FILE COPY

United States Copyright Office
Library of Congress · 101 Independence Avenue SE · Washington, DC 20559-6000 · www.copyright.gov

August 19, 2004

Salans Hertzfeld Heilbronn Christy & Viener
Attn: Lora A. Moffatt
Rockefeller Center
620 Fifth Avenue
New York, New York 10020-2457

Re: Bracelet B05004M; Ring R06179; Drop (Pendant) D06273; and Earrings E06179.
Control Number: 60-721-7853(R)

Dear Ms. Moffatt:

The Copyright Office Board of Appeals has reviewed your request for reconsideration of the Office's refusal to register the four jewelry designs listed above for your client, Yurman Design Inc. The Board has determined that the above-referenced works cannot be registered. The design elements found on each work do not contain the requisite creative authorship to support a copyright registration.

ADMINISTRATIVE RECORD

Initial submission:

On March 26, 2002, the Copyright Office received applications, deposits and fees for nineteen jewelry designs. In a letter dated April 5, 2001, John Ashley, Supervisory Examiner for the Visual Arts Section of the Copyright Office, refused registration of 18 of the designs due to a lack of original authorship. Letter from Ashley to Ramirez of 4/5/01, at 1. Mr. Ashley stated that "[i]deas or concepts which may be embodied in a work, including what might be considered a designer's unique, distinctive style are not protected by copyright law." *Id.* Morever, he pointed out that "copyright does not protect familiar symbols and designs, minor variations of basic geometric shapes, lettering, and typography, or mere variations in coloring." *Id.* at 2. He requested clearer photographs on the nineteenth design so a more through examination could be conducted regarding its copyrightable authorship. *Id.* at 1.

First Request for Reconsideration:

In a letter dated July 31, 2001,[1] you filed a request for reconsideration of the refusal to register the 19 jewelry designs. You argued that these works possessed the minimum level of creativity required by the case law. Letter from Moffatt to Ashley of 7/31/01, at 2. You cited Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) as evidence that originality has two components: (1) that the work was independently created by the author; and (2) that it possess some minimal level of creativity. You asserted that the Examiner found, "without any explanation, that the jewelry designs at issue do not contain a sufficient level of creativity to warrant copyright protection." *Id.*

Citing Feist again, you urged that the requisite level of creativity is extremely low, and that the vast majority of works make the grade easily. *Id.* at 2. You gave as additional citations regarding the low threshold of originality Re-Alco Indus., Inc. v. National Center for Health Educ., Inc., 812 F.Supp. 387 (S.D.N.Y. 1993), and Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951). Next you asserted that the Examiner held your client's jewelry designs to a higher standard. *Id.* at 2.

You then provided a chart setting out the elements of each of the 19 jewelry designs to demonstrate that each was both original and creative. *Id.* at 2-4. You concluded by asserting that your client "has contributed even more than the requisite modicum of creativity in designing these highly artistic and complex jewelry designs." *Id.* at 4.

While you conceded that your client's jewelry designs are composed of public domain materials, and use commonly known shapes, you argued that Yurman's designs were a distinguishable variation of the public domain elements, citing Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951). *Id.* at 2. You also asserted that these works met the originality standard on the basis of selection and arrangement. Key Publications, Inc. v. Chinatown Today Pub. Enters., Inc., 945 F.2d 509 (2d Cir. 1991); Stoneworks Inc. v. Empire Marble and Granite Inc., 49 U.S.P.Q.2d 1760 (D. Fla. 1998); and C.S. Hammond & Co. v. International College Globe, Inc., 210 F.Supp. 206 (S.D.N.Y. 1962). *Id.*

Finally, you claimed that the nineteen jewelry designs were similar to the jewelry design protected in the case of Weindling Int'l Corp. v. Kobi Katz, Inc, 56 U.S.P.Q.2d

---

[1] Payment to process the appeal was made on August 3.

1763 (S.D.N.Y. 2000). *Id.* at 5. In that case, the court considered: (1) the number of design options available to a jewelry designer; (2) that the jewelry designer's choices were not only dictated by function alone, but also by consideration of design; and (3) that the overall combination of components had an "overall distinctive" feel. A similar finding was likewise made in Yurman Design, Inc. v. PAJ, Inc., 93 F. Supp. 2d 449 (S.D.N.Y. 2000). *Id.* at 5. Finally, you argued Mr. Yurman had innumerable options in designing jewelry and that each of the designs has a distinctive look that is unique to him. *Id.*

After reviewing the works in relation to the points made in your first request for reconsideration, Examining Division Attorney Advisor Virginia Giroux responded in a letter dated September 13, 2001. She upheld the refusal to register the 19 works on the grounds that they do not contain a sufficient amount of original artistic or sculptural authorship to support registration. Letter from Giroux to Moffatt of 9/13/01, at 1. She acknowledged that David Yurman was a well known jewelry designer, but noted that in order for a work to be copyrightable, it must not only be original but "possess more than a de minimis quantum of creativity," citing Feist Publications v. Rural Telephone Service Co., 499 U.S. 340 (1991). She noted: "In applying this standard, the Copyright Office examines a work to determine if it contains elements, either alone or in combination, on which copyright can be based." In making this decision, the Copyright Office does not consider aesthetic considerations, the attractiveness of the design, the time and effort it took to create the designs, the unique look of the design, or its commercial success. Instead, the determination is made on "whether there is sufficient original authorship within the meaning of the copyright law and settled case law." *Id.* at 2.

Ms. Giroux then described each of the 19 jewelry designs. *Id.* at 2-3. She concluded that cable twisted design, circular tubing, and simple shapes as embodied in those works were familiar shapes and designs, or minor variations thereof, which were not copyrightable. Citing 37 C.F.R. § 202.1, she elaborated that the simple combination and arrangement of the two or three common public domain shapes in each work failed to rise to the level of creativity necessary to sustain a copyright registration. *Id.* at 3.

She observed that simple variations of standard designs and their simple arrangements can not be copyrighted. She cited to John Muller & Co., Inc. v. N.Y. Arrows Soccer Team, 802 F.2d 989 (a logo consisting of four angled lines forming a arrow, with the word "arrows" in cursive script below); Jon Woods Fashions, Inc. v. Curran, 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988)(a design consisting of two inch strips, with small grid squares superimposed upon the stripes); and DBC of New York, Inc. v. Merit Diamond Corp., 768 F.Supp.1454 (S.D.N.Y. 1991)(a simple jewelry design). She continued that while "each of these works incorporates both separate design elements of

textured contrasts and common geometric shapes, the particular combination of elements in each work was not sufficient to rise to the level of a copyrightable work of sculptural authorship." *Id.*

Ms. Giroux agreed with your statement that Alfred Bell and Feist only required a low standard for copyrightability. She cited Feist, however, for the point that "there remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright." Feist, 499 U.S. After examining your client's works, she found that neither the individual elements nor their arrangement met that low threshold. *Id.* at 4. Finally, with respect to the case of Weindling International Corp. v. Kobi Katz, Inc., 56 U.S.P.Q.2d 1763 (S.D.N.Y. 2000), Ms. Giroux concluded the case was distinguishable because the ring taken as a whole contained a sufficient amount of original and creative authorship to support copyright registration. *Id.*

Second Request for Reconsideration:

In a letter dated January 11, 2002, you filed a second request for reconsideration for four of the jewelry designs: bracelet B0500M; ring R06179; Drop (Pendant) D06273; and earrings E06179. You agree with the Copyright Office that Feist requires a minimal degree of creativity, but contest the Office's conclusion that these four jewelry designs do not contain a sufficient amount of creativity. Letter from Moffatt to Giroux of 1/11/02, at 2.

You urge that your client's jewelry designs "are works of art and consist of more then mere trivial variations of common shapes and designs" and describe the works at issue as follows:

> Applicant's B05044M is composed of sterling silver cable twisted into helix with a yellow gold buckle connecting either end. The design of the yellow buckle consists of yellow gold uniquely sculpted in a horse-shoe shape.



> Applicant's D06273 is also an original design. Applicant uses a rectangle shape to create a pendant that consists of an outer-layer of sterling cable, and inner

outline of yellow gold, and a black onyx at the center. Each contrasting layer provides the piece with multiple dimensions.



With respect to Applicant's E06179 earrings, they are a modern twist on the classic hoop earring. The earrings have at the center, two side-by-side yellow gold tubes welded together, with a double twisted sterling silver cable on either end.



To compliment these earrings, Applicant created R06179 ring, which is composed of two stacked yellow gold tubes welded together. The gold tubes are the focal point of the ring, with the rest of the ring made from either yellow gold or sterling silver twisted cable.



After describing the four jewelry designs, you claim that David Yurman has contributed more than the requisite modicum of creativity in designing the works. *Id.* at 2. You acknowledge that the designs are composed of materials that are in the public domain, and that each design uses commonly known shapes. However, you urge that the combination of each of these elements has more than a spark of creativity. *Id.* at 2-3. Moreover, you assert that the designs are clearly a distinguishable variation of any public domain elements used. *Id.* at 3.

You further contend that the cases of John Muller & Co., Inc. v. N.Y. Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986); DBC of N.Y., Inc. v. Merit Diamond Corp., 768 F.Supp. 414, 417 (S.D.N.Y. 1991); and Woods Fashions, Inc. v. Curran, 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988) are not applicable to your client's designs, either because the litigated designs were simpler than your client's or because standards relating to useful articles were applied. You cite three cases protecting costume jewelry as support for registering your client's four jewelry designs, Boucher v. Du Boyes, Inc., 253 F.2d 948 (2d Cir. 1958); Trifari Krusman & Fishel, Inc. v. Charel Co., 134 F.Supp. 551 (S.D.N.Y. 1955); and Hollywood Jewelry Mfg. v. Dushkin, 136 F.Supp 738 (S.D.N.Y. 1955). *Id.* at 3. Finally, you cite the case of Weindling Int'l. Corp. v. Kobi Katz, Inc., 56 U.S.P.Q.2d 1763 (S.D.N.Y. 2000) as protecting under copyright a jewelry design similar to the designs in this case. *Id.* at 3.

DECISION

The Board has reviewed all of the arguments you have presented in your requests for reconsideration of the Office's refusal to register the four Yurman designs shown above. The Board does not question that these designs are original in the sense that they were created by David Yurman. Nor would it question your earlier assertions that these designs might have a David Yurman look.[2] The only question before the Board is whether these jewelry designs have sufficient copyrightable authorship to sustain a copyright registration. With respect to pictorial, graphic and sculptural works, the class within which the four jewelry designs would fall (*see* 17 U.S.C. § 102(a)(5)), the Compendium of Copyright Office Practices, II (1984) ("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, § 503.02(b)(1984). The Compendium recognizes that it is not aesthetic merit, but the presence of creative expression that is determinative of copyrightability,

> [R]egistration cannot be based upon standard designs which lack originality, such as common architecture moldings, or

---

[2] The look of these designs was not brought up in the second request for reconsideration and even if it were, *i.e.*, if you were to assert that Mr. Yurman's designs share a unique, distinctive look that distinguishes them from the designs of other jewelry, that is self-defeating. While it may be that the first time Mr. Yurman incorporated this "unique, distinctive look" into a jewelry design, it demonstrated copyrightable authorship (assuming that one could describe just what that "look" consists of and ascertain whether it is, in fact original), its subsequent use in his other jewelry designs would be incontestably unoriginal.

> the volute used to decorate the capitals of Ionic and Corinthian columns. Similarly, it is not possible to copyright common geometric figures or shapes in three-dimensional form, such as the cone, cube, or sphere. The mere fact that a work of sculpture embodies uncopyrightable elements, such as standard forms of ornamentation or embellishment, will not prevent registration. However, *the creative expression capable of supporting copyright must consist of something more than the mere bringing together of two or three standard forms or shapes with minor linear or spatial variations.*

Id. (Emphasis added). *See also* section 202.1(a) of the Copyright Office regulations ("familiar symbols or designs" are "not subject to copyright and applications for registration of such works cannot be entertained"). 37 C.F.R. § 202.1(a)

In your request for reconsideration, you acknowledge that the materials used are in the public domain, and that the jewelry designs use commonly known shapes, such as circles and squares. You assert, however, the "combination of each of these elements results in a jewelry design that has more than a spark of creativity." You also assert that these designs "are clearly a distinguishable variation of any public domain elements used." Letter from Moffatt to Giroux of 1/11/02, at 2-3. The Board agrees with Ms. Giroux that "the cable twisted design, as well as the circular, semi-circular, squarish, dome-like, circular tubing...embodied in these...[four designs] are familiar shapes and designs, or minor variations thereof, in the public domain and, therefore, not copyrightable." Giroux Letter at 3. Nor can the fact that these pieces of jewelry are attractive and made of costly materials take them out of the public domain.

In Homer Laughlin China v. Oman, 22 U.S.P.Q.2d 1074 (D. D.C. 1991), the court affirmed the Copyright Office's refusal to register a commercially successful chinaware design because neither familiar shapes and symbols nor simple variations or combinations of basic geometric designs are capable of supporting a copyright registration.

You further argue that two of the cases cited by Ms. Giroux on simple designs using public domain elements are distinguishable from your client's works due to the complexity of the Yurman jewelry designs. You assert that unlike the familiar symbols and extremely simplistic fabric design in two cases, Jon Woods and John Muller the designs here involve "complex combinations of precious materials in different textures and shapes." Letter from Moffatt to Giroux of 1/11/02, at 2-3. The Board, however, finds

the simplicity of the designs here are closely similar to the long line of cases establishing that familiar symbols and simple arrangements are outside of copyright protection. In Jon Woods Fashions v. Curran, 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988) the design consisted of two inch stripes with small grid squares superimposed upon the stripes. In both of these cases, the number of elements and simple arrangement is roughly equivalent to what is found in the four designs involved in this reconsideration. In John Muller & Co., Inc. v. N.Y. Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986), the work was a logo consisting of four angled lines forming an arrow, with the word "arrows" in cursive script below. Each design here is comprised of familiar shapes such as twisted cable designs, circles, semi-circles, rectangles, squares with minor variations combined in routine and symmetrical ways. The fact that the materials used by Yurman are more expensive than the materials used in those cases does not affect the copyrightability of these works.

You dismiss another case cited by Ms. Giroux, DBC of New York, Inc. v. Merit Diamond Corp., 768 F.2d 414 (S.D.N.Y. 1991), because you argue that it used a different standard. In DBC, the court held that evidence put forward by plaintiff DBC was insufficient to overcome the determination of non-copyrightability by the Copyright Office for the two Marquise-Trillion rings in question in that case. The DBC court examined in detail the individual elements of the rings which made up their designs and found that the "two rings, on the whole, [are] not exceptional, *original*, or unique." *Id.* at 416 (emphasis added). In so holding, the court recognized that familiar and common shapes and symbols are not copyrightable in themselves, citing 37 C.F.R. § 202.1; the court further refused to recognize protection for the rings each in its entirety ("[F]urthermore, DBC's gestalt theory that the whole is greater than the sum of its parts is rejected..."). *Id.*

Although the DBC court arrived at the same conclusion of non-copyrightability concerning the two rings as had the Copyright Office in its registration consideration, the court's reasoning also included references to the rings as utilitarian articles. The concept of useful articles and the need for the presence of separable authorship in order to assert copyright in such useful articles (17 U.S.C. § 101, definition of "pictorial, graphic and sculptural works") was not part of the Office's determination in its refusal to register the DBC rings. However, the difference in analysis does not vitiate the fact that both the DBC court and the Office concluded that the rings were not copyrightable because the composition of the jewelry pieces consisted of familiar or commonplace shapes and designs which alone and in combination lacked the necessary amount of original authorship and, thus, did not support a copyright--this being the sole reasoning of the Office in its refusals to register and being, at least, a salient part of the reasoning of the DBC court in refusing protection to the rings. Since the question before the Appeals Board is whether these four jewelry designs contain sufficient originality, we consider DBC a relevant case.

Next, you argue that the designs here are copyrightable because they are "significantly more creative and sophisticated" than the costume jewelry that has been registered in Boucher v. Du Boyes, Inc., 253 F.2d 948 (2d Cir. 1958); Trifari, Krussman & Fishel, Inc. v. Charel Co., 134 F. Supp. 551 (S.D.N.Y. 1955); and Hollywood Jewelry Mfg. v. Dushkin, 136 F. Supp. 738 (S.D.N.Y. 1955). Letter from Moffatt to Giroux of 1/11/02, at 3. The Board does not find this argument persuasive. The artistic merit, aesthetic value or the commercial success of a work does not determine its copyrightability. Compendium II, § 503.01(1984); *see* Homer Laughlin China Co. v. Oman, 22 U.S.P.Q.2d 1074, 1076 (D.D.C. 1991). Similarly, the sophistication or lack thereof of a piece of jewelry has no bearing on whether that piece is copyrightable. Rather, copyrightability turns on whether a sufficient amount of original artistic authorship is embodied in that piece of jewelry. The Office determined, and the courts upheld, that the pieces of costume jewelry in the cases you cited contained a sufficient amount of original artistic authorship. In Trifari the court noted that while copyrighted matter "need not be strikingly unique or novel," an author must "contribute more than a merely trivial variation" "something recognizably his own." Moreover, the court found the jewelry to be copyrightable because it found that "plaintiff has contributed something substantial of its own to the prior art." 134 F. Supp. 551 at 553. The jewelry designs here do not.

You have also asserted that Weindling Int'l Corp. v. Kobi Katz, Inc., 56 U.S.P.Q.2d 1763 (S.D.N.Y. 2000), in which the court upheld the Office's registration of a diamond bridge ring, is a more relevant case for the Board to consider. You claim that the Examiner's distinction of this ring from the diamond bridge ring in that case is unsubstantiated. Letter from Moffatt to Giroux of 1/1//02, at 3.

In upholding the copyrightability of the Kobi Katz ring, the court in Weindling analyzed the various aspects of the jewelry design in question as part of its analysis of copyrightability. *Id.* at 1765-77. This case involved the infringement of the Kobi Katz bridge ring which was registered by the Copyright Office. The ring consisted of a single marquis diamond that was transversely mounted between two outwardly flaring pyramidal supports which have pointed upper apex ends. The marquis diamond was suspended between the outside surfaces of the pointed apex ends of the pyramidal supports. The shank of the ring had a line of square cut diamonds inset between the two pyramidal supports and followed the curved contour of the top surface of the band of the ring. The pyramidal supports which were further embellished with triangular cut-outs had sharp edges along the top of their apexes and sharp edges at the side edges of the apex about the triangular cut-outs.

The Board agrees that an original combination of elements, each of which individually is unoriginal, may be copyrightable if that combination meets the minimal

standards of creativity. The combination and arrangement of the components as embodied in the ring described above contained a sufficient amount of original authorship consistent with the standards set forth in the Feist case to support a copyright registration. The Board does not find this to be true with respect to the four jewelry designs involved here. We do not find the requisite creativity in the familiar and simple combinations of elements in the public domain to support a copyright. A "simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations" is not copyrightable nor is the"mere bringing together of two or three standard forms or shapes with minor linear or spatial variations..." Compendium II at § 503.02(b).

CONCLUSION

The Board of Appeals has looked at these jewelry designs in light of copyright principles concerning the copyrightability of works based on materials in the public domain and concluded that Bracelet B05004M; Ring R06179; Drop (Pendant) D06273; and Earrings E06179 do not contain sufficient creative authorship to support a registration. Consequently, the Board of Appeals upholds the Examining Division's refusal to register these works. This decision constitutes final agency action.

Sincerely,

/S/

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