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February 10, 2005

Evan Gourvitz
Fross Zelnick Lehrman & Zissu, P.C.
866 United Nations Plaza
At First Avenue & 48th Street
New York, New York 10017

Re: Lucida® Ring Setting
Control No. 61-200-6471(T)

Dear Mr. Gourvitz:

I am writing on behalf of the Review Board[1] in response to your letter dated October 28, 2003, requesting reconsideration of a refusal to register a work entitled "Lucida® Ring Setting" on behalf of your client, Tiffany and Company. The Board has carefully examined the application, the deposit, and all correspondence in this case concerning this application and affirms the denial of registration of this work.

DESCRIPTION OF THE WORK

The Lucida Ring Setting is comprised of a shank which curves and extends upward to merge with the bezel, the bezel which holds the diamond in the center of the ring, and four prongs that secure the diamond and merge into and form two identical curved crisscross designs extending into and ending at the shank of the ring.



[1] On January 27, 2005, the body which considers an applicant's second request for reconsideration of a refusal to register a work became known as the Review Board. *See* 69 Fed. Reg. 77636 (December 28, 2004).

ADMINISTRATIVE RECORD

Initial Submission

On August 29, 2002, the Copyright Office received a Form VA application from Tiffany and Company to register a jewelry design entitled "Lucida® Ring Setting." In a letter dated October 11, 2002, Visual Arts Section Examiner James L. Shapleigh, refused registration of this work because it lacked the authorship necessary to support a copyright claim. Mr. Shapleigh noted that a copyrightable work of visual art must contain a minimum amount of pictorial, graphic or sculptural authorship and that the ideas or concepts embodied in such a work are not protected by copyright. In addition, he noted that copyright does not protect familiar symbols and designs; basic geometric shapes; words or short phrases such as names, titles and slogans; or mere variations of typographic ornamentation, lettering or coloring. Lastly, he pointed out that neither the aesthetic appeal or commercial value of a work nor the amount of time and effort expended to create the work are considered in ascertaining the copyrightability of a work.

First Request for Reconsideration

On February 5, 2003, you requested that the Office reconsider its refusal to register the Lucida® Ring Setting. You assert that the setting is a copyrightable work of visual art because it contains sculptural authorship which "embodies the necessary degree of creativity." (Letter from Gourvitz to Examining Division of 2/5/03, at 1.)

In support of your assertion, you state that the work satisfies the requirements of Feist Publications Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991), namely, that the work was independently created, and not copied from other works, by a Tiffany employee and contains the "minimal degree of creativity." (Letter from Gourvitz to Examining Division of 2/5/03, at 2), citing Feist, 499 U.S. at 345. To illustrate that the design contains the requisite level of creativity, you provide copies of the studies and preliminary sketches of the Tiffany employee, a sculptor who "looked to architecture and furniture as inspirations for her work." (Letter from Gourvitz to Examining Division of 2/5/03, at 2.) You also cite to 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), aff'd in relevant part, 262 F.3d 101 (2d Cir. 2001), cases in which the court found that various jewelry designs were either copyrightable or could be found copyrightable by a jury.

Next, you note that a two-dimensional depiction of the ring setting was registered. You assert that "[w]here a two-dimensional representation of a particular design has been found sufficiently original for protection by copyright, it seems only reasonable that the three-

dimensional representation of that same design should be considered at least equally protectable," especially in light of the fact that "the appearance of the item in question is not found in nature, but instead is wholly the result of artistic creation." (Letter from Gourvitz to Examining Division of 2/5/03, at 2.)

Finally, you urge that the work be registered under the Office's rule of doubt, noting that your arguments regarding the copyrightability of the ring setting are "at least sufficient to bring into play the Copyright Office's rule of doubt," and cite Ronald Litoff, Ltd. v. Am. Express Co., 621 F. Supp. 981 (S.D.N.Y. 1985), in support of this assertion.

Response of the Examining Division

In a letter dated July 1, 2003, Attorney Advisor Virginia Giroux of the Examining Division replied that she had reviewed your client's work in light of the points raised in your request for reconsideration submitted on February 5, 2003, and determined that no copyright registration could be made because the ring setting is a functional element within the ring and is not separable as required under the copyright law. (Letter from Giroux to Gourvitz of 7/1/03, at 1.)

At the outset, Ms. Giroux explained that "it does **not** follow that the registration of a two-dimensional representation of a work also protects a three-dimensional representation of the same work" since the "registration of the two-dimensional representation of this ring extends **only** to the pictorial drawing of the ring and **not** to the design of the ring itself or its components." *Id.* (emphasis in original). As a result, the fact that the two-dimensional representation of the ring setting was registered has no bearing on the copyrightability of its three-dimensional representation.

She then described the design as a ring setting comprised of four prongs which merge into and form two identical curved crisscross designs flowing into and ending at the shank of the ring, supporting the diamond and accentuating the cut of the diamond. *Id.* She then stated that the setting for a gemstone, no matter what its shape, is a functional aspect of the design and is not protectable by copyright.

Because of the gemstone setting's functional nature, she explained that it must be treated as a useful article. She then set forth the definition of a useful article under the Copyright Act and the extent to which such a work is copyrightable. She explained that the Office examines useful articles first to determine whether the work contains any pictorial, graphic, or sculptural authorship that is physically or conceptually separable from the work's utilitarian aspects.

She explained that there were no physically separable elements of the work here because "[a]ny actual physical removal of the setting components, *i.e.* the prongs as they are designed, is not possible without destroying the [ring setting] in its entirety." (Letter from Giroux to Gourvitz of 7/1/03, at 2.)

She then set forth the Office's test for conceptual separability under section 505.03 of the Compendium of Copyright Office Practices, Compendium II (1984), namely, whether any of the pictorial, graphic, or sculptural aspects of a work can be visualized as independent of the shape of the useful article without destroying the basic shape of the article. She noted that the test could not be met merely by analogizing the general shape of the useful article to works of modern sculpture. Furthermore, she explained that no registration could be made where certain features that are non-functional or that could have been designed differently are integral parts of the overall shape or contour of the useful article and cited Esquire v. Ringer, 591 F.2d 796 (D.C. Cir. 1987), as support. (Letter from Giroux to Gourvitz of 7/1/03, at 2.)

Applying these principles, she concluded that there were no conceptually separable features of the ring setting. First, any alleged artistic or decorative features could not be perceived as existing separately and independently from the useful article. Additionally, the four-pronged "X" shaped setting is an integral aspect of the functional structure of the ring, as it serves the purpose of holding or securing the gemstone in place.

She then explained that even if, for the sake of argument, the Office viewed the ring setting as decorative, and not functional, in nature, the ring setting would not be copyrightable under 37 C.F.R. § 202.1 because the crisscross design of the setting is a common and familiar design in the public domain. She went on to explain that the type of sculptural authorship embodied in the setting, taken either individually or as a whole, did not reflect sufficient original and creative authorship to support a copyright registration. Rather, the design involved a minor variation of common and familiar shapes arranged in a rather simple configuration, resulting in de minimis creativity. *See* Compendium II, § 503.02(b).

Ms. Giroux then moved on to distinguish the cases you cited in your letter. She gave a detailed description of the ring at issue in Weindling and pointed out that the combination and arrangement of the components of the work there, unlike that of the ring setting here, contained a sufficient amount of original and creative authorship. Similarly, she found that the ring setting here is not comparable to the works at issue in Yurman Design because those works were of greater complexity and extent of authorship with respect to the overall jewelry design.

She then addressed your assertions regarding the uniqueness and distinctiveness of the Ring Setting by pointing out that such factors have no bearing on the determination of the copyrightability of a work. Nor do factors regarding the design's attractiveness, its look or feel, and the like. She also pointed out that while all designs involve choices, "[i]t is not the possibility of choices that determines copyrightability but rather whether the particular resulting expression or product contains copyrightable authorship." (Letter from Giroux to Gourvitz of 7/1/03, at 5.)

Finally, she refused to register the ring setting under the Office's rule of doubt in light of the determinations that 1) the setting in the Lucida® ring serves a functional use and is not a conceptually separable design element and 2) even if, assuming arguendo, the setting is non-functional and considered as part of the overall jewelry design, it is not copyrightable because it is fundamentally a variation on a common and familiar shape. She explained that since these determinations dispose of the only two possible bases upon which a copyright registration could be made, there is no reasonable doubt as to whether a court would determine that the setting is copyrightable. Accordingly, she explained that the case at hand is distinguishable from that in the case you cited, Ronald Litoff Ltd. v. American Express Co., 621 F. Supp. 981 (S.D.N.Y. 1985), where the Office had "considerable doubt" about the copyrightable authorship in the work there but made "the registration under the rule of doubt, for whatever the registration may be worth." (Letter from Giroux to Gourvitz of 7/1/03, at 5), citing Litoff, 621 F. Supp. at 983.

Second Request for Reconsideration

On October 28, 2003, you again requested reconsideration of the Office's refusal to register the Lucida Ring Setting. You strongly disagree with Ms. Giroux's description of the ring setting and her conclusion that the Lucida Ring Setting is a useful article. Rather, you argue that "regardless of whether the Lucida Setting is considered in terms of the entire ring (minus the diamond), or merely the three-dimensional criss-cross design that decorates a portion of that ring, it does not have any intrinsic utilitarian function making it an unprotectable 'useful article' under the Copyright Act." (Letter from Gourvitz to Board of Appeals of 10/28/03, at 2.)

First, you discuss the setting as encompassing the entire ring except for the diamond. As such, you state that the ring setting "encompasses all elements [except for the diamond] of the metal Lucida ring, from the 'band'–the shank or circular body of the ring worn around the finger–through its criss-cross design to the prongs" and, therefore, is clearly not functional. *Id.* at 2. You cite several cases for the proposition that jewelry may be protected by copyright. *Id.* at 3. You then rely on two of those cases–Weindling Int'l Corp. v. Kobi Katz Inc., 56 U.S.P.Q.2d 1763 (S.D.N.Y. 2000), and Donald Bruce & Co. v. B.H. Multi Com Corp., 964 F. Supp. 265 (N.D. Ill. 1997)–to support your argument that rings are

not useful articles. Specifically, you state that Weindling found that diamond rings are not utilitarian articles but rather "works of art, or more precisely ornamental sculpture, even if mass produced." (Letter from Gourvitz to Board of Appeals of 10/28/03, at 3), citing Weindling, 56 U.S.P.Q.2d at 1766. Similarly, you state that Donald Bruce "expressly rejected the argument that the ring design [gold ring with a beveled head designed to hold a gemstone] was a 'useful article' . . . merely because of the utilitarian aspects of the ring's beveled head." (Letter from Gourvitz to Board of Appeals of 10/28/03, at 3), citing Donald Bruce, 964 F. Supp. at 267. You argue that in light of these cases the ring setting, minus the diamond, here is not a useful article, but rather "an ornamental sculpture, a work of art whose sole purpose is to portray its appearance." (Letter from Gourvitz to Board of Appeals of 10/28/03, at 3.)

Next, you address the ring setting as a portion of the ring in light of Ms. Giroux's description of the setting as "a four pronged setting, which merges into and forms two identical curved criss-cross designs flowing into and ending at the shank of the ring." (Letter from Gourvitz to Board of Appeals of 10/28/03, at 3), quoting (Letter from Giroux to Gourvitz of 7/1/03, at 1.) In contrast to Ms. Giroux's description, you assert that as a portion of the ring, the setting is a "three-dimensional sculptural design used to decorate a portion of the ring" comprised of "four slim curved shapes that flow from the shank of the ring, briefly follow the curve of the circumference of the ring, cross, and curve up and around the shank and bezel to merge into the prongs." (Letter from Gourvitz to Board of Appeals of 10/28/03 at 3.) As such, you argue that the setting would not include the bezel, which actually holds the diamond in place, or the shank, leaving the only "conceivable useful aspect" of the setting, as just defined, as the merging with, but not inclusion of, the prongs. *Id.* at 4. "This, in itself, is insufficient to make the Lucida Setting a 'useful article.'" *Id.* (citations omitted).

You then argue that even if the ring setting is considered to be a useful article, the design is conceptually separable from any utilitarian aspects of the ring. *Id.* at 4. You employ the test articulated by the Second Circuit in Brandir Intern. v. Cascade Pacific Lumber Co., 834 F.2d 1142 (2d Cir. 1987), to support your argument. The Brandir test finds conceptual separability where "design elements can be identified as reflecting the designer's artistic judgment exercised independently of functional influences." (Letter from Gourvitz to Board of Appeals of 10/28/03, at 4), citing Brandir, 834 F.2d at 1145. Using this test, you assert that the setting's "sculptural features do not advance any utilitarian purpose of the ring" and "[t]he design choices were not dictated by function alone, but rather were determined by consideration of design." *Id.* Therefore, you argue, the "design elements reflect the designer's artistic judgment exercised independently of functional influences"; as such, you conclude that the ring setting is copyrightable. *Id.*

Your next argument is that the ring setting is "sufficiently original" to be copyrightable as it was independently created by Tiffany and possesses "at least the minimal necessary degree of creativity" required under Feist Publ'ns Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991). *Id.* at 5. You argue that, contrary to Ms. Giroux's assertion, the ring setting is not in the public domain, which even if true, is irrelevant. You point out that the design was created by a Tiffany employee, whose declaration is attached to your letter, "through independent efforts, after a number of studies and preliminary sketches." *Id.* at 6. Similarly, you argue that Ms. Giroux's assertion that the crisscross design is a common and familiar design in the public domain or a minor variation of common and familiar shapes arranged in a simple configuration misses the mark, as she cites "no proof that this is the case" and that such assertions have been "expressly rejected" by the courts in Weindling and Yurman.

Finally, you again assert that registration under the Office's rule of doubt is appropriate here, especially in light of the fact that the "Second Rejection's functionality and originality arguments are without merit, or at the very least are open to serious dispute" and the decisions in Weindling, Yurman, and Donald Bruce, "which strongly suggest that a court would find the Lucida Setting copyrightable." (Letter from Gourvitz to Board of Appeals of 10/28/03, at 8.)

DECISION

After reviewing the application and the arguments you presented, the Review Board affirms the Examining Division's refusal to register the Lucida Ring Setting because it does not contain a sufficient amount of original and creative authorship to support a copyright registration.

Useful Articles

The Board notes at the outset that some confusion existed regarding what elements comprised the Lucida Ring Setting. No description of the work was included in your first request for reconsideration. It appears that Ms. Giroux believed that the setting consisted solely of the crisscross design which merges into and includes the prongs because a setting, as the word implies, serves the purpose of securing or positioning a precious stone, including a diamond, within a ring. As such, she correctly classified the work as a useful article and applied the appropriate analysis. However, in your second request for reconsideration, you clarified that despite the name of the work, copyright protection is being sought for the entire ring, except for the diamond, and not just the pronged setting. In light of this clarification, the Board concludes that the work as a whole is not a useful article but rather is a sculptural work.

Copyrightable Subject Matter

The Board recognizes that jewelry designs can be protected by copyright as "pictorial, graphic, and sculptural works." 17 U.S.C. § 102(a)(5)(2003); Compendium of Copyright Office Practices, Compendium II, (1984) ("Compendium II"), § 502. However, while some jewelry designs qualify for copyright protection, others do not.

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 Publications, Inc. v. Rural Telephone Service Company, Inc., 499 U.S. 340, 345 (1991). First, the work must have been independently created by the author, *i.e.*, not copied from another work. It is clear from your second request for reconsideration that you are under the impression that Ms. Giroux raised a question regarding this component by her statement "that the Lucida Ring Setting is 'in the public domain.'" (Letter from Gourvitz to Board of Appeals of 10/28/03, at 6.) You refute this "assertion" by stating that "[t]here is no evidence at all that the [setting] was in the public domain" and go on to explain that the setting was designed by a Tiffany employee through "independent efforts, after a number of studies and preliminary sketches" and "was not copied from any other work." *Id.* We point out that you misapprehend Ms. Giroux's statement that the "criss-cross design of the ring setting [was] a common and familiar design in the public domain." (Letter from Giroux to Gourvitz of 7/1/03, at 2.) By that statement she did not mean that the Lucida Ring Setting was in the public domain; she meant that an element of the setting was comprised of a common and familiar design or shape in the public domain.[2] Accordingly, she did not question the independent creation of the work. Likewise, the Board does not dispute that the overall design, *i.e.*, the Lucida Ring Setting in its entirety (except for the diamond), although consisting of some elements which may fall within the public domain, was independently created by a Tiffany employee.

Thus, the sole issue left for the Board to decide is whether the ring setting contains sufficient creativity, the second component of "originality." For the reasons set forth below, the Board has determined that the jewelry design at issue here fails to possess the requisite amount of creativity and, therefore, is not entitled to copyright protection.

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[2] We note that you took issue with Ms. Giroux's statements regarding what constituted a "common and familiar design in the public domain" or "a minor variation of common and familiar shapes arranged in a rather simple configuration" because she "cite[d] absolutely no proof that this is the case, and disregards the Copyright Office's own practice. *See* Compendium II at 108.05 ('the Copyright Office does not ordinarily make findings of fact with respect to publication or any other thing done outside the Copyright Office')." (Letter from Gourvitz to Board of Appeals of 10/28/03, at 6.) While you are correct that the Office does not make findings of fact, the Office "may take notice of matters of general knowledge." Compendium II, § 108.05(b). That is all Ms. Giroux did in her letter, and we agree with her conclusion.

The Creativity Threshold

In determining whether a work has a sufficient amount of original artistic or sculptural authorship necessary to sustain a copyright claim, the Board adheres to the standard set forth in Feist, where the Supreme Court held that only a modicum of creativity is necessary to support a copyright. 499 U.S. at 345. However, the Court also ruled that some works (such as the work at issue in Feist) fail to meet the 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," 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.") While "the standard of originality is low, . . . it does exist." Feist, 499 U.S. at 362.

Even prior to the Feist decision, the Office recognized the modest, but existent, requisite level of creativity necessary to sustain a copyright claim. Compendium II states "[w]orks that lack even a certain minimum amount of original authorship are not copyrightable." Compendium II, § 202.02(a)(1984). With respect to pictorial, graphic and sculptural works, the class within which the Lucida Ring Setting falls, *see* 17 U.S.C. § 102(a)(5), 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 also recognizes that it is the presence of creative expression that determines the copyrightability of a work and that

> registration cannot be based upon the simplicity of standard ornamentation . . . Similarly, it is not possible to copyright common geometric figures or shapes . . . a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations [also cannot support a copyright].

Id. *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)."

The case law confirms these principles. *See* Forstmann Woolen Co. v. J.W. Mays, Inc., 89 F. Supp. 964 (E.D.N.Y. 1950)(label with words "Forstmann 100% Virgin Wool interwoven with standard fleur-de-lis could not support a copyright claim without original authorship); Bailie v. Fisher, 258 F.2d 425 (D.C. Cir. 1958)(cardboard star with two

folding flaps allowing star to stand for retail display not copyrightable work of art); Magic Marketing, Inc. v. Mailing Services of Pittsburgh, 634 F. Supp. 769 (W.D. Pa. 1986)(envelopes with black lines and words "gift check" or "priority message" did not contain minimal degree of creativity necessary for protection); and Tompkins Graphics, Inc. v. Zipatone, Inc., 222 U.S.P.Q. 49 (E.D. Pa. 1983) (collection of various geometric shapes not copyrightable).

Despite the considerable case law sustaining Copyright Office decisions of refusal to register simple designs, the Office nonetheless recognizes that the use of public domain elements and/or commonly known shapes can result in a copyrightable work as long as the overall resulting design or overall pattern, taken in its entirety, constitutes more than a trivial variation of such elements. Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99, 102-03 (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.'"); *see also* Compendium II, § 503.02(a).

As evidenced by your description of the work as a "band of clean lines and sensuous curves [that] merges with the prongs in a gently sloping, crisscross design that accents the diamond art's soft feminine quality," (Letter from Gourvitz to Board of Appeals of 10/28/03, at 6) and your subsequent argument that the Lucida Ring Setting "combines a number of elements . . . in a creative manner to create an original design," *Id.* at 7, you seem to recognize that the individual elements comprising the work here are not copyrightable. This is further evidenced by your citation to Weindling and Yurman to support your contention that the copyrightability of the work here should not be evaluated based on its component parts. Weindling, 56 U.S.P.Q.2d at 1764-65 ("analyzing the . . . ring simply in terms of its components parts effectively begs the question, because the copyright here asserted is not for the component parts . . .); Yurman Design v. PAJ, Inc., 93 F.Supp. 449, 457 (S.D.N.Y. 2000), aff'd in relevant part, 262 F.3d 101 (2d Cir. 2001)("[t]o accept [the] argument that [the] pieces of jewelry are merely unprotectable agglomerations of basic design elements already in the public domain would be akin to accepting the position that every song is merely a collection of basic notes, every painting a derivative work of color and stroke, and every novel merely an unprotected jumble of words.").

As discussed above, the Board agrees with you that a copyrightable work may result from a combination of non-protectable elements. We note, however, that merely combining nonprotectable elements does not automatically establish creativity where the combination or arrangement results in expression that contains nothing more than a minor variation on such elements. *See* Alfred Bell, 191 F.2d at 102-03.

Analysis of the Work

The Board finds that none of the individual elements comprising the Lucida Ring Setting–the shank, bezel and prongs–contain a sufficient amount of sculptural authorship when examined individually because they consist of common and familiar designs and shapes in the public domain, or minor variations thereof. The shank consists of a minor variation on a common and geometric shape–a circle. The variation on the circle consists of leaving the circle open at the top. The bezel, which merges with the shank, is itself a square–a common and familiar geometric shape. Finally, the prongs, by which we mean the supporting "X" structure as well as the individual prong tabs or tips, consist of a variation of an "X" shape which is created by a crisscross design, itself a familiar design. Because none of these elements individually can support a copyright registration, the Board agrees that the question to be decided is whether the combination or arrangement of these common and familiar designs and shapes exhibits sufficient original sculptural authorship.

The Board concludes that the combination and arrangement of the component parts of the Lucida Ring Setting lack a sufficient amount of authorship to support a copyright registration. The design calls for a diamond to be positioned in a square-shaped bezel which is surrounded by a prong setting having an "X"-shaped base–itself a minor variation of a crisscross design with the lines of the "X" being three-dimensional curved sides–which holds the diamond in place by simple rectangular prong tabs or tips. This all sits atop a circular shank. The overall arrangement is commonplace and lacks any distinguishing sculptural or design variation from the routine. Thus, the Board finds that the design here merely brings together two or three standard shapes with minor variations thereof in a common, routine, and symmetrical arrangement which fails to rise to the level of creativity required to support a copyright registration. Compendium II, § 503.02(b).

As such, the Lucida Ring Setting consists of simple variations of standard shapes and simple arrangements, which while aesthetically pleasing and commercially successful, do not contain the minimal amount of original artistic authorship to support a copyright registration. Courts have consistently upheld the Office's refusal to register such works. Jon Woods Fashion, Inc. v. Curran, 8 U.S.P.Q.2d 1879 (S.D.N.Y. 1988)(action brought under Administrative Procedure Act upholding Copyright Office's refusal to register design consisting of striped cloth over which was superimposed a grid of 3/16" squares); Homer Laughlin China Co. v. Oman, 22 U.S.P.Q.2d 1074 (D.D.C. 1991)(action brought under Administrative Procedure Act upholding Copyright Office's refusal to register chinaware design pattern); *see also* John Muller & Co., Inc. v. N.Y. Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986)(logo consisting of four angled lines forming an arrow, with the word "Arrows" in cursive script below, found not copyrightable).

You quote extensively from the decision by the Southern District Court of New York in Weindling Int'l., Corp. v. Kobi Katz, Inc., 56 U.S.P.Q.2d 1763 (S.D.N.Y. 2000), to support your argument that the Lucida Ring Setting is copyrightable. (Letter from Gourvitz to Board of Appeals of 10/28/03, at 6-7.) In upholding the Copyright Office's decision to register the diamond bridge ring at issue there, the court looked at several factors including the design options available to the designer; whether the designer's choices were dictated by function alone or also by design considerations; and whether the overall combination of components had an "overall distinctive 'feel'" and concluded that the diamond bridge ring contained a sufficient amount of originality in the "unique combination and arrangement of otherwise uncopyrightable elements." Weindling, 56 U.S.P.Q.2d at 1764-66.

The Board notes that in theory an author creating any work has an unlimited choice of alternatives. However, it is not the possibility of choices that determines copyrightability, but whether the resulting expression contains copyrightable authorship. *See* Florabelle Flowers, Inc. v. Joseph Markovits, Inc., 296 F. Supp. 304, 307 (S.D.N.Y. 1968) (an "aggregation of well known components [that] comprise an unoriginal whole" cannot support a claim to copyright). The Board finds that the jewelry design here, upon examination of its individual elements and the design as a whole, does not contain a sufficient amount of original and creative authorship to sustain a copyright claim. The fact that an author had many choices does not necessarily mean that the choice the author made meets even the modest creativity requirement of the copyright law.

You argue that like the ring in Weindling, the Lucida Ring Setting "combines a number of elements . . . in a creative manner to create an original design with its own overall distinctive 'feel.'" (Letter from Gourvitz to Board of Appeals of 10/28/03, at 7.) 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 any creativity in the particular combination of elements presented here. 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).

Moreover, while we recognize that some courts addressing copyrightability speak in terms such as the "look and feel" of a work, we can ascertain no standard by which the Office can be expected to judge originality and creativity based upon a work's "feel." *See* 4 M. & D. Nimmer, Nimmer on Copyright § 13.03[A][1][c] (criticizing the use of "feel" as an "amorphous referent" that "invites an abdication of judicial analysis"). Invoking a work's "feel" is no substitute for articulating an objective analysis of the work's original and creative elements. Indeed, Weindling did not simply accept the proposition that the work in question was copyrightable on that basis. The court referred to "overall distinctive feel"

in its characterization of Kobi Katz's assertion of the basis for copyrightability. 56 U.S.P.Q.2d at 1765. However, ultimately the court analyzed the various aspects of the jewelry design in question as part of its analysis of copyrightability. *Id.* at 1765-77.

Similarly, you argue that like the bracelets and earrings at issue in Yurman, the combination of elements here–the shank, the bezel, the "four slim curved shapes . . . [which] merge into the prongs"–contain "enough original creative expression" to merit copyright protection. (Letter from Gourvitz to Board of Appeals of 10/28/03, at 6, 7.) The Board disagrees. The jewelry designs at issue in Yurman consisted of "silver, gold, cable twist and cabochon cut colored stones." 262 F.3d at 109. In that case, the court found that the jewelry designs at issue were copyrightable because of the "way Yurman has recast and arranged those constituent elements." 262 F.3d at 110. As previously discussed, the Board does not find such recasting and arrangement sufficiently original under Feist to sustain a copyright registration for the jewelry design here.

Rule of Doubt

Finally, you request that the Office register the Lucida Ring Setting under its rule of doubt, Compendium II, § 108.07, because the "functionality and originality arguments are without merit, or at the very least open to serious dispute . . . [since case law] strongly suggest[s] that a court would find the Lucida Setting copyrightable." (Letter from Gourvitz to Board of Appeals of 10/28/03, at 8.) For the reasons discussed herein, the Board has no doubt as to the copyrightability of the work: it is not copyrightable. Therefore, we cannot "make the registration for whatever the registration may be worth," as the Office did in Ronald Litoff Ltd. v. American Express Co., 621 F. Supp. 981 (S.D.N.Y. 1985). As a result, we have no alternative but to refuse registration.

CONCLUSION

For the reasons stated herein, the Copyright Office Review Board affirms the refusal to register the Lucida Ring Setting. This decision constitutes final agency action on this matter.

Sincerely,

/S/

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