which formed an arrow. She also cited the *Magic Marketing* court which found insufficient creativity in the printing of the words "gift check enclosed," "priority message" and "telegram" on an envelope accompanied by black stripes, 634 F. Supp. at 772. The *Forstmann Woolen Co.* court similarly found insufficient the words "Forstmann 100% Virgin Wool" on a label accompanied by three fleurs-de-lis. 89 F. Supp. at 971. In each of these cases, the courts found that the simplistic combination of a word, stylized or otherwise, with other non-protectable elements was insufficiently creative to support a copyright. The subject bracelet, with its two links spelling "Mom" and evenly interspersed gemstones, is no different. Contrary to your contention, it is immaterial that in the cited cases the words and other elements were printed on labels, envelopes, shirts, fabric and dishes, but that the words and other elements of the subject bracelet are three-dimensional pieces of metal and

stone. The analysis, and therefore the conclusion, must be the same for each of these works, regardless of the medium in which the work is fixed.

C. Other Considerations

Several other factors that you argue, while perhaps important on personal or commercial levels, have no bearing on the determination of whether or not copyright registration is available for this work. For example, in his declaration, Mr. Tenhagen declares that the bracelet is beautiful. (Tenhagen Decl., ¶5.) Aesthetics, however, are simply not a factor to be considered in the determination of copyright availability. Similarly, neither is any symbolic value of a work to be considered in the analysis. *See, Compendium II*, *supra*, § 503.02(b) ("The requisite minimal amount of original sculptural authorship necessary for registration in Class VA does not depend upon the aesthetic merit, commercial appeal, or symbolic value of a work.") Your argument that the work represents infinity, timelessness and art in motion is therefore immaterial. Letter from Haley to Board of 11/13/03, at 3 (the work "conveys a feel of a said sculpturally smooth, endless and timeless three dimensional motif that flows from various points of view"); *Id.* at 7 (the work's "never ending pattern respresent[s] art in motion" and it is "arranged in order to express the idea of infinity and timelessness").

Furthermore, despite your repeated emphasis of the bracelet's alleged unique and different appearance from traditional tennis bracelet designs, *id.* at 3-4, 7, 10 and Tenhagen Decl. ¶4, uniqueness is relevant to a patent analysis, not to a copyrightability analysis. As is well-settled, two non-unique, even identical, works may both be registered for copyright protection, provided that each was independently created and contains the requisite level of creativity. Therefore, the allegation that the subject bracelet differs substantially from "traditional" tennis bracelets, even if true, does not bear upon the determination of its registerability.

Additionally, you argue that in analyzing the copyrightability of a work, courts may look to the authors' choices in implementing their expression of an idea. Letter from Haley to Board of 11/13/03, at 4. As Ms. Giroux explained, though, the number of other possible design choices, *e.g.*, angles and lengths, is immaterial to the analysis. Letter from Giroux to Haley of 7/16/03, at 4. The Office considers only those elements actually expressed in the deposit materials submitted with the application for registration, not those that could have been selected.

Similarly, your argument that the bracelet has the ability to move and rotate is also irrelevant. *Id.* at 2 and 7. Copyright protection does not extend to any processes, 17 U.S.C. § 102(b), including the one by which the links are connected. Again, this aspect of the bracelet may be able to protected by patent law, but not copyright.

You finally argue that in examining jewelry, courts may consider "whether the derivative work possesses an 'overall distinctive feel' or 'markedly different visual impact' from the works

form, [sic] which it is derived", and cite *Diamond Direct, LLC*, 116 F. Supp. 2d at 529 in support of this contention. Letter from Haley to Board of 11/13/03, at 3; *Id.* at 4 (arguing that courts may consider the "overall visual impact" of a work). Despite the fact that *Diamond Direct* principally addressed the idea versus expression dichotomy, which is not presently at issue, the sensory impact of a work or the feelings it may evoke in a viewer does not bear upon the copyrightability analysis. While some courts such as *Diamond Direct* may have adopted an ad hoc look and feel analysis for evaluating substantial similarity in infringement proceedings, such an analysis is not relevant to the Office's examination for registration purposes. The registration analysis must focus instead on the tangible elements embodied in the work itself. Regardless of the effect the bracelet may have on a viewer, because the tangible elements of the subject bracelet lack sufficiently creative authorship, both individually and in combination, the subject bracelet cannot receive a copyright registration.

IV. CONCLUSION

For the reasons stated herein, the Copyright Office Board of Appeals affirms the refusal to register the jewelry design entitled "MOM Tennis Bracelet." This decision constitutes final agency action on this matter.

Sincerely,

/s/

Marilyn J. Kretsinger
Associate General Counsel
for the Appeals Board
United States Copyright Office