**United States Copyright Office**
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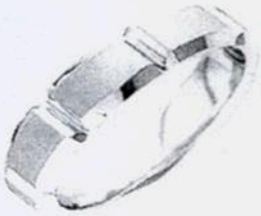
**Re: FINGER RING # 2935**
**Copyright Office Control No. 61-207-771.(S)**

Dear Mr. Miskin:

I write on behalf of the Copyright Office Board of Appeals ("Board") in response to your Second Appeal dated May 27, 2003 requesting reconsideration of a refusal to register a jewelry design entitled "Finger Ring # 2935." 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 fundamental component of the jewelry design is a rectangle raised from and connected to the shank of a ring by four, angled, almost perpendicular other rectangles, the corners of which appear to be connected by triangles. This grouping of rectangles forms a squat, three-dimensional trapezoid, the top of which features a matt finish, but the sides of which are smooth and glossy. Eight, identical trapezoidal units lie end-to-end surrounding the shank of the ring. Where the ends of two trapezoidal units meet, the angled side rectangles form a "V" shaped depression.



## II. ADMINISTRATIVE RECORD

### A. Initial Application and Office's Refusal to Register

On March 27, 2002, the Copyright Office ("Office") received a Form VA application from Ms. Gloria Tsui-Yip of your firm on behalf of your client, Jeff Cooper, Inc., to register a jewelry design for a finger ring. In a letter dated July 22, 2002, Visual Arts Section Examiner Joy Mansfield refused registration of this work because it lacked the artistic or sculptural authorship necessary to support a copyright claim. (Letter from Mansfield to Miskin of 7/22/02, at 1.)

Ms. Mansfield explained that in order to be copyrightable, a work must be original and contain a certain minimum amount of creative authorship within the meaning of the copyright law and settled case law. She explained that aesthetics and commercial value do not bear on the copyrightability of a work. She further noted that copyright does not protect ideas or concepts which may be embodied in a work, nor familiar shapes, symbols, designs, coloring or mere variations thereof. (*Id.*)

**B. First Request for Reconsideration**

In a letter dated November 19, 2002, you requested reconsideration of the Office's refusal to register this work. You described the subject jewelry design as "a plurality of ridges separated by identical v-shaped depressions." (Letter from Miskin to Mansfield of 11/19/02, at 2.) Citing the relatively low threshold for creativity articulated in *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991), you argued that the creativity embodied in this finger ring exceeded the minimum artistic or sculptural authorship required to sustain a claim of copyright protection. (*Id.* at 1-2.) You further argued that the design of the ring and its "repetitive series of specific shaped and dimensional geometrical configurations" were not familiar shapes within the meaning of 37 C.F.R. § 202.1's prohibition on the registration of familiar shapes and designs. (*Id.* at 2.) You continued that your client's personal influence necessarily affected the subject jewelry design, however simple it may appear, and analogized the design to a photograph which on its face appears merely to reflect reality and lack creativity, but which is nonetheless affected by the author's personal influence. (*Id.* at 2.) (citing, *Jeweler's Circular Pub. Co. v. Keystone Pub. Co.*, 274 F.Supp. 932 (S.D.N.Y. 1921), *aff'd* 281 F. 83 (2d Cir. 1922), *cert. denied*, 259 U.S. 581 (1922)). Highlighting the features of the ring that the designer chose, including the various surfaces' angles, lengths and textures, you argued that the combination of these unique features demonstrates sufficient creativity to qualify for copyright protection. (*Id.* at 2-3.) You also argued that the large number of purchasers of the ring evidences that it is unique and novel, and therefore sufficiently creative. (*Id.* at 2, 3.) Finally, you cautioned that the Office should not substitute a subjective opinion as to the minimum amount of creativity necessary to sustain copyright protection. (*Id.* at 3.)

**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 November 19, 2002, Attorney Advisor Virginia Giroux of the Examining Division reexamined the application, and she too determined that the subject jewelry design did not contain a sufficient amount of original and creative authorship upon which to support a copyright registration. (Letter from Giroux to Miskin of 2/24/03, at 1.) As Ms. Giroux explained in a letter dated February 24, 2003, in order to be copyrightable, a work must not only be original, but it must also possess more than a *de minimis* quantum of creativity. (*Id.* at 1.) (citing *Feist*, 499 U.S. at 345). While this

threshold is very low, she explained that not all independent efforts will qualify, as in the case of the subject work. (*Id.* at 2.) She cited *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951) in further support of the proposition that, specifically with respect to jewelry designs, sufficient authorship must constitute more than a trivial variation of public domain elements. Ms. Giroux noted that the requisite creativity can arise from a work's constituent elements alone or from the combination thereof. (*Id.* at 1.)

After describing the subject finger ring, Ms. Giroux concluded that the rectangles and "V" shapes featured in the design were common and familiar shapes within the public domain, and that their simple arrangement and minor variations, including the use of different textures, did not reflect sufficient creative authorship to sustain a copyright registration. (*Id.* at 2.) (citing 37 C.F.R. § 202.1 (2003) and *Compendium II: Compendium of Copyright Office Practices* § 503.02(b) (1984) ("*Compendium II*")). She cited several cases to support the proposition that although simple variations of standard designs and their simple arrangement may be aesthetically pleasing, they do not furnish a basis upon which to support a copyright registration. (*Id.* at 2.) (citing *John Muller & Co. v. New York Arrows Soccer Team, Inc.*, 802 F.2d 989 (8th Cir. 1986), *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 explained that in determining copyrightability, the Office does not consider the materials of which a work is made (*e.g.*, platinum or silver), 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 1-3.) She further noted that the Office does not judge art, nor exclude any category of art from registration. (*Id.* at 3.) (citing *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903)). However, she explained, the Office can and does examine a work to determine if it falls outside of the limits of copyrightability which various courts have identified, such as the limits applicable to familiar shapes and designs. (*Id.*)

**D. Second Request for Reconsideration**

In a letter dated May 27, 2003, you requested the Office to reconsider for a second time its refusal to register the copyright claim in the Finger Ring #2935 jewelry design. (Letter from Miskin to Board of 5/27/03, at 1.) You reiterated your description of the work, specifically noting the combination of "a repetitive series of specific shaped and dimensional geometrical configurations" which includes "a plurality of general rectangular ridges," "identical tapered generally v-shaped depressions," "carefully chosen angles and length of surface[s]," as well as glossy and matt textures on the surfaces. (*Id.* at 2.) You argued that the combination of these elements exceeds the level of creativity necessary to sustain a copyright, and that the "Attorney Advisor [was] wrong as a matter of law in ignoring the artistic appearance of the entire combination rather than in individual components." (*Id.* at 1,2.) You also stated that all works

are composed of common and familiar shapes. For example, a statute of a human being features arms and legs and a painting of flowers features petal and leaves; it is "the artist's interpretation that makes the difference." (*Id.* at 4.) Conceding that the constituent elements of the subject finger ring are not sufficiently creative in and of themselves, you asserted that works may be copyrighted even though based on public domain elements, provided that the combination and integration of these elements are sufficiently creative. (*Id.* at 4-5.) (citing *Gelles-Widmer Co. v. Milton Bradley Co.*, 313 F.2d 143 (7th Cir. 1963), *cert. denied*, 373 U.S. 913 (1963) and *Knitwaves, Inc. v. Lollytogs, Ltd.*, 71 F.3d 996, 1003 (2d Cir. 1995), *aff'd*, 1996 U.S. App. LEXIS 30737 (2d Cir. 1996)). You stated "The Attorney Advisor misapplies the *Feist* decision to the present facts." (*Id.* at 5.) The harmonization of the elements in this case, you argued, gives the ring its unique appearance. (*Id.* at 6.)

Citing *Feist* and *Bleistein*, you noted that the requisite level of creativity to sustain a copyright is low. (*Id.* at 3.) In addition to *Feist*, you also cited *Weindling International Corp. v. Kobi Katz, Inc.*, 56 U.S.P.Q.2d 1763 (2000) for the proposition that specifically with respect to jewelry, the amount of creativity necessary to sustain a copyright is modest. (*Id.* at 6.) In support of your assertion that the subject ring possesses the necessary amount of creativity, you explained that even though the jewelry design may appear simple, it cannot be unaffected by the author's personal influence. (*Id.* at 3-4.) You also reminded the Board that large numbers of customers have purchased the ring at issue. (*Id.* at 4 and 5.)

Finally, you reiterated your concern that a registration should not depend upon the subjective opinion of the Office, and referenced Ms. Giroux's citation to the *Bleistein* court that "it would be a dangerous undertaking for persons trained only to the law to constitute themselves the final judges of the work of pictorial illustrations, outside of the narrowest and most obvious limits." (*Id.* at 2 and 6.)

## III. DECISION

### A. The Legal Framework

#### 1. Copyrightable Subject Matter

The Board recognizes that jewelry designs can be copyrighted as "pictorial, graphic, and sculptural works." 17 U.S.C. § 102(a)(5) (2003); *Compendium II, supra,* § 502. 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). 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 work must have been independently created by the author, *i.e.*, not copied from another work. You state that "the ring sought to be copyrighted was independently created by the author . . . ." (Letter from Miskin to Board of 5/27/03, at 3.) The Board accepts this statement at face value, and has no reason to doubt its validity. 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 it is not entitled to copyright protection.

**2. The Creativity 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 Miskin to Board of 5/27/03, at 3.) (quoting *Feist*, 499 U.S. at 345).

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).

In implementing this 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.").

As evidenced by both Ms. Giroux's and your descriptions of the subject work, the finger ring is comprised of common shapes, primarily rectangles and "V"s. You appropriately concede that these public domain shapes are uncopyrightable. (Letter from Miskin to Board of 5/27/03, at 4.) Therefore, the copyrightability of the individual constituent elements is not at issue herein.

**3. Selection, Coordination and Arrangement**

The Board agrees with your assertion that some combinations of common or standard designs contain sufficient creativity with respect to how the common elements are combined or arranged to support a copyright. *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 Miskin to Board of 5/27/03, at 5.).

However, merely combining non-protectible elements does not automatically establish creativity where the combination or arrangement itself is simplistic. For example, in *Jon Woods Fashions*, 8 U.S.P.Q. 2d at 1870, the district court upheld the Register's decision that a fabric design consisting of striped cloth over which a grid of 3/16" squares was superimposed, even though distinctly arranged and printed, did not contain the minimal amount of original artistic material to merit copyright protection. Similarly, the Eighth Circuit upheld the Register's refusal to register a simple logo consisting of four angled lines which formed an arrow and the word "Arrows" in cursive script below the arrow. *John Muller & Co.*, 802 F.2d at 990. Similar to these cases, the Board has determined that Finger Ring # 2935 does not embody the requisite level of creativity with respect to the combination of its constituent elements, the reasoning of which is set forth below in more detail.

**B. Analysis of the Work**

As discussed and conceded above, the constituent elements of the subject jewelry design are standard geometric shapes which are within the public domain and not copyrightable in and of themselves. Therefore, the only means by which the various non-protectible elements in the finger ring could possibly sustain a copyright would be if their particular combination or arrangement exhibited a sufficient level of creativity. Unfortunately, they do not.

Although the combination of the constituent rectangles and connecting triangles creates a three-dimensional trapezoidal unit, this shape itself is a standard, non-copyrightable geometric form. The fact that some rectangles have a glossy finish while others have a matt finish does not affect the result. The matt finish is simply a product of a rough surface, while a smooth surface gives rise to a glossy finish. These standard textures embody no creativity. The textures featured on the subject finger ring are akin to colors, which are not sufficient in and of themselves to sustain a copyright. *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.") Moreover, the matt finish appears on all of the rectangles parallel to the shank, while the perpendicular shapes feature the glossy finish. This simple arrangement of textures is not a sufficiently creative design.

The eight, identical trapezoidal units are laid end-to-end in, what you describe as, "a repetitive series of specific shaped and dimensionally geographic configurations to create an original and creative appearance." (Letter from Miskin to Board of 5/27/03, at 2.) The use of linear, end-to-end placement is also not sufficiently creative to warrant copyright protection, despite your assertion that "the particular way in which the shaped elements 'are placed, balanced and harmonized'" should be copyrightable. (*Id.* at 4.) Although the end-to-end placement gives rise to the "V" shaped depressions, that design itself is also a non-protectible, standard shape.

The mere repetition of these various non-protectible elements is simply not sufficiently creative to support a copyright registration. *See, Compendium II, supra*, § 503.02(b) ("[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.").

Yet, you claim that given the minimal requisite level of creativity, your client's "interpretation of the length and depth of the ridges and 'v' shaped cuts that have different visual finishes reach[es] the level of creativity more than significant to warrant copyright registration." (Letter from Miskin to Mansfield of 5/27/03, at 4.) Specifically, you argue that all works of art are in essence composed of common and familiar shapes, such as a statute of a man may include a head and a painting of a flower may include petals. You note that "it is the artist's interpretation that makes the difference." (*Id.*) You have ignored the fact, though, that there

exists an infinite number of ways for an artist to interpret and express a man's head or a flower's petals. In contrast, there is a vastly limited number of ways in which to express basic geometric shapes. It is because of this limitation that the copyright law deems common shapes and designs, such as the ones incorporated into the subject finger ring, to be in the public domain and prohibits their registration. 37 C.F.R. § 202.1. Minor alterations to the length, depth, angle or texture of a common geometric shape, such as in the work at issue, do not necessarily inject the requisite level of creativity without some more original contribution. *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.").

In support of your assertion that works incorporating uncopyrightable elements may still be copyrighted based upon an original combination of such elements, you cite *Gelles-Widmer,* 313 F.2d 143, and *Knitwaves,* 71 F.3d 996. Regardless of the fact that the quotations for which you cite *Gelles-Widmer* and *Knitwaves* do not appear in those cases, the Board does agree with the general legal principle you have asserted, as evidenced by the fact that in both of those cases, the Office did indeed register the works even though they were based on uncopyrightable elements. *See, Gelles-Widmer*, 313 F.2d at 147 (upholding the validity of registrations for educational type flash cards even though "the basic materials and arithmetical problems may have been old and in the public domain."); *Knitwaves*, 71 F.3d at 1004 (examining each of two fall motif sweaters as a whole, even though each contained uncopyrightable elements such as multi-colored stripes and panels.) The finger ring presently at issue, though, is not comparable to those situations. The flash cards existed as sets, which incorporated not only a substantial amount of creative selection, coordination and arrangement but also copyrightable testing sheets and instructions. Likewise, the sweater maker's original contribution included coordinating copyrightable artwork such as felt squirrels, acorns and leaves with non-copyrightable colors and patterns, as well as creatively arranging all of the design elements into an original pattern. In contrast, the finger ring consists only of uncopyrightable elements that are not creatively arranged.

You also quote *Weindling*, 56 U.S.P.Q.2d 1763, stating that copyright protects works embodying even a modest amount of creativity. Again, the Office agrees with the general proposition, as evidenced by the fact that in that case, the Office also issued a copyright registration for the subject finger ring design. However, the Office must 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. With respect to the finger ring presently at issue, though, the linear placement of eight, identical trapezoids is not sufficiently creative.

Finally, you argue that the determination of copyrightability should not depend on "subjective opinion." (Letter from Miskin to Board of 5/27/03, at 2.) The Board agrees. The

finger ring consists of standard shapes and simple arrangements, which while perhaps subjectively aesthetically pleasing and commercially successful, do not objectively contain the minimal amount of creative authorship to support a copyright registration. Consistent with both your and Ms. Giroux's citation to *Bleistein*, 188 U.S. 239, the Board has not judged the artistic worth of the finger ring. Rather, the Board has evaluated the ring to determine whether it contains any elements other than non-copyrightable geometric shapes and simple arrangements. It does not. The fatal defect in the subject copyright application is that the elements and their assembly are so simplistic, that regardless if the elements are viewed individually or in combination, the work does not exhibit the requisite level of creativity to sustain a copyright.

## 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, you argue that the necessary creativity "is supported by a large number of ring buyers, selecting this design over the hundreds of other designs available. This recognition by the purchasing public of the unique design which differs from other 'bands' is evidence of the creative spark discussed by the United States Supreme Court in *Feist Publications, supra*." (Letter from Miskin to Board of 5/27/03, at 5.) Commercial success, however, is simply not a factor to be considered in the determination of copyright availability. *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.") Furthermore, despite your repeated emphasis of the ring's alleged unique, novel, distinctive and innovative appearance,[1] these characteristics are material to a patent analysis, not a copyrightability analysis. As is well-settled, two identical works may both be

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[1] (Letter from Miskin to Board of 5/27/03, at 2.) ("The generally v-shaped depressions and the ridges' side facets all have carefully chosen angles and length of surface in order to provide the ring with its unique appearance. In addition, all the ridges' side facets are glossy, while the top surfaces of the ridges are matt aiding in creating a combination having a distinctive appearance."); (*Id.* at 4.) ("[The personal influence of the designer] is certainly appreciated by the purchaser, who must consider the design sufficiently unique to purchase it in a large number."); (*Id.* at 6.) (arguing consideration of a work's "overall distinctive feel" or "markedly different visual impact."); (*Id.*) ("The artist's original and creative design for this jewelry combines a repetitive series of specific shaped and dimensionally proportional geometrical configurations with varied surface treatment to create an original and innovative appearance."); (*Id.* at 7.) ("The v-shaped depressions and the ridges' side facets, all have carefully unique dimensions, such as chosen angles and length of surface, which harmonize, in order to give the ring its unique appearance."); (*Id.*) ("The design that is the subject of this application is unique to applicant.") (*See also,* Letter from Miskin to Mansfield of 11/19/02, at 2.) ("This unique design for jewelry combines a repetitive series of specific shaped and dimensional geometrical configurations to create a novel appearance."); (*Id.* at 2-3.) ("The v-shaped depressions and the ridges' side facets all have carefully chosen angles and length of surface in order to give the ring its unique appearance.") (emphasis added throughout).

registered for copyright protection, provided that each was independently created and contains the requisite level of creativity.

Additionally, you note several times that the finger ring has "carefully chosen angles and lengths of surface." (Letter from Miskin to Board of 5/27/03, at 2.) 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 Miskin of 2/27/03, at 2-3.) 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, the argument that your client's personal influence necessarily affected the design is also immaterial. (*Id.* at 3-4.) Copyright protection does not extend to any processes, 17 U.S.C. § 102(b), including the one by which the designer decided which features to express in the ring. Your citation to *Jeweler's Circular*, 274 F. at 934, that even a simple photograph is affected by the personal influence of the author, is unpersuasive. First, the cited quotation is merely a passing musing, which the Honorable Learned Hand immediately notes "seems to me quite beside the point." *Id.* More importantly, as made clear by the affirming action, 281 F. 83 (2d Cir. 1921), the case centered on copyright protection of directories and the amount of labor, not creativity, necessary to support a claim under the 1909 version of the Copyright Act prior to the destruction of the "sweat of the brow" doctrine by *Feist*. The *Feist* Court specifically criticized *Jeweler's Circular*, and noted that "the Second Circuit, which almost 70 years ago issued the classic formulation of the 'sweat of the brow' doctrine in *Jeweler's Circular Publishing Co.*, has now fully repudiated the reasoning of that decision." *Feist*, 499 U.S. at 360. This case therefore has no relevance to a post-*Feist* analysis of the requisite level of creativity to sustain a copyright.

You finally argue the "Board should focus on and appreciate the combination of the 'differences affecting the feeling quality and sensory impact of the whole'," and cite *Slifka v. Citation Fabrics Corp.*, 329 F. Supp. 1392, 1393 (S.D.N.Y. 1971) in support of this contention. While the Board has already considered and rejected as not sufficiently creative the particular combination of the elements in this work, it is not relevant to a copyrightability analysis to consider the sensory impact of a work or the feelings it may evoke in a viewer.[2]

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[2] The Board also notes that in *Slifka*, the action was simply a motion for a preliminary injunction, the opinion did not contain an analysis regarding copyrightability, the court decided the motion mainly on equitable considerations based on plaintiff's laches and misrepresentations, and in that context, the court chose also to weigh other admittedly non-copyrightable elements such as color.

## IV. CONCLUSION

For the reasons stated herein, the Copyright Office Board of Appeals affirms the refusal to register the jewelry design entitled "Finger Ring # 2935." 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