United States Copyright Office
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May 5, 2006

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Re: SI 1297, SI 1300, SI 1304, SI 1309, SI 1310, SI 1319, SI 1336, SI 1337, SI 1369, SI 1370SQ, SL 929, SL 950, SL 961, SL 962, SL 963, SL 969SQ
Control No: 61-311-8426(B)

Dear Mr. Saunders:

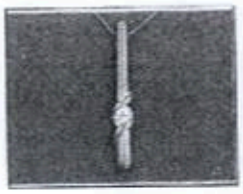
I am writing on behalf of the Review Board in response to your letter dated August 12, 2005, requesting reconsideration of a refusal to register 15 of 16 pieces of jewelry on behalf of your client Merit Diamond Corporation. The Board has carefully examined the applications, the deposits, and all correspondence in this case and affirms the denial of registrations of the 15 works. Moreover, the Board reverses the decision to register the remaining piece of jewelry.

DESCRIPTION OF THE WORKS

The works involved in this reconsideration are described as follows:

1. SI 1297 Single Stone Satin Finish Pendant

This work is a pendant consisting of a plain white gold element with rounded ends which has a single round diamond set in an "S"-shaped element below the center of the white gold element.



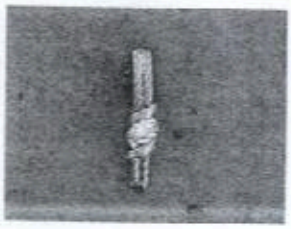
2. SI 1300 Single Stone Swirl Pendant

This work is a pendant consisting of a corkscrew-shaped element in white gold into which a single round diamond is placed in the bottom swirl.



3. SI 1304 Single Stone Pendant, Dbl Cable

This work is a pendant consisting of a yellow gold twisted double cable element with a single round diamond set in a slightly flattened silver "S"-shaped element which is placed slightly below the center of cable element.



4. SI 1309 Stone Sirena Pendant

This work is a pendant consisting of a corkscrew-shaped element increasing slightly in size from top to bottom with five round diamonds set vertically in between each of the swirls of the corkscrew element.



5. SI 1310 Single Stone Pendant

This work is a pendant consisting of a yellow gold twisted double cable element at the end of which is a single round diamond set in a silver "S"-shaped element with a swirl added on to the "S"-shaped element.



6. SI 1319 Past, Present, Future Sirena Hearts

This work is a pendant consisting of three heart shapes of varying sizes joined vertically and each connected by a single round diamond set in an "S"-shaped element.



7. SI 1336 ROYALCREST Center Pendant

This work is a pendant consisting of an arc-shaped element which flows into an "S"-shaped element which has been squared off and holds a single square diamond.



8. SI 1337 Three Stone Marquise Pendant

This work is a pendant consisting of a slightly elongated corkscrew-shaped element with a slightly curved element at the top with three oval-shaped diamonds set vertically in between each of the swirls.



9. SI 1369 Three Stone Square Pendant

This work is a pendant consisting of a corkscrew-shaped element which has been squared off with a curved element at the top with three square-shaped diamonds set vertically in between each of the squared swirls.



10. SI 1370SQ Single Stone Square Pendant

This work is a pendant consisting of an arc-shaped element which flows into an "S"-shaped element which has been squared off and holds a single square diamond with the lower arm of the "S" extending past the diamond.



11. SL 929 Sirena Earrings on Cable

This work is a pair of hoop-shaped earrings consisting of a double cable gold element atop of which sits a single round diamond set in a silver "S"-shaped element.



12. SL 950 Half Hoop Earring

This work is a half-hoop-shaped earring consisting of a single round diamond set in an "S"-shaped element placed in the center of the half hoop.



13. SL 961 Hoop Earring Leverback

This work is a hoop-shaped earring with a lever back consisting of a single round diamond set in an "S"-shaped element placed in the center of the hoop.



14. SL 962 5-Stone Hoop Earring Leverback

This work is a hoop-shaped earring with a lever back consisting of a corkscrew-shaped element with five round diamonds set vertically in between each of the swirls.



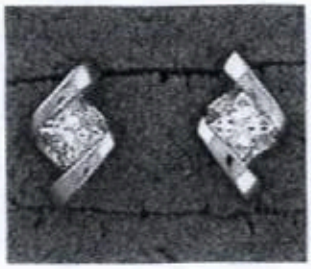
15. SL 963 3-Stone Hoop Leverback

This work is an earring consisting of a corkscrew-shaped element with three round diamonds set vertically in between each of the swirls.



16. SL 969SQ Square Diamond Earrings

This work is a pair of earrings consisting of a single square diamond set in a squared-off "S" shaped element with the ends of the squared "S" extending beyond the diamond.



ADMINISTRATIVE RECORD

Initial Submission

On March 24, 2004, the Copyright Office received 24 Form VA applications from Applicant, Merit Diamond Corporation, to register 24 jewelry designs entitled:

1. SI 1201 Heart Shape Pendant with Sirena Ctr.
2. SI 1202 Heart Shape Pendant with Sirena Attaching to Bale
3. SI 1297 Single Stone Satin Finish Pendant
4. SI 1300 Single Stone Swirl Pendant
5. SI 1304 Single Stone Pendant, dbl. Cable
6. SI 1305 Heart Pendant with Full Sirena Top Center
7. SI 1309 Stone Sirena Pendant
8. SI 1310 Single Stone Pendant
9. SI 1318 Sirena Fashion Pendant
10. SI 1319 Past, Present, Future Sirena Hearts
11. SI 1335 Marquis Center Sirena
12. SI 1336 ROYALCREST Center Pendant
13. SI 1337 Three Stone Marquise Pendant
14. SI 1369 Three Stone Square Pendant
15. SI 1370SQ Single Stone Square Pendant
16. SL 929 Sirena Earrings on Cable
17. SL 946 Fashion Earring, Post
18. SL 950 Half Hoop Earring
19. SL 951 Earring
20. SL 952 Earring
21. SL 961 Earring
22. SL 962 5 Stone Hoop Earring-Leverback
23. SL 963 3 Stone Hoop-Leverback
24. SL 969SQ Square Diamond Earrings

In a letter dated June 12, 2004, Visual Arts Examiner Marjorie M. Kress refused registration of 16 of these works because they lacked the artistic or sculptural authorship necessary to support copyright claims.[1]

Ms. Kress explained that copyright protects original works of authorship that are fixed in some physical form and that under *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), originality in this context meant that the work was independently created by the author, and not copied, and that it possessed at least a minimal degree of creativity. She went on to explain that a work of the visual arts must contain at least a minimum amount of original pictorial, graphic, or sculptural material in order to be copyrightable and that ideas or concepts which may be embodied in the work are not protected by copyright.

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[1] Eight of the works were cleared for registration: SI 1201 Heart Shape Pendant with Sirena Ctr.; SI 1202 Heart Shape Pendant with Sirena Attaching to Bale; SI 1305 Heart Pendant with Full Sirena Top Center; SI 1318 Sirena Fashion Pendant; SI 1335 Marquis Center Sirena; SL 946 Fashion Earring, Post; SL 951 Earring; and SL 952 Earring.

She further explained that neither the commercial value nor the aesthetic appeal of a work nor the time and effort expended in creating the work were factors to be considered in determining the copyrightability of a work. After carefully considering each of the 16 works, she concluded that none possessed the authorship necessary to support a copyright claim.

First Request for Reconsideration

On January 11, 2005, Sharon Blinkoff of Buchanan Ingersoll, the firm representing Merit Diamond Corporation at that time, requested that the Office reconsider its refusal to register the 16 jewelry designs. Ms. Blinkoff began by describing each of the 16 works, noting the unique and/or novel quality of each of the works. She made clear that registration was not being sought for "the shape or configuration of the stones themselves, nor to any underlying general design concepts" but rather for "the specific designs as depicted." Letter from Blinkoff to Chief, Receiving and Processing Division of 01/11/05, at 4. She stated that the works were "created solely by the author" and not copied and that the works "are unique and have garnered significant commercial success." *Id.*

She then argued that *Feist* involved significantly different facts from the case at hand as the jewelry designs here are not compilations. As such, she pointed out that these works should be viewed as a "unitary whole" because "the elements are integrated and inseparable in terms of the jewelry's aesthetic appeal and overall appearance," citing *Yurman Design v. PAJ*, 93 F. Supp. 2d 449 (S.D.N.Y. 2000), in support of this assertion. *Id.* at 5. She added that the "uniqueness and commercial success certainly underscores that the creativity attached to them is sufficient for purpose of copyright protection." *Id.*

Next, she argued that even under *Feist*, the works warrant copyright registration. She quoted extensively from *Weindling International Corp. v. Kobi Katz Inc.*, 56 U.S.P.Q.2d 1763 (S.D.N.Y. 2000), and *Diamond Direct v. Star Diamond*, 116 F. Supp. 2d 545 (S.D.N.Y. 2000), to show that courts have found that commercial jewelry designs, like the ones at issue here, need only possess a modest level of creativity in order to receive copyright protection. Letter from Blinkoff of 01/11/05, at 7. She concluded that the 16 works here have satisfied this requirement.

Response of the Examining Division

In response to Ms. Blinkoff's request and in light of the points raised in her January 11, 2005, letter, Attorney Advisor Virginia Giroux of the Examining Division reexamined the 16 applications. She concluded that three of the works, namely, SI 1370SQ Single Stone Square Pendant, SI 1336 RoyalCrest Center Pendant and SL 969SQ Square Diamond Earrings, contained a sufficient amount of original and new sculptural authorship to support a copyright registration. She noted, however, that only one of these three could be registered as they were all published on the same day and contained the same or similar elements. She explained that under such circumstances the Office would register only one of the works, to be selected by the applicant. She went on that the one registration would "cover or extend to the same or similar copyrightable material appearing in the other works or in any concurrent or similar copyrightable material appearing in the other works or in any concurrent or subsequent versions of the work." Letter from Giroux to Blinkoff of 05/16/05, at 2. She then requested that one of these three works be selected by the applicant for registration.

Conversely, she determined that none of the remaining 13 works contained a sufficient amount of original and creative sculptural authorship, either elementally or as a whole. Ms. Giroux explained that in

order to be copyrightable, a work must not only be original, but it must also possess more than a *de minimis* quantum of creativity. *Id.*, citing *Feist*, 499 U.S. at 345. She went on that, in the case of a jewelry design, a certain amount of pictorial, graphic, or sculptural material in the work must have originated with the author and such authorship must constitute more than a trivial variation of public domain, preexisting, or published elements, citing, *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951). Ms. Giroux noted that the requisite creativity can arise from a work's constituent elements alone or from the combination thereof. Letter from Giroux of 05/16/05, at 1.

She then explained that when a work contains previously registered, published, preexisting, or public domain elements or material, such as the 13 works here, copyright protection extends only to copyrightable additions or changes made for the first time. Such new elements or materials must be sufficiently original and creative and copyrightable. She then noted registration was not possible where only a few changes or additions have been made or where the new material consists of noncopyrightable elements such as layout or arrangement, additional gemstones, or different metals. She then concluded that none of the new material added to each of the 13 works was sufficiently original and creative to support a new registration. *Id.* at 2.

She then described each of the 13 works and concluded that the elements comprising each of the works were common and familiar shapes or minor variations thereof in the public domain and are, therefore, not copyrightable. Even, taken as a whole, the combination and arrangement of the gemstones coupled with that of the "S" shaped elements do not demonstrate the originality and creativity necessary to sustain a copyright registration. The resulting designs are *de minimis* involving public domain elements combined and arranged in rather simple configurations. Letter from Giroux of 05/16/05, at 3 citing 37 CFR § 201.1 and *Compendium of Copyright Office Practices II*, Ch. 500, § 503.02(a) & (b) (1984) [hereinafter *Compendium II*]. She also cited several cases to support the proposition that although simple variations of standard designs and their simple arrangements may be aesthetically pleasing, they do not furnish a basis upon which to support a copyright registration. *Id.*, citing *John Muller & Co. v. New York Arrows Soccer Team, Inc.*, 802 F.2d 989 (8th Cir. 1986), *Forstmann Woolen Co. v. J.W. Mays, Inc.*, 89 F. Supp. 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 Fashions, Inc. v. Curran*, 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988), and *DBC of New York, Inc. v. Merit Diamond Corp.*, 768 F. Supp. 414 (S.D.N.Y. 1991).

Ms. Giroux then moved on to distinguish the cases cited by Ms. Blinkoff. 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 jewelry designs here, contained a sufficient amount of original and creative authorship. Similarly, she found none of the jewelry designs here comparable to the works at issue in *Yurman Design* because the *Yurman* works were recast and arranged in a way that evidenced a sufficient amount of original and creative authorship.

Finally, Ms. Giroux explained that in determining copyrightability, the Office does not consider the materials of which a work is made (*e.g.*, gold, silver, platinum or gemstones), the work's aesthetics, attractiveness, uniqueness, visual effect, impression or commercial success, nor the availability of alternative design choices. Letter from Giroux of 05/16/05, at 5. She summarized her position by stating "[b]ecause there are no artistic or sculptural elements or features in this work, either alone or in combination, upon which a copyright registration is possible, we regret that we must again refuse copyright registration for these particular 13 works." *Id.*

Second Request for Reconsideration

On August 12, 2005, you requested that the Office again reconsider its decision. You began by describing each of the 13 rejected works, in addition to the three Ms. Giroux found copyrightable, and selected SI 1370SQ - Single Stone Square Pendant from those three for registration. You noted, however, that you "respectfully traverse[] the rejection of separate registrations" for these three works as "each . . . consists of original elements in a combination that warrants separate copyright registration for each individual piece." Letter from Saunders to Copyright R&P Division of 08/12/05, at 5.

You then disputed Ms. Giroux's finding that the designs here are mere familiar symbols or designs. Rather, you contended that "all contain creative variations of the 'S' element, *e.g.*, compressed 'S,' blended 'S,' flattened 'S,' and widened 'S,'" with none being the same. *Id.* You then turned to distinguish the designs here from the works at issue in *John Muller*, *Forstmann*, *Homer Laughlin*, *Jon Woods*, and *DBC*. You argued that unlike the works in these cases, the designs here–consisting primarily of original variations of the "S"– are not common or familiar to others nor are such variations well known in the jewelry trade. Similarly, you asserted that the designs here contain more creativity and originality, as evidenced by the variations on the "S" curve, than the envelope at issue in *Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc.*, 634 F. Supp. 769 (W.D. Pa. 1986), where the "terse phrases on the envelope [to] describe their contents" were found uncopyrightable because the phrases were "like a listing of ingredients." *Id.* citing 634 F. Supp. at 772.

You then repeated verbatim the arguments made by Ms. Blinkoff in her letter of January 11, 2005.

DECISION

After reviewing the applications and the arguments you presented, the Review Board affirms the Examining Division's refusal to register 15 of the 16 jewelry designs but reverses its decision to register one of the designs. The Board finds that none of the 16 jewelry designs contain a sufficient amount of original and creative authorship to support a registration.

Before turning to its analysis of each of the 16 jewelry designs, the Board addresses its reversal of the Examining Division's determination that three of the works, namely, SI 1370SQ - Single Stone Square Pendant, SI 1336 - ROYALCREST Center Pendant, and SL 969SQ - Square Diamond Earrings, contain a sufficient amount of original and new sculptural authorship to support a copyright registration. Pursuant to 37 CFR § 202.5(c)(1), when considering an applicant's second request for reconsideration, the Board bases its decision on the applicant's written submissions. In your letter, you argued that each of the three works Ms. Giroux identified as copyrightable warranted separate registrations. In order to evaluate this argument, the Board examined anew all three pieces of jewelry and concluded, for the reasons set forth below, that none of the three designs is copyrightable.

The Board now turns to its analysis.

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 II*, Ch. 500, § 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*, 499 U.S. at 345 (1991). First, the work must have been independently created by the author, *i.e.*, not copied from another work. You state, "these designs were created solely by the author, not copied from any existing work." Letter from Saunders to Copyright R&P Division of 08/12/05, at 4. The Board accepts this statement at face value and has no reason to doubt its validity. Therefore, the first component of the term "original" is not at issue in the analysis set forth herein. The second *Feist* requirement is that a work must possess sufficient creativity. Although the Board recognizes your point that *Feist* "involved significantly different facts than the case under consideration" as the work at issue there was a compilation and not a jewelry design, Letter from Saunders of 08/12/05, at 6, *Feist's* holding regarding the statutory originality requirement applies generally to any copyrightability analysis, regardless of the form or authorship content of the work. For the reasons set forth below, the Board has determined that none of the jewelry designs at issue here possesses 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. You quote the Court for the proposition that the "requisite level of creativity is extremely low; even a slight amount will suffice." Letter from Saunders of 08/12/05, at 7, quoting *Feist*, 499 U.S. at 345. You cite *Yurman Designs*, *Weindling*, and *Diamond Direct*, as further support that works containing even a small amount of creative expression can sustain a copyright registration. Letter from Saunders of 08/12/05, at 7-9. The Board agrees with this general legal principle.

However, the Court in *Feist* also ruled that some works (such as the work at issue in that case) fail to meet the low 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 CFR § 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*, Ch. 200, § 202.02(a). With respect to pictorial, graphic and sculptural works, the class within which jewelry designs fall, *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." *Id.* Ch. 500, § 503.02(a).

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*, Ch. 500, § 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.*

Ch. 200, § 202.02(j) ("Familiar symbols or designs . . . or coloring, are not copyrightable."); *Id.* Ch. 500, § 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 CFR § 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*, 191 F.2d at 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*, Ch. 500, § 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.").

Despite your assertions that the jewelry designs "are not mere familiar symbols or designs" but rather "creative variations of the 'S' element," you acknowledge that each design contains an "'S' or helical element." Letter from Saunders of 08/12/05, at 5. Moreover, your descriptions of each of the works identify other familiar shapes which comprise the designs, namely a "D" shape, arcs, loops, half loop, and hearts. *Id.* at 2-4. Therefore, you seem to recognize that such individual elements comprising the designs here are not copyrightable, as further evidenced by your statement that these designs "need to be looked [at] as a unitary whole," and your citation to *Yurman Design v. PAJ*, 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."). The Board finds that each of the jewelry designs here consists of a combination of familiar shapes, or minor variations thereof, in the public domain, none of which exhibit original sculptural authorship when examined individually. Therefore, the question to be decided is whether the combinations and arrangements of these familiar shapes in any of the jewelry designs exhibit sufficient original sculptural authorship.

Selection, Coordination and Arrangement

Although none of the elements comprising the 16 jewelry designs when examined individually exhibits sufficient original sculptural authorship to support a copyright, the Board recognizes that some combinations of common or standard shapes may 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 or arrangement).

However, as Ms. Giroux noted, merely combining non-protectible elements does not automatically establish creativity where the combination or arrangement itself is simplistic or minor in its overall configuration. For example, in *Jon Woods Fashions*, 8 U.S.P.Q.2d at 1870, the district court upheld the Register of Copyrights' decision that a fabric design consisting of striped cloth over which a grid of 3/16" squares was superimposed, even though distinctly arranged and printed, did not contain the minimal amount of original artistic material to merit copyright protection. Similarly, in *DBC*, 768 F. Supp. at 416, the district court upheld the Register's refusal to register the two Marquise-Trillion rings in question in that case. After examining in detail the individual elements of the rings which made up their designs, the court found that the "two rings, on the whole, [are] not exceptional, original, or unique." In so holding, the court recognized

that familiar and common shapes and symbols are not copyrightable in themselves, citing 37 CFR § 202.1. Additionally, the Eighth Circuit upheld the Register's refusal to register a simple logo consisting of four angled lines with formed an arrow and the word "Arrows" in cursive script below the arrow. *John Muller & Co.*, 802 F.2d at 990. Similar to these cases, the Board has determined that none of the 16 jewelry designs embodies the requisite level of creativity with respect to the combination of its constituent elements; we set forth our reasoning below in more detail.

We note that you argue that the jewelry designs at issue here, unlike the works in the cases just discussed as well as the other cases cited by Ms. Giroux, "meet the requirements for copyright due to the original variations of the 'S' curve" because they are not common or familiar to others or well known in the jewelry trade. Letter from Saunders of 08/12/05, at 5. Such comparison with other existing jewelry design elements is not determinative of a work's copyrightability. The Office does not judge, as a part of its examining procedures, the commercial, artistic or aesthetic worth of a given work. From *Compendium II*: "Quality, aesthetic merit, ingenuity, and uniqueness are not considered in determining the copyrightability of a work." *Compendium II*, Ch. 200, § 202. Again, "[t]he requisite minimal amount of original sculptural authorship necessary for registration in Class VA does not depend on aesthetic merit, commercial appeal, or symbolic value of a work." *Id.* at § 503.02(b). Thus, nothing can be concluded about the protectibility of any of the 16 jewelry designs as they are compared to other jewelry designs.

Next, you argue that the designs here are copyrightable because they are "independently designed jewelry with original and creative features including variations on the 'S' curve" which "requires creativity and originality beyond that of an envelope listing the contents"–the work at issue in *Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc.*, 634 F. Supp. 769 (W.D.Pa. 1986). Letter from Saunders of 08/12/05, at 6. The Office must independently evaluate each work submitted for registration to determine if it meets the minimal, but existent, statutory requirements. It is simply not the Copyright Office's role to compare and contrast works submitted for registration. Rather, copyrightability turns on whether a sufficient amount of original artistic authorship is embodied in that piece of jewelry. As stated previously and will be explained, the jewelry designs here do not.

Analysis of the Works

The Board has examined each of the jewelry designs at issue here in terms of their component elements as well as in their entirety and has determined that none possesses the requisite level of creativity necessary to support a copyright registration.[2]

1. *SI 1300 - Single Stone Swirl Pendant*

You describe this work as a series of "sweeping elongated "S"s" which are "blended together to create a vertical spiral" with a single diamond "cupped in the lowest sweeping 'S.'" Letter from Saunders of 08/12/05, at 2. As evidenced by your description, the resulting design is that of a spiral or a corkscrew, a standard and familiar shape. As explained earlier, such familiar shapes are not copyrightable. *Compendium*

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[2] It is unclear whether any of the "S"-shaped elements into which the diamonds in these works are set also serve the purpose of holding the diamond in place. As a useful article, any functional component would be barred from copyright registration absent any separable authorship. It is unnecessary to address this concept in detail, however, because you have not raised any functionality argument in your appeal and because the works' lack of sufficient creativity forms an independent basis for the Board's rejection of these applications.

II, Ch. 500, § 503. In addition, there is no sculptural authorship in the lowest, simple swirl surrounding the diamond sufficient to support a registration. Similarly, the placement of a diamond in the lowest swirl does not result in copyrightable expression. The overall arrangement is too simplistic to warrant registration.

2. *SI 1297 - Single Stone Satin Finish Pendant*

This work consists of a vertical element which is slightly larger at its bottom and rounded at the ends. A single diamond is set in an "S"-shaped element slightly below the center of the vertical element. The element in which the diamond sits is a minor variation on a common "S" shape and contains insufficient original sculptural authorship. Although the vertical element is slightly larger at its bottom, such difference in size is a minor spatial or linear variation and does not provide the requisite level of creativity needed to support a registration. *Compendium II*, § 503.02(a). Also, the placement of a diamond on the lower part of a pendant is a routine and standard design, as is having the diamond flanked at the top by the identical diagonal arms of the "S" shape and the arcs on its side. The overall arrangement is simple and lacks any distinguishing sculptural or design variation. Thus, the design here merely brings together two or three familiar shapes with minor variations thereof in a simple configuration which fails to rise to the level of creativity required to support a copyright registration. *Compendium II*, § 503.02(b).

3. *SI 1319 - Past, Present, Future Sirena Hearts*

This work is a pendant comprised of three hearts descending vertically with each connected by a single diamond set into an "S"-shaped element. The hearts gradually increase in size from top to bottom as do the "S"-shaped elements. Again, the hearts are common and familiar shapes and the element holding the diamond is a variation of an "S" shape, with the identical diagonal arms of the "S" and arcs flanking the diamond. The difference in size of the hearts is a minor spatial or linear variation. As before, there is insufficient sculptural authorship in the "S"-shaped element. Overall, this design is a simple combination of a few familiar symbols or shapes–hearts and "S" shape–with minor linear or spatial variations for which no registration can be made. *Compendium II*, § 503.02(a).

4. *SI 1304 - Single Stone Pendant, Dbl Cable*

This work is a pendant consisting of a double cabled chain with a diamond set in the "S"- shaped element which is positioned just below the center of the chain. The diamond is flanked on its top and bottom by the identical diagonal rectangular arms of the "S" and by silver arcs on its sides. This routine arrangement of public domain elements is not sufficiently creative within the meaning of the copyright law. The fact that the cabled chain and the "S"-shaped element are different colors is immaterial. "[M]ere coloration cannot support a copyright even though it may enhance the aesthetic appeal or commercial value of a work." *Compendium II*, Ch. 500, § 503.02(a). Also, it is a somewhat common jewelry design to use one type of metal for the chain element and another metal, often matching or coordinating with any gemstones, for the gemstone's setting. The totality of this simplistic combination of public domain elements is not sufficiently creative to support a copyright registration.

5. *SL 929 - Sirena Earrings on Cable* and *SI 1310 - Single Stone Pendant*

These two works are very similar. SL 929 is a pair of hoop-shaped earrings consisting of a diamond set in an "S"-shaped element positioned atop of a double cabled element. The diamond is flanked by the identical diagonal rectangular arms of the "S"-shaped element on its top and bottom and by arcs on its sides.

An additional identical diagonal rectangular arm separates the "S"-shaped element and the cabled element. The individual elements comprising this work, such as the cable and hoop designs, rectangles, and arcs, are all in the public domain, and are arranged in a rather simplistic manner that is not sufficiently creative to warrant registration. Again, the difference in color between the cable element and the "S"-shaped element is immaterial. *Compendium II*, § 503.02(a). As with SI 1304, using different types of metal for the hoop and another for the gemstone's setting is a somewhat common jewelry design. The overall arrangement again is too simplistic to support a copyright registration.

Similarly, SI 1310 is a pendant consisting of a vertical double cabled element with a diamond set in an "S"-shaped element which is positioned at the bottom of the cabled element. Just like SL 929, the diamond is flanked by the identical diagonal rectangular arms of the "S"-shaped element on its top and bottom and by arcs on its sides. An additional, slightly shorter diagonal rectangular arm sits below the "S"-shaped element. This work, like SL 929, is also comprised of public domain elements. The fact that the second arm is slightly shorter than the other two arms of the "S"-shaped elements is a minor spatial or linear variation. The overall design merely brings together two or three standard shapes with minor linear or spatial variations and fails to rise to the level of creativity required to support a copyright registration. *Compendium II*, § 503.02(b).

6. *SL 962 - 5 Stone Hoop Earring - Leverback* and *SL 963 - 3 Stone Hoop - Leverback*

SL 962 is a hoop-shaped earring with a lever back consisting of a corkscrew/spiral element with five round diamonds set vertically in a repetitive manner between each of the spirals. As with most of these works, each diamond is flanked on its top and bottom by identical diagonal rectangular arms of the corkscrew/spiral element and on its sides by arcs. The spiral or corkscrew is a common and familiar shape in the public domain. The hoop-shape is comprised of a slightly rounded "D"–itself a minor variation on a common and familiar shape. The resulting design merely brings together two or three standard shapes with minor variations thereof. As explained previously, no registration can be made for this work.

SL 963 is comprised of the same elements as SL 962, with the exception that it utilizes three diamonds instead of five. Therefore, the same analysis applies.

7. *SL 950 - Half Hoop Earring* and *SL 961 - Hoop Earring Leverback*

SL 950 is a half-hoop-shaped earring consisting of a diamond set in an "S"-shaped element positioned in the center of the half hoop. The diamond is flanked by the identical diagonal rectangular arms of the "S"-shaped element on its sides and by arcs on its top and bottom. Utilization of a half hoop instead of a completed hoop is a somewhat common jewelry design as is the placement of a diamond in the center of the half-hoop element. This work is not copyrightable for the reasons already discussed with regard to the other works.

Similarly, SL 961 is a hoop-shaped earring with a leverback consisting of a diamond set in an "S"-shaped element positioned in the center of the hoop. The diamond is flanked by the identical diagonal rectangular arms of the "S"-shaped element on its sides and by arcs on its top and bottom. The hoop shape is comprised of a slightly rounded "D" –itself a minor variation on a common and familiar shape. This work is also not copyrightable for the reasons already discussed.

8. *SI 1309 - 5 Stone Sirena Pendant, SI 1337 - Three Stone Marquise Pendant*, and *SI 1369 - Three Stone Square Pendant*

Each of these three works is a pendant consisting of a corkscrew/spiral element with diamonds set vertically in a repetitive manner in each of the spirals. In each pendant, each diamond is flanked on its top and bottom by diagonal rectangular arms of the corkscrew/spiral element and on its sides by arcs. The top of the spiral in each work is slightly curved, and the spirals increase slightly in size from top to bottom. The differences among these works lie in the number and shape of the diamonds utilized, with SI 1309 comprised of five round diamonds, SI 1337 comprised of three oval-shaped diamonds and SI 1369 comprised of three square-shaped diamonds. As previously discussed, the spiral or corkscrew used in each work is a common and familiar shape in the public domain. Likewise, the slight differences in size of the spirals of each work are a minor spatial or linear variation. Again, none of these works is copyrightable for the reasons already discussed.

9. *SI 1336 - RoyalCrest Center Pendant, SI 1370SQ - Single Stone Square Pendant*, and *SL 969SQ - Square Diamond Earrings*

SI 1336 and SI 1370SQ are pendants consisting of an arc-shaped element which flows into a squared-off "S"-shaped element into which a single square diamond is set. In SI 1370SQ, the lower arm of the "S"-shaped element extends beyond the diamond while the lower arm in SI 1336 is more flush with the diamond. The diamond in each work is flanked by the diagonal rectangular arms of the "S"-shaped element. Likewise, SL 969SQ is a pair of earrings comprised of a single square diamond set in a squared-off "S"-shaped element with each of the arms of the squared "S" extending beyond the diamond. As in most of the designs at issue here, the diamond is flanked by the diagonal rectangular arms on two of its opposing sides and by arcs on its other two sides.

Again, as with other pieces of jewelry designs at issue here, each of these designs consists of two or three common or familiar shapes, namely, arcs, squares, and rectangles, in the public domain. The overall designs merely bring together two or three standard shapes with minor variations thereof with minor linear or spatial variations and fail to rise to the level of creativity required to support a copyright registration. *Compendium II*, § 503.02(b).

Other Considerations

Several other arguments that you make have no bearing on the determination of whether or not copyright registration is available for any of these 16 works. For instance, you state the jewelry designs here are "products of independent effort and are original." Letter from Saunders of 08/12/05, at 6. The Board does not dispute your client's effort in creating the jewelry designs but can only evaluate the actual artistic expression embodied in the designs. As you have noted, *Feist* clarified that the effort expended in creating a work (*i.e.*, the "sweat of the brow") is simply not relevant to whether the work can support a copyright registration. *Feist*, 499 U.S. at 359-360.

In several of your descriptions of the designs, you point out that the design itself or various aspects of a design are "unique" and/or "novel." Neither of these considerations affects whether the work is an original work of authorship pursuant to the copyright statute. For instance, you state that the combination of "unique elements" in SI 1337 "achieves a novel design with artistic merit." Letter from Saunders of 08/12/05, at 3. Novelty and uniqueness are not copyright considerations. They belong to the inquiry of

whether an item can be patented. Likewise, the artistic merit of a work simply cannot be considered in the determination of whether a work contains creative expression upon which to base a registration. *Compendium II*, §§ 503.01, 503.02(a).

Finally, you seem to equate commercial success with creativity by your argument that the "uniqueness and commercial success [of the jewelry designs] certainly underscores that the creativity attached to them is sufficient for purpose of copyright protection." Letter from Saunders 08/12/05, at 7. Such is not the case. As the court in *Bleistein v. Donaldson Lithographic Co.*, 188 U.S. 239 (1903), made clear in considering the copyrightability of a circus poster, a work's aesthetic or commercial value is not to be considered in determining whether the work is entitled to copyright protection. Accordingly, the Copyright Office determines a work's copyrightability based upon "the presence of creative expression in a work, and not upon aesthetic merit, commercial appeal, or symbolic value." *Compendium II*, § 503.02(a); *see also Compendium II*, § 503.01; *Homer Laughlin*, 22 U.S.P.Q.2d at 1076.

CONCLUSION

For the reasons stated herein, the Copyright Office Review Board finds that none of the 16 jewelry designs contains a sufficient amount of original and creative authorship to support a registration, thereby affirming the Examining Division's refusal to register 15 of the 16 jewelry designs and reversing its decision to register one of the designs. This decision constitutes final agency action in this matter.

Sincerely,

/s/
Nanette Petruzzelli
Special Legal Advisor for Reengineering
for the Review Board
United States Copyright Office