United States Copyright Office
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March 15, 2004

Salans Hertzfeld Heilbronn Christy & Viener
Attn: Emily M. Spectre
Rockefeller Center
620 Fifth Avenue
New York, NY 10020-2457

Re: PAVE CROSSOVER COLLECTION
Copyright Control Number: 61-203-5425(Y)

Dear Ms. Spectre:

The Copyright Office Board of Appeals has reviewed your request for reconsideration of the Office's refusal to register the "Pave Crossover Collection" for your client, Yurman Design Inc. The Board has determined that this jewelry design cannot be registered. The design elements contain *de minimis* amounts of originality and do not rise to the level of copyrightability.

ADMINISTRATIVE RECORD

Initial Submission

On August 28, 2001, the Copyright Office received applications, deposits and fees for four works: 'Peruvian Opal Ice, "O" Collection, Metro Pave Collection, and Pave Crossover Collection. These jewelry designs were submitted by Joseph Ramirez on behalf of your client. In a letter dated February 13, 2002, Copyright Examiner, Helen Livanios, refused registration of any of the four works which had been submitted due to a finding that they each lacked the original artistic authorship necessary for copyright protection. Letter from Livanios to Ramirez of 2/8/02, at 1.

First Request for Reconsideration

In a letter dated May 13, 2002, Ms. Moffatt of your firm requested reconsideration of the decision to refuse registration of the "O Collection" and the "Pave Crossover Collection." She argued that the works at issue possessed the minimum level of originality required by the case law, *citing* Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991); Re-Alco Indus., Inc. v. National Center for Health Educ. Inc., 812 F.Supp. 387, 393 (S.D.N.Y. 1993); and Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951). Letter from Moffatt to Livanios of 5/13/02, at 2. Furthermore, she asserted that the jewelry designs were clearly a distinguishable variation of any public domain elements used, *citing* 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 Fl. 1998); and Hammond & Co. v. International College Globe, Inc., 210 F.Supp. 206 (S.D.N.Y. 1962). *Id.* at 3. Finally, she claimed the two jewelry collections were similar to the designs protected in the cases of Weindling Int'l Corp. v. Kobi Katz, Inc, 56 U.S.P.Q.2d 1763 (S.D.N.Y. (2000), and Yurman Design, Inc. v. PAJ, Inc., 93 F.Supp.2d 449 (S.D.N.Y. 2000). *Id.*

On August 28, 2002, Attorney-Advisor Virginia Giroux of the Examining Division responded to this request for reconsideration; she noted that she had considered all of the points raised and had concluded that the two jewelry collections did not contain a sufficient amount of original and creative sculptural authorship to support copyright registration. Ms. Giroux stated that neither the materials used in the jewelry design, nor the ideas underlying a jewelry design could serve as basis for finding copyrightable authorship. Letter from Giroux to Moffatt of 8/28/02, at 1. Ms. Giroux stated that in order to be copyrightable, a work must not only be original, but must also possess more than a *de minimis* quantum of creativity, *citing* Feist Publications v. Rural Telephone Service Co., 499 U.S. 340 (1991). *Id.* at 1. After examining the designs in the two collection, Ms. Giroux concluded that the combinations of elements in each design were too simple to support a copyright claim on the basis of arrangement. *Id.* at 2. 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 in that case when taken as a whole contained a sufficient amount of original and creative authorship to support copyright registration. *Id.* at 3.

Second Request for Reconsideration

In a letter dated December 26, 2002, you requested a second reconsideration of the Office's refusal to register the "Pave Crossover Collection." You assert that the proper construction of Feist Publications, 499 U.S. 340 (1991), supports registration in this instance. Letter from Spectre to Giroux of 12/26/02, at 2. You argue that "distinguishable variations" of the public domain will support a copyright, *citing* Alfred Bell & Co., 191 F.2d at 103, and you further argue that the arrangement of the elements of design were original. *Id.* at 2. Finally, you again cited to the cases of Weindling Int'l. Corp. v. Kobi Katz, Inc., 56 U.S.P.Q.2d 1763 (S.D.N.Y. 2000), and Yurman Design, Inc. v. PAJ, Inc., 262 F.3d 101 (2d Cir. 2001) as protecting, under copyright, jewelry designs similar to the designs in this case. *Id.* at 2-3.

DECISION

Description of Works in Collection

The Board has examined the works involved in the "Pave Crossover Collection" and finds them to be a ring, a bracelet, a necklace and earrings, all of which are in a crossover cable pattern which is aptly described in your request for reconsideration as designs "composed of twisted cable which is highlighted against a single layer of smooth yellow gold,

where the yellow gold is, at various points, entwined with the twisted cable. "Letter from Spectre to Giroux of 12/26/02, at 2. This description is similar to Ms. Giroux's characterization of the jewelry designs as consisting "of a silver twisted cable design combined and interwoven at various intervals with a layer of smooth yellow gold." Letter from Giroux to Moffatt of 8/28/02, at 2.

Minimal Degree of Creativity

You urge that this collection should be registered because you allege it contains more than a minimal degree of creativity. You agree with Ms. Giroux that the appropriate legal standards are those set out in Feist Publications, Inc. v. Rural Tel Serv. Co., 499 U.S. 340 (1991) that in order to qualify for copyright protection a work must be original in the sense that (1) it was independently created by the author (as opposed to copied), and (2) it possesses some minimal degree of creativity. *Id.* at 345. While you agree with the legal standards set forth in Feist and articulated by the Examiner, you disagree with the Office's application of those standards.

No one in the Office has ever questioned the originality of this collection in the sense of it being created by the claimant; the question before the Board is whether the Crossover Collection has a sufficient amount of original and creative sculptural authorship. The Board concludes that it does not. From the above descriptions, it is apparent there are only two elements in the design adapted for each of the pieces in this jewelry collection; it is a design for a piece of jewelry consisting of twisted silver cable and smooth yellow gold. Both elements are clearly in the public domain; precious metals are not subject to copyright protection, and the cable is a familiar shape. These elements have been combined entwining the yellow gold in the silver twisted cable at various intervals. Basically, this design is nothing more than the twisting together of two public domain to form the simple shapes of the jewelry pieces in the collection. There is not enough copyrightable authorship to support a registration.

The Board agrees with you that under Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340 (1991), only a modicum of creativity is necessary to support a copyright. However, the Supreme Court ruled that some works (such as the work at issue in Feist) fail to meet that standard. The Court observed that "as 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 work in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359. The Court also recognized that some works, such as a "garden-variety white pages directory devoid of even the slightest trace of creativity," are not copyrightable. *Id.* at 362. This comports with the standard articulated in Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99, 103 (2d Cir. 1951).

Even prior to Feist, Copyright Office registration practices following settled precedent such as Alfred Bell, and recognized that some works of authorship contain only a *de minimis* amount of authorship and, thus, are not copyrightable. *See* Compendium of Copyright Office

Practices, Compendium II, § 202.02(a), (1984). With respect to pictorial, graphic and sculptural works, the class in which the four pieces of jewelry in the Crossover Collection belong, 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(a), (1984). Compendium II recognizes that it is not aesthetic merit, but the presence of creative expression that is determinative of copyrightability. It states that:

> [R]egistration cannot be based upon the simplicity of standard ornamentation such as chevron stripes, the attractiveness of a conventional fleur-de-lys design, or the religious significance of a plain, ordinary cross. Similarly, it is not possible to copyright common geometric figures or shapes such as the hexagon or the ellipse, a standard symbol such as an arrow or a five-pointed star. Likewise, mere coloration cannot support a copyright even though it may enhance the aesthetic appeal or commercial value of a work... The same is true of a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations.

Id. The Compendium recognizes that it is not aesthetic merit, but the presence of creative expression that is determinative of copyrightability, *id.*, and that "registration cannot be based upon standard designs which lack originality, such as common architecture moldings, or 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.* *See also* section 202.1(a) of the Copyright Office regulations, 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").

Combination of Public Domain Elements

In your request for reconsideration, you assert that it is the way that your client has arranged public domain elements which makes these works original and that the result is more than a trivial variation and supports copyright registration. You also rely on Weindling Int'l Corp. v. Kobi Katz, Inc., 56 U.S.P.Q.2d 1763 (S.D.N.Y. 2000), and Yurman Design, Inc. v. PAJ, Inc., 262 F.3d 101 (2d Cir. 2001) as protecting similar jewelry designs and supporting registration of the "Pave Crossover Collection." We agree that an original combination of elements, each of which individually is unoriginal, may be copyrightable if that combination meets the minimal standards of creativity. However, we do not find sufficient creativity in the particular combination of elements presented here. Cf. Compendium II, § 503.02(a) ("simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear

or spatial variations" not copyrightable); § 503.02(b)("mere bringing together of two or three standard forms or shapes with minor linear or spatial variations" not copyrightable).[1]

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 entitled BW2798 which was registered by the Copyright Office. The ring in question 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 support 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. In the Board's view, the combination and arrangement of the components as embodied in this work 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 the case with respect to the Pave Crossover Collection which is based on combining two elements in the public domain.

In Yurman Design, Inc. v. PAJ, Inc., 262 F.3d 101(2d Cir. 2001) the court did not provide a description of the jewelry pieces in which copyright was upheld. All the pieces had been registered by the Copyright Office, so it is clear that this Office had regarded the jewelry designs as being copyrightable. The Copyright Office does not compare works when reviewing an application for registration. In order, however, to be responsive to your request letter for reconsideration, the Board has examined the deposit photographs of the four jewelry designs cited in the court's opinion. The Board is satisfied that those jewelry pieces combining a cabling design with other sculptural elements is more complex than the design involved in the "Pave Crossover Collection." Consequently, the Board does not believe this case supports registration in this instance.

While the Board agrees that a combination of public domain elements may merit copyright protection if it has sufficient originality, (*see, e.g.* Feist 495 U.S. at 358) not every

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[1] In John Muller & Co., Inc. v. N.Y. Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986), the court upheld a refusal to register a logo consisting of four angled lines forming an arrow, with the word "arrows" in cursive script below, noting that the design lacked the minimal creativity necessary to support a copyright and that a "work of art" or a "pictorial, graphic or sculptural work ... must embody some creative authorship in its delineation of form." *See also*, Homer Laughlin China Co. v. Oman, 22 U.S.P.Q.2d 1074 (D.D.C. 1991) (upholding refusal to register chinaware design pattern composed of simple variations or combinations of geometric designs due to insufficient creative authorship to merit copyright protection); Jon Woods Fashions v. Curran, 8 USPQ2d 1870 (S.D.N.Y. 1988) (upholding refusal to register fabric design consisting of striped cloth with small grid squares super-imposed on the stripes for failure to meet minimal level of creative authorship).

combination of public domain elements does. The entwined layer of gold and silver cable which make up the designs in the Crossover Collection do not have the requisite creativity i.e. more than *a de minimis* amount, necessary to sustain registration. Recently, two cases were decided by the Ninth Circuit Court of Appeals which support the Board's determination that "Pave Crossover Collection" lacks sufficient artistic authorship. In Satava v. Lowry, 323 F.3d 805 (9th Cir. 2003), an artist brought a copyright infringement action against a competitor over the artist's life-like glass-in-glass sculptures of jellyfish. In this case the court stated: "it is not true that any combination of unprotectable elements automatically qualifies for copyright protection. Our case law suggests, and we hold today, that a combination of unprotectable elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.... The combination of unprotectable elements in Satava's sculpture fall short of this standard. The selection of the clear glass, oblong shroud, bright colors, proportion, vertical orientation, and stereotyped jellyfish form, considered together, lacks the quantum of originality needed to merit copyright protection." *Id* at 811. In Lamp Plus, Inc. v. Dolan, 345 F.3d 1140 (9th Cir. 2003), the Ninth Circuit held that the mechanical combination of four preexisting ceiling lamp elements with a preexisting lamp base did not constitute original authorship. Neither does the combination of a silver cable and a gold layer.

Other Considerations

You assert that the works are original because the Office failed to point to other works similar to this jewelry *citing* to Weindling. The Board notes that in Weindling the court was considering whether a valid copyright had been infringed; it may have thus found "substantial similarity" of existing rings to have some merit. The Office does not compare works; instead it considers whether the application and deposit for any given work meets the standards of the copyright law before issuing a registration. Jewelry designs are treated no differently from other works.

CONCLUSION

For the reasons stated above, the Copyright Office Board of Appeals concludes that the "Pave Crossover Collection" cannot be registered for copyright protection. This decision constitutes final agency action.

Sincerely,

Marilyn J. Kretsinger

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