United States Copyright Office
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April 22, 2004

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915 Broadway
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Re: APPASSIONATA BAROCCO - RING
APPASSIONATA BAROCCO - NECKLACE
APPASSIONATA BAROCCO - BRACELET
APPASSIONATA BAROCCO - EARRINGS
Copyright Office Control No. 61-207-7866(T)

Dear Mr. Danish:

I am writing on behalf of the Copyright Office Board of Appeals in response to your letter dated July 30, 2003 requesting reconsideration of a refusal to register four works entitled "Appassionata Barocco - Ring," "Appassionata Barocco - Necklace," "Appassionata Barocco - Bracelet," and "Appassionata Barocco - Earrings." The Board has carefully examined the applications, the deposits and all correspondence in this case concerning these applications and affirms the denial of registration of these works.

I. ADMINISTRATIVE RECORD

A. Initial Applications and Office's Refusal to Register

On June 4, 2002, the Copyright Office ("Office") received four Form VA applications from you on behalf of your client, Roberto Coin S.p.A., to register four related jewelry designs. In a letter dated July 24, 2002, Visual Arts Section Examiner Kathryn Sukites refused registration of these works because they lacked the artistic or sculptural authorship necessary to support copyright claims.

Ms. Sukites explained that in order to be copyrightable, artwork or sculpture must contain at least a minimum amount of original artistic material. Ideas or concepts which may be embodied in a work are not protected by copyright. In addition, copyright does not protect familiar symbols and designs, minor variations of basic geometric shapes or simple combinations of these elements. (Letter from Sukites to Danish of 7/24/02, at 1.)

B. First Request for Reconsideration

In a letter dated November 20, 2002, you requested reconsideration of the Office's refusal to register the works. You argued that the works were entitled to protection as "pictorial, graphic, and sculptural works" which include artistic jewelry, and that they were "the result of substantial creativity and originality, far more than the minimal degree necessary to invoke the protection of the copyright law." (Letter from Danish to Sukites of 11/20/02, at 2.) In support of your position, you relied upon *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991), for the proposition that the requisite level of creativity to sustain a copyright is extremely low. You also

cited three other jewelry cases as further support of this principle. *See, Herbert Rosenthal Jewelry Corp. v. Grossbardt,* 436 F.2d 315, 316 (2d Cir. 1970) (noting the "defense [of lack of originality] has been almost drained of meaning as applied to works of art or of artistic craftsmanship . . . ."); *Diamond Direct, LLC v. Star Diamond Group, Inc.*, 116 F. Supp. 2d 525 (S.D.N.Y. 2000) (finding an original combination of unoriginal elements can result in an original work of jewelry meriting copyright protection); *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101 (2d Cir. 2001) (looking to very small elements of arrangement or sculpture in upholding the copyrightability of a jewelry design comprised of twisted multi-strand cables, gemstones and other elements). Finally, you argued that the commercial success and imitations of your client's works evidence the works' creativity, uniqueness, appeal, value and originality.

You appended to your November 20, 2002 letter a declaration by Roberto Coin, your client's founder, President, and principal creative designer. Mr. Coin stated his belief that the works were sufficiently original by reason of:

> (a) the twisting and weaving of gold wires without soldering to create a sleek appearance with the sensual drape and feel of fabric,
> (b) the decorative pinnings of the gold wires,
> (c) the placement of a ruby (which is [Mr. Coin's] 'signature' and trademark) on the inside of the woven gold,
> (d) the placement of precious stones in an original pattern on the underside of the jewelry, e.g., the 'necklace', and
> (e) the overall combination of precious stones with the gold weave.

(Coin Decl. ¶ 7.) Mr. Coin also stated in this declaration that he has: developed an international reputation for jewelry design and the brand "ROBERTO COIN," become a trend-setter, been awarded the "Gold Virtuosi (2nd edition)" award for goldsmith design, designed thousands of pieces of jewelry, generated millions of dollars from the sale of his jewelry, generated approximately $800,000 from the sale of jewelry embodying the designs in the subject applications, and patented a process of pinning gold threads together to resemble fabrics. (Coin Decl. ¶¶ 2, 3, 6, 8.) His declaration also listed numerous retailers that sell his jewelry as well as publications that advertise it. (Coin Decl. ¶¶ 4, 5.) It also referenced several unauthorized "knock-offs" of his designs. (Coin Decl. ¶ 9.) Copies of advertisements for Mr. Coin's jewelry designs, as well as for imitations thereof, accompanied the declaration. Additional photographs of the pieces of jewelry that are the subject of the applications at issue were also attached.

Following the submission of your first request for reconsideration, in a letter dated December 4, 2002 you submitted additional advertisements for the claimant's "Appassionata Barocco" jewelry. (Letter from Danish to Sukites of 12/04/02, at 1.)

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 20, 2002 and the accompanying declaration, Attorney Advisor Virginia Giroux of the Examining Division reexamined the applications and determined that each of the four jewelry designs lacked

a sufficient amount of original and creative artistic or sculptural authorship upon which to support a copyright claim. As Ms. Giroux explained in a letter dated April 4, 2003:

> We do not dispute that jewelry designs are works of art that fall within the subject matter of copyright. However, not all jewelry designs are copyrightable. All works, no matter what category they fall within[,] must contain a sufficient amount of original and creative authorship to be copyrightable.

(Letter from Giroux to Danish of 4/4/03, at 1.) Ms. Giroux cited *Feist* for the proposition that to be copyrightable, a work must possess more than a *de minimis* amount of creativity. She explained that although the threshold is low and the vast majority of works make the grade easily, there does exist a category of works where the amount of creativity is too trivial or insignificant to support a copyright. (*Id.* at 3.) (citing *Feist*, 499 U.S. at 345 and 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.01(b) (2002)). She noted that sufficient creativity must consist of more than a trivial variation of public domain elements, and in support of this position cited *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951), *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), *DBC of New York, Inc. v. Merit Diamond Corp.*, 768 F. Supp. 414 (S.D.N.Y. 1991), *Copyright Office and Procedures*, 37 C.F.R. § 202.1 (2003) and *Compendium II: Compendium of Copyright Office Practices* § 503.02(b) (1984) ("*Compendium II*").

Ms. Giroux then described the four jewelry designs as "identical and repetitive in nature, consist[ing] of a gold basket weave design whose elements are interwoven both horizontally and vertically and depending on the piece of jewelry are set with a ruby or rubies at various selected points and on the underside of the woven gold design." (Letter from Giroux to Danish of 4/4/03, at 2.) She concluded that the basket weave design is a minor variation on a familiar design within the public domain, and is therefore not copyrightable. She also noted that stones per se are not copyrightable elements. Therefore, "the sculptural authorship embodied in these works [did] not reflect sufficient original and creative authorship to support a copyright registration." (*Id.*)

Ms. Giroux did note that with respect to uncopyrightable elements, a sufficiently creative arrangement or combination of such elements may sustain a copyright. (*Id.* at 3.) (citing *Diamond Direct*, 116 F. Supp. 2d at 528 and *Atari Games Corp. v. Oman*, 979 F.2d 242 (D.C. Cir. 1992)). However, Ms. Giroux found that with respect to the subject four pieces of jewelry, the "woven gold elements, pinnings, and rubies [were] arranged in a rather simple configuration" and "fail[ed] to rise to the level of creativity necessary to sustain a copyright registration." (*Id.* at 2.) Ms. Giroux distinguished the subject jewelry from the copyrighted bee pin at issue in *Grossbardt* and the combined twisted cable pieces at issue in *Yurman*. She noted that those cases centered on "works of greater complexity and extent of authorship than the instant works, and are, therefore, not comparable." (*Id.* at 3.) Ms. Giroux ultimately concluded that "[t]he design elements embodied in these four works, individually, and in their particular arrangement, simply do not contain a sufficient amount of original and creative authorship to be copyrightable." (*Id.* at 3-4.)

Citing Section 102(b) of the Copyright Act, 17 U.S.C., Ms. Giroux also explained that it is not the materials of which a work is made (*e.g.*, gold wiring, decorative gold pinnings and rubies), nor the method or process used to create the work (*e.g.*, weaving of gold thread), that determines

copyrightability. She also explained that the composition of the work itself, not the impression or effect of the work (*e.g.*, sleek appearance with the sensual drape and feel of fabric), is the basis for determining copyrightability. Finally, Ms. Giroux discussed that the following factors do not bear on the examining process of whether a work is copyrightable: uniqueness, distinctiveness, aesthetics, design choices in relation to the number of possibilities, commercial success, imitation, infringement, nor the time, effort and expense undertaken to create a work. Based on the reasoning discussed above, Ms. Giroux again refused copyright registration for these four works.

D. Second Request for Reconsideration

In a letter dated July 30, 2003, you requested the Office to reconsider for a second time its refusal to register the copyright claims in the four "Appassionata Barocco" jewelry designs. (Letter from Danish to Board of Appeals of 7/30/03, at 1.) You reiterated your earlier argument that the requisite level of creativity to support copyright registration is extremely low, and maintained that "[t]he spacing, balancing and positioning of the elements of each design, and their overall appearance, rise up at least to the minimum level of arrangement and sculpture at which a jewelry design is entitled to copyright protection." (*Id.*) You again cited *Yurman* and *Feist*, and added a reference to Nimmer & Nimmer, *supra*, § 2.08[B], in support of your position. You also argued that the works' appearance, with its drape and feel, was "the tangible embodiment of an original and creative design in a three-dimensional sculptural work." (Letter from Danish to Board of Appeals of 7/30/03, at 1.) Therefore, you maintained that the works did contain a sufficient amount of original and creative artistic or sculptural authorship upon which to support copyright registrations. In the alternative, you argued that the copyright claims in the works should be registered under the "Rule of Doubt," for which you cite Section 108.07 of *Compendium II* and *Ronald Litoff, Ltd. v. American Express Co.*, 621 F. Supp. 981 (S.D.N.Y. 1985).

II. DECISION

A. The Legal Framework

1. Copyrightable Subject Matter

One of the prerequisites for a work to qualify as copyrightable subject matter is that it must fall within one of the enumerated categories of protectible works. 17 U.S.C. § 102 (2003). As you correctly noted in your first request for reconsideration, and as Ms. Giroux concurred in her response, jewelry designs can qualify for copyright protection as "pictorial, graphic, and sculptural works." 17 U.S.C. § 102(a)(5); (Letter from Danish to Sukites of 11/20/02, at 2); (Letter from Giroux to Danish of 4/4/03, at 1); *Compendium II: Compendium of Copyright Office Practices* § 502 (1984) ("*Compendium II*"). However, the fact that some jewelry designs can receive copyright protection does not mean that all jewelry designs are necessarily entitled to it.

All copyrightable works, be they jewelry designs, manuscripts, motion pictures or otherwise, must also qualify as "original works of authorship fixed in any tangible medium." 17 U.S.C. § 102(a). The tangibility requirements codifies the expression/idea dichotomy, *i.e.*, "protection is given only to the expression of the idea - not the idea itself." *Mazer v. Stein*, 347 U.S. 201, 217 (1954). "In no case does copyright protection for an original work of authorship extend to any idea, procedure, system, method of operation, concept, principle, or discovery, regardless of the form in

which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. § 102(b); *see also, Copyright Office and Procedures*, 37 C.F.R. § 202.1 (2003) ("The following are examples of works not subject to copyright and applications for registration of such works cannot by entertained: . . . (b) Ideas, plans, methods, systems, or devices, as distinguished from the particular manner in which they are expressed . . . ."); *Compendium II, supra*, § 503.03(c) ("Mere ideas and concepts cannot support a copyright claim."); 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.03[D] (2003) ("Copyright may be claimed only in the 'expression' of a work of authorship, and not in its 'idea'."); *Diamond Direct, LLC v. Star Diamond Group, Inc.*, 116 F. Supp. 2d 525, 529-30 (S.D.N.Y. 2000) (idea of replacing a diamond solitaire stone with a cluster of smaller diamonds is not protectible, only the actual design of laying the stones is). Therefore, the idea of a piece of jewelry that incorporates a twisted cable design and gemstones could not be protected, only the actual, original expression of such idea could be so long as all other factors are met.

As used with respect to copyright, the term "original" consists of two components: independent creation and sufficient creativity. *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). First, the work must have been independently created by the author, *i.e.*, not copied from another work. Both of your requests for reconsideration state that the subject works "were independently created by their author." (Letter from Danish to Sukites of 11/20/02, at 2); (Letter from Danish to Board of Appeal of 7/30/03, at 1.) The Office accepts this statement at face value, and has no reason to doubt its validity. Therefore, the first prong 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 Office determines that each of the four subject jewelry designs fails to possess the threshold amount of creativity, and therefore none is entitled to protection under the Copyright law.

2. The Creativity Threshold

In determining whether a work has 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 Danish to Sukites of 11/20/02, at 2.) (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 work in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359; *see also*, *Diamond Direct*, 116 F. Supp. 2d at 528 ("So the level of creativity necessary to support copyright is modest indeed. While no precise verbal formulation can capture it, there is some irreducible minimum beneath which a work is insufficiently original to find protection."); 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."); Nimmer & Nimmer, *supra*, § 2.01(b) ("[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, geometric shapes are not sufficiently creative to support 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) ("familiar symbols or designs" are "not subject to copyright and applications for registration of such works cannot be entertained."); *DBC of New York, Inc. v. Merit Diamond Corp.*, 768 F. Supp. 414, 416 (S.D.N.Y. 1991) (upholding a refusal to register a jewelry design featuring marquise and trillion cut diamonds noting that "[f]amiliar symbols and designs are not entitled to copyright protection.").

Moreover, making minor alterations to these otherwise standard shapes will not inject the requisite level of creativity. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102-03 (2d Cir. 1951) (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."); *Id.* § 503.02(b).

3. Selection, Coordination and Arrangement

Of course, some combinations of common or standard forms contain sufficient creativity with respect to how they 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); *Atari Games Corp. v. Oman*, 979 F.2d 242, 245-46 (D.C. Cir. 1992) (a work viewed as a whole may be subject to copyright due to its selection and arrangement of otherwise unprotectible elements); *Diamond Direct*, 116 F. Supp. 2d at 528 ("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.") (emphasis in original).

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, Inc. v. Curran*, 8 U.S.P.Q. 2d 1870 (S.D.N.Y. 1988), the district court upheld the Register's decision that a fabric design consisting of striped cloth over which a grid of 3/16" squares

were superimposed, even though distinctly arranged or printed, did not contain the minimal amount of original artistic material necessary to merit copyright protection. Similarly, the Eight 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. v. New York Arrows Soccer Team*, 802 F.2d 989 (8th Cir. 1986).

After again examining the four "Appassionata Barocco" jewelry designs, the Board has determined that none of these designs exhibits the requisite level of creativity either by its component elements or as a result of the combination thereof.

B. Description of Works



The fundamental component of each of the four jewelry designs is a twisted, single-strand cable. Rows of identical cables lay side-by-side in a slightly convex fashion to create the width and depth of the relevant piece of jewelry. At regular intervals along the length of the jewelry, additional side-by-side rows of cables lay perpendicularly across the underlying rows of cables, thereby creating a type of woven or basket weave design. With respect to pieces of jewelry whose shape remains fixed, namely the ring and the earrings, the underlying rows appear to be continuous underneath the perpendicular rows. With respect to the pieces of jewelry whose shape is flexible, namely the necklace and the bracelet, the rows of cables are affixed to individual, underlying links. The orientation of the rows, straight or perpendicular, alternates with respect to each link which creates the same visual effect found in the static-shaped jewelry of the perpendicular rows overlapping continuous underlying rows thereby creating a basket weave. The links of both the necklace and bracelet are connected with pinnings which feature small, round balls at each end where the pinnings exit the links. A single ruby is affixed to the underside of one of the links in each of the necklace and bracelet. An additional square, bezeled ruby is affixed to the top of the clasp on the necklace and bracelet.

C. Analysis of Works

As noted by the legal authorities cited above, the idea of combining a cable design with gemstones into a piece of jewelry is not protectible, so any protectible aspects would have to be found in the actual implementation of that idea. The basic elements of the four subject pieces of jewelry are a cable design, a basket weave design, spherical ends to the pinnings and square gemstones. These elements are standard designs and geometric shapes which are within the public domain and not copyrightable in and of themselves. Section 503 of *Compendium II* states, "If the

work consists entirely of uncopyrightable elements, registration is not authorized." Even if some of these shapes have been slightly modified (*e.g.*, rounded edges), minor alterations of stock features are not sufficient to sustain a claim of copyright. *See, Vogue Ring Creations, Inc. v. Hardman*, 410 F. Supp. 609, 612 (D.R.I. 1976) (addition of rope design and changes in width and shape of ring were "trivial and meaningless, utterly devoid of any 'original creativity,'" and these components were therefore not entitled to copyright protection). Additionally, as Ms. Giroux noted, "[s]tones per se, such as rubies, are also not copyrightable elements." (Letter from Giroux to Danish of 4/4/03, at 2.)

Therefore, the only means by which these non-protectible elements could possibly sustain a copyright would be if their particular combination or arrangement exhibited a sufficient level of creativity. Unfortunately, they do not. The identical cables are simply laid perpendicularly across each other at regular and repetitive intervals. The use of side-by-side and perpendicular placement is not sufficiently creative to warrant copyright protection. Although the perpendicular placement gives rise to a basket weave design, that design itself is also a non-protectible, standard design. The mere repetition of these non-protectible elements is also not sufficiently creative to support a copyright registration. *See, DBC of New York*, 768 F. Supp. at 416-17 (refusing to find copyright in a diamond ring featuring several, graduated, common-place marquise and trillion cut diamonds mounted on a knife-edge shank). Furthermore, the separate placement of two rubies and the gold balls at the ends of the pinnings on each of the necklace and bracelet simply do not create a combination or arrangement that rises to the level of creativity necessary to sustain a copyright registration.

Yet, you argue that given the minimal requisite level of creativity, the subject pieces of jewelry should meet the threshold. Specifically, you claim that the "spacing, balancing and positioning of the elements of each design, and their overall appearance, rise up at least to the minimum level of arrangement and sculpture at which jewelry design is entitled to copyright protection." (Letter from Danish to Board of Appeals of 7/30/03, at 1.) However, the overlapping cables are simply spaced and positioned at equidistant points along the respective piece of jewelry. The pieces of jewelry are certainly balanced because if divided at any axis, they will produce two mirror images of each other. Therefore, the Office is not persuaded that the repetitive, symmetrical, equidistant arrangement of non-protectible design elements somehow rises to the requisite level of creativity. *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."). The subject jewelry designs consist of simple variations of standard designs and simple arrangements, which while perhaps aesthetically pleasing and commercially successful, do not contain the minimal amount of creative authorship to support a copyright registration.

Through the declaration of your client's founder, though, you set forth five specific elements of the subject pieces of jewelry that you claim evidence sufficient creativity on which to base a copyright claim. (Letter from Danish to Sukites of 11/20/02, at 2.); (Coin Decl. ¶ 7.) First, you cite "the twisting and weaving of gold wires without soldering to create a sleek appearance with the sensual drape and feel of fabric." As explained with respect to the idea/expression dichotomy, the idea of creating a fabric-like metal is not protectible, nor is the process or method of doing so. Next, you cite "the decorative pinnings of the gold wires." Again, while the process used in affixing these pinnings may be relevant to a patent analysis, and the Office notes that some of the advertisements

for the subject pieces of jewelry tout a "patented new manufacturing technique," the only visible parts of the pinnings themselves consist of plain spheres, a standard geometric shape for which no copyright protection is available. Third, you cite "the placement of a ruby (which is [his] 'signature' and trademark) on the inside of the woven gold." Placing a single stone on a necklace can hardly be considered creative for there is no design element of which to speak. Furthermore, whether or not a work or element has also obtained trademark rights is immaterial to the determination of the work's protection under copyright. *See,* 37 C.F.R. § 202.10. Fourth, you cite "the placement of precious stones in an original pattern on the underside of jewelry, e.g., the necklace." The deposit materials, however, only show a single stone on the underside of the necklace and bracelet. A single stone is simply not capable of constituting an original pattern and thereby forming the basis of creative expression. Finally, you cite "the overall combination of precious stones with this unusual gold weave." As previously stated, the combination at issue is simply a repetition of a standard cable design at perpendicular angles with one stone affixed underneath and another on the clasp. This overall design simply does not rise to the level of creativity necessary to sustain a claim of copyright.

D. Case Law Distinguished

In your first request for reconsideration, you relied in part on the Second Circuit's statement in 1970 that the "defense [of lack of originality] has been almost drained of meaning as applied to works of art or of artistic craftsmanship . . . ." (Letter from Danish to Sukites of 11/20/02, at 2) (citing *Herbert Rosenthal Jewelry Corp. v. Grossbardt*, 436 F.2d 315, 316 (2d Cir. 1970)). However, your reliance is misplaced for three reasons. First, *Grossbardt* was decided pre-*Feist* when the Court made unmistakable that a creativity threshold did indeed still exist. Second, the *Grossbardt* court made the above-quoted comment simply as a hypothetical explanation as to why appellate counsel chose a different defensive strategy than did trial counsel. The case provides no analysis, much less guidance, as to the requisite amount of creativity to sustain a copyright claim. Rather, it analyzes the statutory requirements of a copyright notice under the prior incarnation of the Copyright Act. Finally, as Ms. Giroux previously explained, the subject jeweled bee pin in *Grossbardt* contained more copyrightable authorship than the four designs for which you have applied for registration. (Letter from Giroux to Danish of 4/4/03, at 3.) Therefore, we find your citation to this case unpersuasive.

You also cited *Diamond Direct*, 116 F. Supp. 2d at 525 and *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101 (2d Cir. 2001) for the respective propositions that an original combination of unoriginal elements can result in an original work of jewelry which merits copyright protection and that the courts will look to very small elements of arrangement or sculpture to uphold the copyrightability of jewelry designs. (Letter from Danish to Sukites of 11/20/02, at 2.) While the Office agrees with the legal propositions for which you have cited these cases, they still do not advance your cause with respect to the factual analysis. The fatal defect in the four subject copyright applications is that the elements and their assembly are so simplistic, that regardless if the elements are viewed individually or in combination, none of the works exhibits the requisite level of creativity. Additionally, as Ms. Giroux explained, the above-cited cases "describe works of greater complexity and extent of authorship than the instant works, and are, therefore, not comparable." (Letter from Giroux to Danish of 4/4/03, at 3.)

E. Other Considerations

Several other factors that you have argued, while perhaps important on personal or commercial levels, have no bearing on the determination of whether or not copyright registration is available. For example, you argue that the works' creativity, uniqueness, appeal, value and originality is evidenced by both their commercial success and the fact that at least one Internet retailer sells "knock-offs" of "Roberto Coin Appassionata inspired" weave jewelry. (Letter from Danish to Sukites of 11/20/02, at 2.) Besides the fact that the examples you have provided of such imitations do not resemble any of the four pieces of jewelry presently at issue, commercial success and competitive imitation are simply not factors that are 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."). Therefore, while the statements in Roberto Coin's declaration (*e.g.*, awards achieved, international reputation, brand awareness, number of jewelry items produced, revenue, advertising and publicity venues, distributors and imitators) and the accompanying advertisements are impressive, they are immaterial to the analysis of whether the works are copyrightable. (Coin Decl. ¶¶ 2-6, 8,9.)

Finally, citing Section 108.07 of *Compendium II*, you argue in the alternative that the four subject pieces of jewelry should be registered pursuant to the "Rule of Doubt." You will note that this rule applies only when the Office determines that there is "reasonable doubt"as to whether a court would determine that the works contain copyrightable subject matter. Based on the analysis above, the Office does not believe that any reasonable doubt exists. The works embody so little copyrightable authorship that it is not reasonable that they would satisfy the threshold necessary to sustain a copyright registration.

III. CONCLUSION

For the reasons stated herein, the Copyright Office Board of Appeals affirms the refusal to register the four jewelry designs, "Appassionata Barocco - Ring," "Appassionata Barocco - Necklace,""Appassionata Barocco - Bracelet," and "Appassionata Barocco - Earrings." 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