...LE COPY

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

March 16, 2005

Mark D. Simpson, Esq.
Synnestvedt & Lechner LLP
Suite 2600 Aramark Tower
1101 Market Street
Philadelphia, PA 19107

RE: Whealan Massicott
Jewelry Design
Umoja Bracelet
Control No. 61-212-9711(S)

Dear Mr. Simpson:

I am writing on behalf of the Review Board[1] in response to your letter dated March 9, 2004, requesting reconsideration of a refusal to register a work entitled "Umoja Bracelet" on behalf of your client, Whealan Massicott. 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 Umoja Bracelet is comprised of three interlocking rings arranged horizontally with loop/hook elements linking the outermost two rings to the rest of the bracelet.



[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 October 15, 2002, the Copyright Office received two Form VA applications from you, on behalf of your client Whealan Massicott, to register two jewelry designs entitled "Umoja Bracelet" and "Karma Bracelet." In a letter dated February 6, 2003, Visual Arts Section Examiner Marjorie M. Kress refused registration of these works because they lacked the authorship necessary to support a copyright claim. Ms. Kress noted that copyright law protects original works of authorship that are fixed in some physical form. She explained that "original" in the copyright context means that the work was independently created by the author, not copied from other works, and that it possesses at least a minimal degree of creativity, citing Feist Publications Inc. v. Rural Telephone Service Company, Inc., 499 U.S. 340, 345 (1991).

She then 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, she noted that copyright does not protect familiar symbols and designs or basic geometric shapes. Lastly, she 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 March 14, 2003, you requested that the Office reconsider its refusal to register the Umoja Bracelet and the Karma Bracelet. You assert that Ms. Kress failed to comply with 17 U.S.C. § 410(b) because her letter did not explain "the standard utilized to measure the degree of artistic or sculptural authorship" in the two bracelets. (Letter from Simpson to Examining Division of 3/14/03, at 3.) Rather, you argue that she "simply concludes that the Subject Works 'lack the authorship necessary to support a copyright claim.'" Id. You assert, therefore, that you are "left in the position to speculate about what the Examiner meant when making her rejection." Id. at 5.

You state that you do not dispute the validity of certain general statements made in Ms. Kress's letter, but you do take issue with the fact that Ms. Kress does not "identify which 'familiar symbols and designs, basic geometric shapes'" she believes your client is trying to protect. Id. at 4. You argue that her failure to do so is because the "distinct and unique shapes [of the two bracelets] bear no resemblance to any familiar symbol or design." Id. at 5.

Next, you argue that while copyright cannot subsist in familiar symbols taken alone, the arrangement of such symbols can be accorded copyright protection, provided that such arrangements are distinctive. Id. In support of this argument, you cite Atari Games Corp. v. Oman, 888 F.2d 878 (D.C. Cir. 1989); Reader's Digest Ass'n v. Conservative Digest, Inc., 821 F.2d 800 (D.C. Cir. 1987); Boisson v. Banian, Ltd., 273 F.3d 262 (2d Cir. 2001); and Compendium of Copyright Office Practices, Compendium II (1984), § 503.02(b). You then go on to state that the artistic expression in the two bracelets are "far more than the mere reproduction of a familiar symbol." (Letter from Simpson to Examining Division of 3/14/03, at 6.) Rather, you argue that neither resembles a familiar shape "in any way" because your client "has intertwined original and distinctive forms with a hook/clasp that creates a distinctive overall shape that aesthetically balances the bracelets themselves," and the "choice of materials, shapes, sizes, proportions, and arrangement are all aspects of artistic expression manifested in the Subject Works." Id.

You agree with Ms. Kress that ideas and concepts are not copyrightable but point out that protection can extend to the expression of the idea provided that the expression is separable from the idea itself. Id. at 7, citing Morrissey v. Procter & Gamble Co., 379 F.2d 675 (1st Cir. 1967); and Atari, Inc. v. Amusement World, Inc., 547 F. Supp. 222 (D. Md. 1981). You explain that protection is not being sought for the idea of "fashioning a bracelet's clasp and hook into a particular shape"; rather, protection is being sought for the specific expression of that idea, namely, the "transformation of metal into the shape shown in the deposit materials." (Letter from Simpson to Examining Division of 3/14/03, at 7.)

Your next argument is that registration is warranted because each of the works was independently created, not copied from other works, and contains the requisite degree of creativity. Id. With regard to independent creation, you state that the bracelets are a "culmination of [your client's] own, original creative expression designed and fashioned in a medium bearing in toto the appearance of an atypical and non-familiar shape." Id. at 8. Similarly, you argue that the works "clearly meet the relatively relaxed and permissive standard established by the Supreme Court" in Feist because neither design is "so mechanical or routine as to require no creativity whatsoever." Id. at 9, citing Feist, 499 U.S. at 362. Finally, you argue the "distinctive use of materials, shapes, sizes, proportions, and layout" of the bracelets "surpass[] the threshold of minimum creativity." (Letter from Simpson to Examining Division of 3/14/03, at 9.)

Response of the Examining Division

In a letter dated November 10, 2003, Attorney Advisor Virginia Giroux of the Examining Division replied that she had reviewed your client's works in light of the points raised in your request for reconsideration submitted on March 14, 2003, and determined that the Karma Bracelet as a whole contained a sufficient amount of original sculptural authorship

to be copyrightable and thus registered this work. (Letter from Giroux to Simpson of 11/10/03, at 1.) She then upheld the denial of registration of the Umoja Bracelet because it did not contain a sufficient amount of original artistic or sculptural authorship to support a copyright registration. Id.

At the outset, Ms. Giroux addressed your assertion that Ms. Kress failed to articulate in detail the analysis of the works and the explicit standards applied in her determination not to register the works. She explained that Ms. Kress's treatment of this case was "firmly in line with customary examining practices" and that she "referred to appropriate statutory and regulatory prohibitions for the rejection of these" works. Id.

Ms. Giroux did not challenge your assertion that the jewelry design was independently created and not copied from any other work. She then explained

> [i]n the case of a jewelry design, a certain minimum amount of pictorial or sculptural material in the work must have originated with the author. Originality, as interpreted by the courts, means that the authorship must constitute more than a trivial variation of public domain elements. See Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951). In applying this standard, the Copyright Office examines a work to determine whether it contains elements, either alone or in combination, on which a copyright can be based. Also, because the Copyright Office does not make aesthetic judgments, the attractiveness of a design, the time and effort it took to create, its uniqueness, or its commercial success in the marketplace are not factors in the examining process. The question is whether there is sufficient original authorship within the meaning of the copyright law and settled case law.

Id. at 2.

She then described the design as consisting of three interconnected circular shapes arranged horizontally with loop like elements linking the outermost two circular shapes to the rest of the bracelet and concluded that the circles, as well as the simple loop design, were familiar designs and shapes, or minor variations thereof, in the public domain and thus not copyrightable under 37 C.F.R. § 202.1. Id. As such, she concluded that the type of sculptural authorship here was insufficient to support a copyright registration. She also found the combination and arrangement of the three circular shapes coupled with the two identical loops too simple to warrant a registration. Id. Rather, the design involved a minor variation of common and familiar shapes arranged in a rather simple configuration, resulting in de

minimis creativity. Id. citing John Muller & Co. v. N.Y. Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986); Forstmann Woolen Co. v. J.W. Mays, Inc., 89 F. Supps. 964 (E.D.N.Y. 1950); Homer Laughlin China Co. v. Oman, 22 U.S.P.Q.2d 1074 (D.D.C. 1991); Jon Woods Fashion, Inc. v. Curran, 8 U.S.P.Q.2d 1879 (S.D.N.Y. 1988); Tompkins Graphics, Inc. v. Zipatone, Inc., 222 U.S.P.Q. 49 (E.D. Pa. 1983); DBC of New York, Inc. v. Merit Diamond Corp., 768 F. Supp. 414 (S.D.N.Y. 1991); and Compendium II, § 503.02(a) & (b).

Ms. Giroux then moved on to distinguish the cases you cited in your letter. She agreed with the principle enunciated in Atari v. Oman that a work should be viewed in its entirety but found that the arrangement and combination of the three circular shapes coupled with the loops here did not rise to the level of copyrightability necessary to support a copyright registration. (Letter from Giroux to Simpson of 11/10/03, at 3.) Similarly, she found that unlike Boisson, where the court found sufficient originality in the arrangement of elements in the quilt designs at issue there, the arrangement and selection of the circular and loop shapes here are de minimis and lack the authorship necessary to support a copyright registration. Id. Lastly, she found that the works in Reader's Digest and Custom Chrome, 35 U.S.P.Q.2d 1714 (D.D.C. 1995), were not comparable to the work here because the work at issue was either more complex than the design here, as in Reader's Digest, or was a useful article, as in Custom Chrome. Id. at 3-4.

Finally, she addressed your assertions regarding the uniqueness and distinctiveness of the jewelry design and the attempt to create a certain impression or effect 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, the time and effort expended in creating the design and its commercial value. 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 Simpson of 11/10/03, at 4.)

Second Request for Reconsideration

On March 9, 2004, you again requested reconsideration of the Office's refusal to register the Umoja Bracelet. You reiterated the arguments made in your March 14, 2003, request except that you dismissed the cases cited by Ms. Giroux as being of "lower precedential value" than Feist, which stated that copyright protection is warranted "even when the quantum of originality is minimal." (Letter from Simpson to Board of Appeals of 3/9/04, at 5) (emphasis omitted). You also point out that the rings and clasps in the work could have been arranged in numerous manners and could have been comprised of different materials. Id. You assert, therefore, that your client "has used at least a minimum level of creativity in arriving at the particular design" at issue here. Id.

DECISION

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

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. The Board does not dispute that the overall design, i.e., the Umoja Bracelet in its entirety, although consisting of some elements which may fall within the public domain, was independently created by Whealan Massicott.

Thus, the sole issue left for the Board to decide is whether the Umoja Bracelet 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.

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 Umoja Bracelet 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).

In implementing this threshold for creativity, the Office and courts have consistently found that standard designs, figures and geometric shapes are not sufficiently creative to sustain a copyright claim. Compendium II, § 503.02(a) ("[R]egistration cannot be based upon the simplicity of standard ornamentation . . . . Similarly, it is not possible to copyright common geometric figures or shapes . . ."); Id., § 202.02(j) ("Familiar symbols or designs . . . or coloring, are not copyrightable."); Id., § 503.03(b) ("No registration is possible where the work consists solely of elements which are incapable of supporting a copyright claim. Uncopyrightable elements include common geometric figures or symbols, such as a hexagon, an arrow, or a five-pointed star . . . ."). See also 37 C.F.R. §202.1(a) ["[F]amiliar symbols or designs" are "not subject to copyright and applications for registration of such works cannot be entertained."). Moreover, simply making minor alterations to these otherwise standard shapes will not inject the requisite level of creativity. 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) ("[Registration cannot be based upon] a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations.").

You admit in your second request for reconsideration that the Umoja Bracelet is comprised of common and familiar shapes, namely, circles and loop-like designs. (Letter from Simpson to Board of Appeals of 3/9/04, at 6.) You argue, however, that the work at issue here is "a unique combination of forms that produce[s] aesthetically pleasing and distinct sculptural presence." Id. at 4. The Board finds that the jewelry design here consists of familiar shapes and designs in the public domain, none of which exhibit original sculptural authorship when examined individually. The Board agrees that the question to be decided is whether the combination of these familiar shapes and designs exhibit sufficient original sculptural authorship.

Selection, Coordination and Arrangement

The Board agrees that some combinations of common or standard shapes contain sufficient creativity with respect to how the common elements are combined or arranged to support a copyright. See, Feist, 499 U.S. at 358 (the Copyright Act "implies that some 'ways' [of compiling or arranging uncopyrightable material] will trigger copyright, but that others will not"; determination of copyright rests on creativity of coordination and arrangement).

However, as Ms. Giroux noted, merely combining non-protectable elements does not automatically establish creativity where the combination or arrangement itself is simplistic or minor in its overall configuration. John Muller & Co. v. New York 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); Forstmann Woolen Co. v. J.W. Mays, Inc., 89 F. Supps. 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); Homer Laughlin China Co. v. Oman, 22 U.S.P.Q.2d 1074 (D.D.C. 1991)(upholding Copyright Office's refusal to register chinaware design pattern); Jon Woods Fashion, Inc. v. Curran, 8 U.S.P.Q.2d 1879 (S.D.N.Y. 1988)(upholding Copyright Office's refusal to register design consisting of striped cloth over which was superimposed a grid of 3/16" squares); and Tompkins Graphics, Inc. v. Zipatone, Inc., 222 U.S.P.Q. 49 (E.D. Pa. 1983) (collection of various geometric shapes not copyrightable).

You take issue with these cases because you argue that they are "lower level cases relative to the U.S. Supreme Court Feist case . . . most of which predate Feist and all of which are of lower precedential value." (Letter from Simpson to Board of Appeals of 3/9/04, at 5.) You go on to state that "it goes without saying that [Feist] takes clear precedence over the lower level cases cited by the Copyright Office." Id. While you are correct that these cases are not decisions of the United States Supreme Court and most predate Feist, they are apposite nonetheless. These cases are consistent with Feist as they apply the same standard: To be copyrightable, the combination or arrangement of nonprotectable elements must result in expression that contains a distinguishable variation on such elements. As such, the Board has determined that, similar to the works in these cases, the Umoja Bracelet does not embody the requisite level of creativity with respect to the combination of its constituent elements, for the reasons set forth below.

Analysis of the Work

The individual elements of the Umoja Bracelet are common and familiar shapes and designs, or minor variations thereof, which are in the public domain and not copyrightable in and of themselves. Therefore, the only means by which the nonprotectable elements in the

Umoja Bracelet–the circular rings and loop-like designs–could warrant a copyright registration would be if their particular combination or arrangement exhibited a sufficient level of creativity. As stated previously, the Board finds that they do not.

The Board concludes that the combination and arrangement of the component parts of the Umoja Bracelet lack a sufficient amount of authorship to support a copyright registration. The design consists of a circular bracelet with loop or hook-like ends which is open at the top. The design on the top of the bracelet consists of three interlocking circular shapes arranged horizontally with the loop-like elements linking the outermost two circular shapes to the rest of the bracelet. 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, like the works in Jon Woods, Homer Laughlin and John Muller, the Umoja Bracelet 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.

You identify the artistic expression in the Umoja Bracelet as not interwining a "single circle with a hook clasp" but rather as intertwining three rings with "a distinctive hook/clasp that creates a distinctive overall shape that aesthetically balances the [bracelet itself]." (Letter from Simpson to Board of Appeals of 3/9/04, at 7.) Such expression is also manifested through the choice of materials, shapes, sizes, proportions, and arrangement, id., as the rings could have been arranged in "numerous manners, as could have the clasps." Id. at 5. Similarly, the "materials could have been different (e.g. matte finish gold, shiny silver, copper, etc.)." Id.

The Board notes 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). In making this determination, the Office considers only those authorship elements actually present in the deposit materials submitted with the application for registration, not those that could have been selected. 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.

Recently, the Ninth Circuit Court of Appeals decided two cases which support the Board's determination that the combination of elements in the Umoja Bracelet is too simple to support a copyright claim. 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 a jellyfish. In this case, the court stated:

> it is not true that any combination of unprotectable elements automatically qualifies for copyright protection . . . [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. Likewise, in Lamp Plus, Inc. v. Dolan, 345 F.3d 1140 (9th Cir. 2003), the Ninth Circuit held the mechanical combination of four preexisting ceiling lamp elements with a preexisting lamp base did not constitute original authorship. Similarly, the combination and arrangement of the three circular shapes coupled with the two identical loops here simply "lack[] the quantum of originality needed to merit copyright protection." Satava, 323 F.3d at 811.

You cite several cases to support your argument that the Umoja Bracelet should be registered. (Letter from Simpson to Board of Appeals of 3/9/04, at 6), citing Atari Games Corp. v. Oman, 888 F.2d 878 (D.C. Cir. 1989); Reader's Digest Ass'n v. Conservative Digest, Inc., 821 F.2d 800 (D.C. Cir. 1987); and Boisson v. Banian, Ltd., 273 F.3d 262 (2nd Cir. 2001). In each of these cases, the courts found that there was sufficient creative authorship in the combination of elements. However, the Board does not find these cases persuasive because each case involves a work which is distinguishable from the jewelry design here.

In Atari, the court found several aspects of the audio-visual work there–such as the motion created by the selection and arrangement of the graphic elements and the subsequent selection and arrangement of the sequence of the screens, the use of a square ball, a rectangular shrinking paddle, the placement and design of the scores and the use of sounds–as beyond mechanical, typical or garden variety. 979 F.2d 242, 247 (D.D.C. 1992). The selection and arrangement of the three circular shapes and two identical loops in the Umoja Bracelet do not evidence the same copyrightable expression as the work in Atari.

Similarly, in Reader's Digest, the court found that the selection and arrangement of common elements in the magazine cover at issue there was entitled protection as a graphic work because the complexity of the layout of numerous components as a whole comprised a "distinctive arrangement and layout" of elements such as multiple lines, typefaces and colors. Again, although you argue otherwise, the arrangement of the public domain elements here is not distinctive but is rather routine.

As Ms. Giroux explained, the works in Boisson involved two quilted designs, each of which consisted of square blocks containing capital letters of the alphabet. The blocks were set in horizontal rows and columns, with the last row filled by various pictures and icons. The letters and blocks consisted of several different colors, set off by a white border and different colored edging. The court found that the arrangement of the elements including the selection of several different colors was sufficiently original to support a copyright registration. 273 F.3d at 271. As discussed above, such sufficient creativity is not present in the arrangement of the nonprotectable elements here.

CONCLUSION

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

Sincerely,

/s/

Marilyn J. Kretsinger
Associate General Counsel