United States Copyright Office
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March 2, 2004

Parker H. Bagley
Milbank, Tweed, Hadley & McCloy LLP
1 Chase Manhattan Plaza
New York, NY 10005-1413

Re: LINK DESIGN
Control No. 61-206-5277(M)

Dear Mr. Bagley:

I am writing on behalf of the Copyright Office Board of Appeals in response to your letter dated December 19, 2002, appealing a refusal to register a work entitled "LINK DESIGN" on behalf of your client Di Modolo International LLC. The Board has carefully examined the application, the deposit and all correspondence concerning this application. The Board affirms the denial of registration because the work does not evidence sufficient creative authorship to support a claim of copyright.

ADMINISTRATIVE RECORD

The initial application for registration of the LINK DESIGN, received on November 8, 2001, sought registration for a jewelry design. In a letter dated June 4, 2002, Visual Arts Examiner Joy Mansfield rejected the application because she found that the work "lacks the artistic or sculptural authorship necessary to support a copyright claim in the jewelry design." Letter from Mansfield to Nici of 6/4/02. Ms. Mansfield noted that a claim for copyright protection must evidence originality and sufficient creative authorship. Ms. Mansfield also explained that copyright protection does not extend to familiar shapes, symbols or design or mere variations thereof. *Id. citing* 37 C.F.R. Section 202.1.

In your letter dated June 19, 2002, you filed a request for reconsideration of the refusal to register this work. You expressed your disagreement with Ms. Mansfield's refusal of registration and stated that LINK DESIGN is not a familiar symbol or design. As evidence of the original nature of the design, you pointed out that Ms. Mansfield did not cite any other "jewelry designs which approximate Applicant's original design" and stated that the design does not consist of "common geometric shapes or other common design elements." Letter from Bagley to Mansfield of 6/19/02,at 1. Citing Feist Publications, Inc. v. Rural Telephone Service Co., Inc, 499 U.S. 340, 346 (1991), you observed that only a modicum of creativity is required to meet the requisite level of original authorship necessary for copyright protection, and you urged that the rejected design far surpasses this level.

In a letter dated August 23, 2002, Examining Division Attorney Advisor Virginia Giroux responded to your first request for reconsideration. After reviewing the application in light of the points raised in your letter, Ms. Giroux stated that the Examining Division agreed with the refusal to register because the LINK DESIGN does not contain a sufficient amount of original artistic or sculptural authorship upon which to support a copyright registration. Letter from Giroux to Bagley of 8/23/02, at 1.

Ms. Giroux responded to your suggestion that the work was unique, i.e., that no other similar work was identified by the Examiner, by pointing out that uniqueness or distinctiveness are not the standard for copyrightability. Ms. Giroux explained that it is the particular expression of an idea, as evidenced in the deposit, that is examined for copyrightability. *Id.* at 1.

Ms. Giroux noted that originality is not the only prerequisite to copyright protection; a work must also "possess more than a *de minimis* quantum of creativity." *Id.* at 1, *quoting* Feist Publications, Inc. v. Rural Telephone Service Co., Inc, 499 U.S. at 363. In addition, Ms. Giroux noted that the courts have interpreted original authorship to require more than a merely trivial variation of public domain elements. *Id.* at 1, *citing* Alfred Bell & Co. v. Catalda Fine Arts Inc., 191 F.2d 99 (2d Cir. 1951). Ms. Giroux indicated that the Copyright Office examines the work for elements that, either alone or in combination, evidence the requisite quantum of creative authorship. She also stressed that the Copyright Office does not make aesthetic judgments about the work, nor does it assess the commercial success of a work. Ms. Giroux stressed that the germane question before the Copyright Office is whether the work evidences sufficient original authorship to warrant a claim for copyright registration.

Ms. Giroux noted that the LINK DESIGN contains a repetitive pattern consisting of twelve identical links each shaped somewhat like a cone with a circle at its top which functions as a connector for each link through which the bottom curved portion of each cone-like element is inserted. *Id.* at 2. She explained the Examining Division's view that these individual elements are minor variations of common and familiar shapes and that the sculptural aspects of the work are too simple to qualify for copyright protection. Similarly, she noted that the arrangement of the individual elements does not reveal sufficient creative authorship to sustain a copyright registration. She stated that the "design is *de minimis* involving public domain elements arranged in a rather simple and repetitive arrangement." *Id.* at 2, *citing* the Compendium of Copyright Office Practices, Compendium II, Section 503.02(b)(1984).

In a letter dated December 19, 2002, you made a second request for reconsideration incorporating all arguments made in your earlier letter and responding to Ms. Giroux's refusal to register the work. You disputed Ms. Giroux's characterization of your argument in the first request for reconsideration as being based on the work's "unique" qualities, and claimed that the thrust of the argument was the "original" nature of the work. Letter from

Bagley to the Board of Appeals of 12/19/02, at 1. In support of this distinction, you noted the lack of evidence of similar designs was itself evidence of creativity and therefore of originality. *Id.*

While you accept the standard of originality set forth in Ms. Giroux's letter of August 23, 2002, you dispute the characterization of the individual links as mere conical shapes. You state that "each link has been sculpted into an original creative design," and that they defy easy description. *Id.* at 2. In contrast to Ms. Giroux's characterization of the links as "conical," you describe them as follows:

> They consist of a large rounded end, concave slopes, and then two smaller rounded ends with a straight line of separation leading to a circle on the links' interior. The individual link ... and the combination of the links when made into the bracelet gives an original, sculpted appearance more evocative of a series of duck heads with slightly parted bills, than of a collection of cones.

I.d. at 2. As such, you claim that there is nothing "common" or "familiar" about the individual links, or their combination in the overall bracelet design. In further support, you distinguish these links from the "familiar symbols and designs" of the cases cited by Ms. Giroux, e.g., the arrow design in John Muller & Co., Inc. v. N.Y. Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986) or the stripes and squares of Jon Woods Fashions, Inc. v. Curran, 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988). You conclude that the LINK DESIGN incorporates more than a trivial variation of public domain elements. *Id.* at 2.

DECISION

LINK DESIGN is a bracelet consisting of 12 identical links of simple conical shape which are reminiscent of a zipper-latch and which contain a circular opening at the wider side of the conical shape. Each link is connected to the next link in an identical manner, namely, the narrow side of the cone, which appears to be divided by a line or linear space from the base to the circular opening, wraps through the circular opening of the next link. Although only one view was provided in the photographic representation of the deposit accompanying the application and the subsequent requests for reconsideration, each link appears to be identical and interconnected in an identical manner. From the deposit, it appears that the LINK DESIGN is composed of a metallic substance which is either textured or encrusted with another material in an identical manner. At each end of twelve connected links are metallic clasps, one circular clasp affixed to the last circular end and one rectangular clasp affixed to the narrow end of the link on the other end of the bracelet.

No one in the Copyright Office has questioned whether the work was created by your client. The sole question presented to the Board of Appeals in this second request for

reconsideration, as was the case in your initial request for reconsideration, is whether the LINK DESIGN meets the minimal level of creative authorship necessary to sustain a copyright registration. In support of your view that the work does meet the requisite level, you rely solely on the Supreme Court's decision in Feist Publications, Inc. v. Rural Telephone Service Co., Inc. 199 U.S. 340 (1991).

The Board recognizes the applicability of Feist when examining and judging the authorship of a sculptural work or any other work. The Board further recognizes that the threshold for copyrightability of a work is low. Nevertheless, a threshold does exist, as indicated by the facts and holding of the Feist decision itself. 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," *Id.* at 363, and that there can be no copyright in works in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359.

In applying the holding in Feist to the LINK DESIGN, the Board of Appeals agrees with the Examining Division's finding that this design contains an insufficient quantum of creative authorship to support a copyright registration.

This conclusion by the Board is also supported by established Copyright Office practices and regulations. Even prior to Feist, Copyright Office registration practices recognized that works with only a *de minimis* amount of authorship are not copyrightable. *See* Compendium of Copyright Office Practices, Compendium II, section 202.02[a](1984). With respect to pictorial, graphic and sculptural works, the class within which LINK DESIGN would 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, sec. 503.02[a]. Compendium II recognizes that it is not aesthetic merit, but the presence of creative expression that is determinative of copyrightability. With respect to sculptural works, registration cannot be based upon "common geometric figures or shapes in three-dimensional form, such as the cone, cube or sphere. Creative expression capable of supporting a 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, section 503.02[b].

Your argument that the shape of each individual link is not a common geometric shape and is, therefore, copyrightable since it is an original shape is not persuasive for a number of reasons. Letter from Bagley to the Board of Appeals of 12/19/02, at 1-2. First, while uniqueness may be evidence of originality, i.e., whether or not a work was copied, it is not evidence that such originality contains a sufficient amount of creative authorship to support a copyright registration. The statement that "[n]o jewelry designer previously had the same spark of creativity to conceive of this same original design, or anything similar" may tend to support the argument that the work was original and unique, i.e., not copied, but this statement begs the question of whether the work reveals a sufficient quantum of creative authorship to support a copyright registration.

The exterior shape of the design, while not precisely conical, is evocative of a conical shape. A creative variation from the standard conical geometric shape arguably exists, yet this variation is a minor one. Placing a circular space in the top portion of the conical shape combines another common geometric shape to the overall design, but that circular space also provides a functional purpose of allowing the individual links to be interconnected. The addition of the straight line or linear space centered from the bottom of the link to the circle is merely the addition of another standard geometric shape. Compendium II states "the creative expression capable of supporting copyright must consist of something more than the mere bringing together of two or three standard forms or shapes with minor linear or spatial variations." Compendium II at sec. 503.02(b). The combination of the shapes in each link reflect a *de minimis* amount of creativity regardless of the uniqueness or aesthetic attractiveness of the links. Similarly, since each link is identical to the others and clasps at the end serve a utilitarian function, the overall combination of the LINK DESIGN does not reach the requisite level of creativity to sustain a registration.

The texture of the surface of the link reveals no distinct creative authorship to alter the Board's finding in relation to the creativity of the overall combination of individual elements. There has been no evidence offered that the texture was the result of original artistic expression and the apparent uniformity of the texture on all of the links supports the view that the texture adds no more creative authorship than would the mere coloration of a work. *See, e.g.*, Compendium II, section 202.02(j). The overall combination of this uniform texture together with minor variations of a few common shapes fails to meet the admittedly low threshold of creative authorship necessary to support registration for the LINK DESIGN.

CONCLUSION

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

Sincerely,

Marilyn J. Kretsinger

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for the Appeals Board
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