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

August 11, 2009

Carole E. Handler
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2029 Century Park East, Suite 3500
Los Angeles, CA 90067

Re: EYEWEAR
Control Number: 61-419-6403(W)

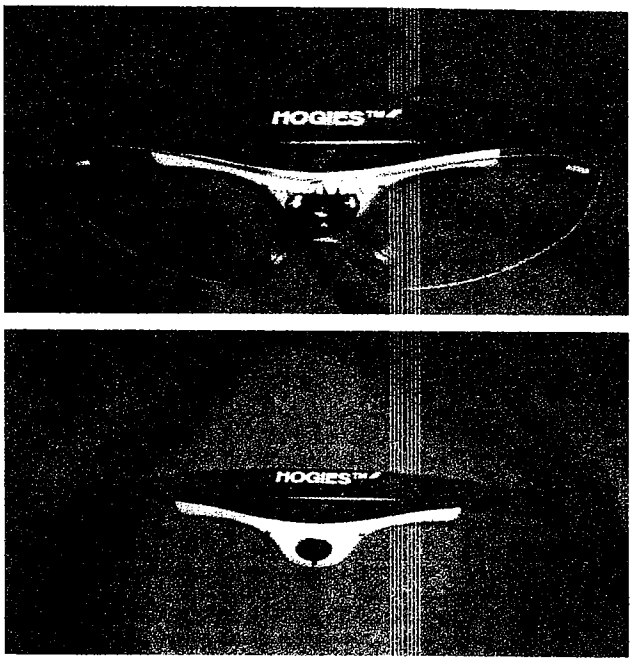
Dear Ms. Handler:

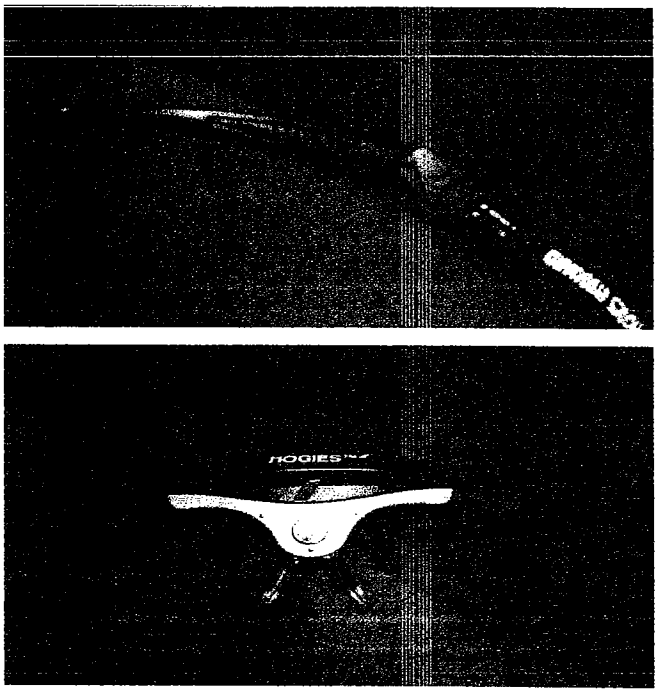
Thank you for your letter of February 15, 2009, informing me that you are the counsel of record for the above– referenced matter.

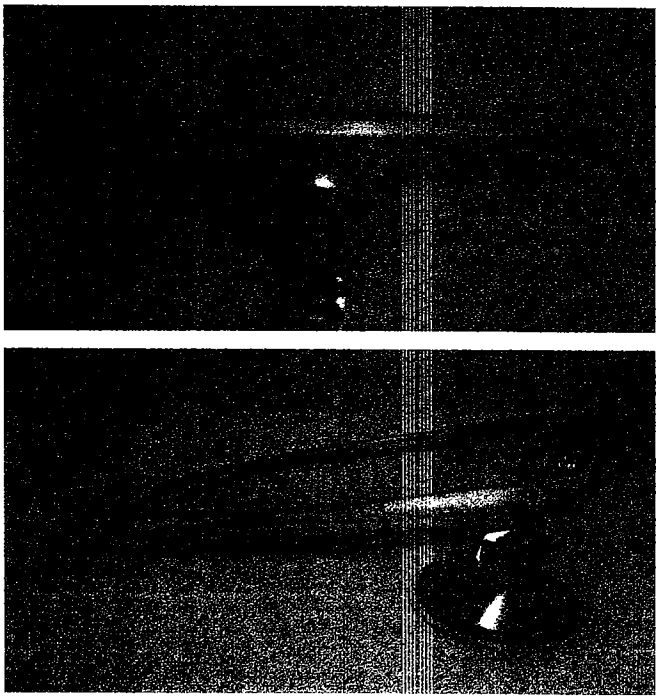
I am writing on behalf of the Copyright Office Review Board in response to your second request for reconsideration of the Office's refusal to register an eyewear design entitled "Eyewear." Although the work is an eyeglass frame, your application and letters chooses to identify the work as an eyewear design, and for purposes of discussion the Board will use your terminology. After reviewing the application, identifying photographs, and arguments you presented on the company's behalf, the Board affirms the Examining Division's refusal to register Applicant's design.

I. DESCRIPTION OF WORK

Identifying photographs of the eyewear design reveal the work as follows:




ROGIES



II. ADMINISTRATIVE RECORD

A. Initial submission

On October 31, 2006, applicant Martin Hogan Pty Ltd. submitted an application to register a design for eyewear. By letter dated November 6, 2006, visual arts examiner Rebecca Barker refused registration on the ground that the design was a useful article that does not contain any separable features that are copyrightable. Letter from Barker to Dunleavy of 11/6/06 at 1. Ms. Barker elaborated that the separable features may consist of pictorial, graphic, or sculptural authorship that are either physically or conceptually separable from the utilitarian aspects of the article. She concluded that all of the elements in the work are either related to the utilitarian aspects or function, or are subsumed within the overall shape, contour, or configuration of the article, and therefore the design could not be registered.

B. First request for reconsideration

In a letter dated December 11, 2006, you requested reconsideration of the decision to refuse registration of the design. Letter from Williams to Examining Division of 12/11/2006 at 1. In this letter you argued that Martin Hogan Pty Ltd. was a well known Australian designer of eyewear products and the design at issue had won awards for design excellence. The design, you asserted, was quite successful in the marketplace. *Id.*

You claimed that there are multiple sculptural and graphic elements of the design that were completely independent of its function and which were designed to creatively and aesthetically enhance the frame. These elements included two-level ridge and groove sculpting along the front piece of the frame; grooved surface above and below the primary ridge; a Hogan signature; and a red, angled, geometric slash shape. You contended that an irregular "dot" design appearing on the ends of the frame arm was removable and, therefore, was both physically and conceptually separable from the function of the eyeglass frames. *Id.* at 2-3.

You cited a number of cases which you claimed supported copyrightability of the Hogan design. You asserted that the ornamental belt buckle that was found to be copyrightable in *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2nd Cir. 1980) was similar to the Hogies frame because it incorporated similar grooves and ridging elements. *Id.* at 3; You also cited *Brandir Int'l, Inc. v. Cascade Pacific Lumber Co.*, 834 F.2d 1142 (2nd Cir. 1987) in contending that although a bicycle rack found to be uncopyrightable because of it was dictated by functional considerations, it actually supported the registration of your client's work because the ornamental surfaces of your client's eyeglass design was not dictated by function. *Id.* at 4. Likewise, you submitted that *Carol Barnhart, Inc. v. Economy Cover Corp.*, 773 F.2d 411 (2nd Cir. 1985) supported registration of your client's eyewear on the grounds that the mannequins were required to resemble the human form, while the Hogan design was purely aesthetic. *Id.* at 4.

After reviewing your first request for reconsideration, Examining Division Attorney Advisor Virginia Giroux-Rollow responded in a letter dated April 2, 2007, upholding the refusal to register the eyewear design on the grounds that it was a useful article that does not contain any authorship which is both separable and copyrightable. Letter from Giroux to Williams of 4/2/2007 at 1. She

stated that 17 U.S.C. § 101 not only defines a useful article as an article having an intrinsic function, but also provides that the design of a useful article "shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that such design incorporates pictorial, graphic, or sculptural features that can be identified separately from and are capable of existing independently of the utilitarian aspects of the article without destroying its basic shape." *Id.* at 1.

In examining a work in the useful article category, Ms. Giroux-Rollow explained that the Copyright Office must determine whether the work has any pictorial, graphic, or sculptural authorship that is either physically or conceptually separable from the utilitarian aspects of the article. She stated further that the Copyright Office examines such a work to determine if it contains physically or conceptually separable elements that can be regarded as a "work of art" apart from that shape of the article. *Id.* at 1.

Ms. Giroux-Rollow indicated that you did not dispute that your client's eyewear product was a useful article. She interpreted your claim in support of registration to say that the test for determining separability is met if the useful article contains non-functional design elements based on the designer's aesthetic judgment. *Id.* at 2. However, this is not the correct test.

Ms. Giroux-Rollow explained that the physical separability test enunciated in *Compendium of Copyright Office Practices II, (Compendium II)* § 505.04 was derived from the principle that a copyrightable work of art which is later incorporated into a useful article retains its copyright protection. The test for physical separability was not met by the mere fact that the housing or other components of a useful article are detachable from the working parts of the article. She concluded that the Hogies eyeglass design did not contain any components which meet the test of physical separability. *Id.* at 2.

Ms. Giroux-Rollow also clarified that the test for conceptual separability was set out in the *Compendium II*, rather than the test articulated in *Brandir Int'l, Inc. v. Cascade Pacific Lumber Co.*, 834 F.2d 1142. She explained that the *Compendium II* states that conceptual separability occurs when the pictorial, graphic, or sculptural features, while physically inseparable by ordinary means from the utilitarian item, are nevertheless clearly recognizable as a pictorial, graphic, or sculptural work which can be visualized independent of the shape of the article. She cited as examples a carving on the back of a chair, or pictorial matter on a glass vase. *Id.* at 2.

Ms. Giroux explained that the "test for conceptual separability, however, is not met by merely analogizing the general shape of a useful article to works of modern sculpture since, in this case, the alleged 'artistic or decorative features' and the useful article cannot be perceived as having separate, independent existences." Further, she explained that although certain features could have been designed differently, if the features are an integral part of the overall shape or contour of the useful article, no registration is possible. She cited *Esquire v. Ringer, Inc.*, 591 F.2d 796 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 908 (1979) for the proposition that copyright could not be secured for a useful article based on the overall shape or configuration of the article, no matter how aesthetically pleasing that shape or configuration might be. *Id.* at 2.

Turning to the works at issue, Ms. Giroux-Rollow stated that the eyewear design did contain some separable elements such as the red-angled geometric slash shape on the lower surface, as well as the irregular "dot" design on the ends of the frame: however, these elements are common, familiar shapes which are in the public domain. Moreover, she explained that the combination and arrangement of the elements, along with their coloring were not sufficiently creative to constitute a copyrightable work. *Id.* at 3.

Finally, Ms. Giroux-Rollow concluded that neither *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), nor *Kieselstein* supported the registration of the eyewear design. While *Feist* confirmed that the requisite level of creativity is low, applying the standard to useful articles first required a finding that the work contains separable authorship: for example, in *Kieselstein* the belt buckles at issue were held by the court to contain separately identifiable sculptural shapes constituting separable authorship. Ms. Giroux-Rollow did not find any comparable authorship in the five works at issue.

C. Second request for reconsideration

In a letter dated July 28, 2007, you requested a second reconsideration of the Office's refusal to register the eyewear design. You repeat a longer version of the statement made in your first letter of reconsideration regarding the acceptance of your client's design within the design community. Letter from Williams to the Review Board of 7/28/2007 at 1. You state that "the various embellishments that make up the aesthetic scheme were specifically designed to create a 21st Century "Eurotekic" styling and mood while evoking the flowing lines and wave concepts similar to the propagation of light waves and other ophthalmic themes," and that the design is award-winning. *Id.* at 1.

In your letter, you agree that the correct standard for copyright protection of your client's eyewear is artistic authorship that is conceptually or physically separable from the functional aspects of the eyeglass frame. However, you contend that your client's work meets this test because the arrangement of grooves and ridges designed to replicate light wave patterns are superimposed on the base frame and can easily be removed without altering the basic shape of the frame. In your view, the frames would still perform and provide all the necessary functionality without the artistic and aesthetic elements. *Id.* at 2.

You claim the creative aesthetic elements in the Hogies design is similar to the type of embellishment found copyrightable in *Kieselstein. Id.* at 3. Further, you state that even under the test in *Esquire*, the Hogies design qualifies for protection because the ridge and groove design can be visualized in a drawing or as a sculpture. *Id.* at 3.

You clarify that your client is not seeking protection in the overall shape and contour of the eyewear frames. Instead, the applicant only seeks registration for the superimposed artistic wave pattern and Euroteknic accents that have been added to the frame. You contend that the frame can be visualized without these design elements. The primary cases you cite in support of registration are *Feist* and *Kieselstein.*

III. DECISION

A. Works of fashion design in general

The work at issue is a useful article: an eyeglass frame. The protection of the design of useful articles, including works of fashion design, has been debated in the United States for many years. The first proposal to protect works of fashion design was introduced in 1914. Since that time, design protection bills have occasionally been introduced in Congress and have, on occasion, passed either the Senate or the House of Representatives. In 1998, a design bill limited to vessels hulls was enacted into law as part of the Digital Millennium Copyright Act. This protection is embodied in Chapter 13 of title 17.

The availability of copyright protection for useful articles in the United States is largely limited by application of the separability principle. This protection began with the landmark Supreme Court case of *Mazer v. Stein*, 347 U.S. 201 (1954) holding that works of art incorporated into useful articles may retain their copyright protection. In order to determine which utilitarian articles could be extended copyright protection, regulations of the Copyright Office adopted a policy whereby copyright registration would only be extended upon a finding of artistic authorship which could be identified separately and was capable of existing independently as a work of art; this principle was later embodied in the 1976 Copyright Act.

B. Copyrightability of useful articles

Your request for a second reconsideration acknowledges that the proper test for determining copyrightability of useful articles like your client's design is whether the work has any pictorial, graphic, or sculptural authorship that is either physically or conceptually separable from the utilitarian aspects of the article. Letter from Williams to the Review Board of 7/28/2007 at 2. Since it is clear that the standards applying to useful articles are controlling in this instance, the Review Board will begin with a discussion of the extent of copyright protection provided for useful articles.

1. The statute

The copyright law sets forth the guiding principle regarding the extent of copyright protection for a useful article by defining this protection in the following terms: "the design of a useful article... shall be considered a pictorial, graphic or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." 17 U.S.C. § 101 (2004). The legislative history accompanying the 1976 Copyright Act clarified Congress's intent with respect to copyright protection for useful articles: "... to draw as clear a line as possible between copyrightable works of applied art and uncopyrighted works of industrial design." H.R. Rep. No. 1476, at 55 (1976). The House Report further explains that "although the

shape of an industrial product may be aesthetically satisfying and valuable, [Congress's] intention is not to offer it copyright protection..." *Id.* Specifically addressing the issue of the "shape" of an industrial product, the House Report goes on to state that:

> Unless the shape of an automobile, airplane, ladies' dress, food-processor, television set, or any other industrial product contains some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted under the bill. The test of separability and independence from "the utilitarian aspects of the article" does not depend upon the nature of the design--that is, even if the appearance of an article is determined by esthetic (as opposed to functional) considerations, only elements, if any, which can be identified separately from the useful article as such are copyrightable.

Id.

2. Copyright Office Compendium

Compendium II, the Copyright Office's manual of practices with respect to examination of copyright registration claims, addresses registration of the works of the visual arts in chapter 500 to include the "pictorial, graphic and sculptural works" to which the statute refers. Chapter 500's treatment of separability provides guidelines which explain how the Copyright Office approaches the examination of useful articles in order to determine whether such articles incorporate the statutorily-required "pictorial, graphic or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the articles." In the case of conceptual separability, *Compendium II*, § 505.03 1984, states:

> Conceptual separability means that the pictorial, graphic and sculptural features, while physically inseparable by ordinary means from the utilitarian item, are nevertheless clearly recognizable as a pictorial, graphic or sculptural work which can be visualized on paper, for example, or as free-standing sculpture, as another example, independent of the shape of the useful article, i.e., the artistic features can be imagined separately and independently from the useful article without destroying the basic shape of the useful article. The artistic features and the useful article could both exist side by side and be perceived as fully realized, separate works– one an artistic work and the other a useful article.

In the case of physical separability, *Compendium II*, § 505.04 (1984) states:

> The physical separability test derives from the principle that a copyrightable work of sculpture which is later incorporated into a useful article retains its copyright protection... However, since the

> overall shape of a useful article is not copyrightable, the test of physical separability is not met by the mere fact that the housing of a useful article is detachable from the working parts of the article.

The Office's position and the *Compendium II* articulation of that position is consistent with the statutory grounds for protecting pictorial, graphic and sculptural works that are incorporated within useful articles. The statute's definitional guideline for determining whether protectible features exist apart from the *utilitarian aspects* of the useful article does not explicitly delineate the meaning, i.e., the scope and range, of utilitarian aspects which must be taken into account in performing such separability judgment. (Emphasis added.)

The House Report also specifically refers to Copyright Office regulations, promulgated in the 1940's, on the subject of separability as the regulations applied to useful articles and industrial design. The House Report, at 54, notes that the 1976 statutory language is "drawn from" those Office regulations and that part of the language is "an adaptation" of subsequent Office regulatory language which implemented *Mazer* (works of art incorporated into useful articles, such as mass-produced articles of commerce, may retain their copyright protection). Courts, under both the 1909 and the 1976 Acts, have considered the appropriate extent of protection for works of art incorporated into useful articles and have consistently recognized the expertise of the Copyright Office in its administration of the registration activity, including confirming Office registration decisions concerning works of art incorporated into useful articles. *See Norris Industries, Inc. v. International Telephone & Telegraph Corp.*, 696 F.2d 918 (11th Cir. 1983), *cert. denied*, 464 U.S. 818 (1983); *Esquire, Inc. v. Ringer*, 591 F.2d 796 (D.C. Cir. 1978), *cert. denied*, 340 U.S. 908 (1979); *Vacheron and Constantin - Le Coultre Watches, Inc. v. Benrus Watch Company, Inc.*, 260 F.2d 637 (2d Cir. 1958); *SCOA Industries, Inc. v. Famolare, Inc.*, 192 U.S.P.Q. 216 (S.D.N.Y. 1976).

Concerning the Office's *Compendium* tests for separability, the relevant sections confirm the case law which supports the long history of the Office's interpretation. In *Esquire*, referring to the useful article passage from the 1976 House Report, *supra,* the United States Court of Appeals for the District of Columbia Circuit stated that the passage "indicate[s] unequivocally that the overall design or configuration of a utilitarian object, even if it is determined by aesthetic as well as functional considerations, is not eligible for copyright." *Id.* at 804. Although *Esquire* was decided under the 1909 Act, the Court made clear that its references to the provisions of the 1976 Act were appropriate because "the new Act was designed in part to codify and clarify many of the [Copyright Office] regulations promulgated under the 1909 Act, including those governing 'works of art.' " *Id.* at 803.

Your letter for second reconsideration relies heavily on *Kieselstein* as supporting registration of your client's eyewear design. Letter from Williams to Review Board of 7/28/2007 at 3. We disagree with your comparison with *Kieselstein* and with your conclusion concerning the elements of the eyewear design involved in this instance. *Kieselstein* involved two belt buckles registered by the Copyright Office; the buckles incorporated ornamental features consisting of geometric shapes with "several surface levels"and wavy lines. 632 F.2d at 990. These identifiable ornamental features were found to be conceptually separable from the utilitarian function of the belt buckles. We do not see a parallel to the *Kieselstein* works in the Hogies eyewear design. To the

extent that a few of the design elements in the Hogies design are arguably separable such as the slash, the elements cannot support copyright registration because they are *de minimis*.

3. Application of the separability test to the Hogies eyeglass design.

You contend that the Hogies eyewear design meets both the conceptual and physical separability test because certain aesthetic elements, such as the irregular dots appearing on the ends of the frame arms, can be removed. Letter from Williams to the Review Board of 7/28/2007 at 2. This argument misconstrues the test established in § 505.04 of *Compendium II*, that a work must be a copyrightable work of sculpture before it is incorporated into a useful article. This principle is derived from the landmark case of *Mazer* involving a sculptured lamp base of a Balinese dancer. There is no independently recognizable work of art in the Hoagies design.

Your letter for second reconsideration seems to take the position that the test for conceptual separability can be met if the work can be visualized without embellishments or certain design features. For instance, on page 2 of your letter you state that "[i]t is not difficult to imagine the frames with a simple, smooth surface with no embellishments whatsoever," and on page 4 you claim that "[a]ll of these elements (the superimposed artistic wave pattern and Eurotekic accents) can be conceptually and visually separated from the utilitarian object and maintain their artistic integrity - and without harm to the overall shape and contour of the 'wraparound' style frame," and that "[t]he frame can be easily visualized with a smooth or rounded surface devoid of ridges and the front can [be] visualized without the high-impact contrasting wing feature." Letter from Williams to the Review Board of 7/28/2007 at 5.

However, visualizing the useful article devoid of its embellishments is not the separability test articulated in the definition of "pictorial, graphic, and sculptural works" in section 101 of the copyright law. In order for a useful article to qualify as a pictorial, graphic, or sculptural work, the work must have pictorial, graphic, or sculptural features which are capable of independent existence as a work of art. In her letter to you, Ms. Giroux-Rollow addressed this issue when she said conceptual separability requires clearly recognizable artistic authorship "which can be visualized on paper... independent of the shape of the article..." Letter from Giroux to Williams of 4/2/2007 at 2. Ridges, grooves, artistic wave pattern are not independently recognizable as works of art.

4. Aesthetic Considerations

Because your requests for reconsideration rest heavily on your assertions that the Hogies eyewear design was widely recognized for its design excellence, we will comment briefly on the Copyright Office policy in the area of aesthetic considerations. Letter from Williams to the Review Board of 6/28/07 at 1-2.

The "registrability of a work . . . is not affected by the style of the work or the form utilized by the artist." *Compendium II*, § 503.01. The work at issue is a work of fashion design. While there may have been considerable skill in the making of the design, the question before the Board is not the artistic style or the amount of skill used by your client in creating the eyewear design, but whether the Hogies design contain separately identifiable artistic expression. In *Mazer*, the Supreme Court held that the "use in industry of an article eligible for copyright" does not prevent

the copyright registration of that article. 347 U.S. at 218. The *Mazer* principle does not, however, negate the need under title 17 to identify separable artistic elements within the design of useful articles to consider such artistic elements for registration.

The Office applies the same standard of authorship to all types of works without judging the aesthetic merit of the works. Many fashion designs are greatly affected by aesthetic considerations. In assessing useful articles for copyright registration, the Copyright Office does not determine the aesthetic merit of a particular design; rather, the Office looks for the presence of separable, copyrightable authorship in the useful article which has been submitted for registration.

5. *De Minimis* authorship

In your letter for reconsideration, you rely on *Feist*. Letter from Williams to the Review Board of 7/28/2007 at 4. The Copyright Office applies the *Feist* standard when it considers whether authorship is registrable; that is, whether it is original. The fundamental basis of copyright protection is a work's originality. Although both independent creation and a certain minimum amount of creativity are components of originality, we assume the independent creation prong has been met and focus on the second prong of the *Feist* standard. As both you and Ms. Giroux-Rollow have noted, the requisite quantum of creativity necessary is low. However, the Supreme Court has stated that there can be no copyright in works in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Feist,* 499 U.S. at 359. *See also Diamond Direct, LLC v. Star Diamond Group, Inc.,* 116 F. Supp. 2d 525, 528 (S.D.N.Y. 2000) ("So the level of creativity necessary to support copyright is modest indeed. While no precise verbal formulation can capture it, there is some irreducible minimum beneath which a work is insufficiently original to find protection.") A work that reflects an obvious arrangement fails to meet the low standard of minimum creativity required for copyrightability. *Feist,* 499 U.S. at 362-63. Indeed, the work before the Court in *Feist* purported to be a copyrightable combination of elements but failed to meet the necessary quantum of creative authorship and was instead found to be a "garden variety" arrangement of noncopyrightable elements. The Court further 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. As *Feist* confirms, all works, no matter what the category, must contain a sufficient amount of original and creative authorship to be copyrightable. 499 U.S. at 346 (originality as a constitutional requirement).

In its long-standing registration practices which predate *Feist*, the Office has consistently recognized and applied the modest but nevertheless extant requisite level of creativity necessary to sustain a claim to copyright. *Compendium II* states that "[w]orks that lack even a certain minimum amount of original authorship are not copyrightable." *Id.* at § 202.02(a). For works of pictorial, graphic, and sculptural authorship within which jewelry designs fall, *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.* at § 503.02(a). In applying this standard, courts have consistently found that standard designs, figures, and geometric shapes are not sufficiently creative to meet the required quantum threshold. 1 M. Nimmer and D. Nimmer, *Nimmer on Copyright*, §2.01[B] (2002), 2-14; *see also Bailie v. Fisher*, 258 F.2d 425 (D.C.Cir. 1958); *Homer Laughlin China Co., v. Oman,* 22 U.S.P.Q. 2d 1074 (D.D.C. 1991); *OddzOn Products, Inc. v. Oman,* 924 F.2d 346 (D.C. Cir. 1991). *Compendium II,* § 503.02(a) notes that "registration cannot be based on the simplicity of standard

ornamentation.... Similarly, it is not possible to copyright common geometric figures or shapes...." Further, "familiar symbols or designs, and mere variations of typographic ornamentation, lettering, or coloring, are not copyrightable." *Compendium II,* § 202.02(j). No registration is possible where the work consists solely of elements that, individually or collectively, 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. *Compendium II,* § 503.02(a); *see also Bailie v. Fisher*, 258 F.2d at 426 ("Register [of Copyrights] may properly refuse to accept for deposit and registration 'objects not entitled to protection under the law'"); *DBC of New York, Inc. v. Merit Diamond Corp.*, 768 F. Supp. 414, 416 (S.D.N.Y. 1991) (upholding a refusal to register a jewelry design of graduated marquise and trillion cut diamonds on a knife-edged shank on the basis of the commonplace symbols and familiar designs); 37 CFR 202.1(a) (familiar symbols or designs "are not subject to copyright and applications for registration of such work cannot be entertained.")

The Office has conceded that the red slash and the irregular dot appearing at the ends of the eyeglass frames are arguably separable, and you contend that on the basis of these separable elements the eyewear design should be regarded as copyrightable. The Board disagrees. *Feist* made it clear that while the standard of originality is low, it does exist. *Feist,* 499 U.S. at 362. In agreement with *Feist*, the Ninth Circuit re-stated the principle governing the necessary quantum of originality. *See North Coast Industries v. Jason Maxwell, Inc.*, 972 F.2d 1031, 1033 (9th Cir. 1992) [citing *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102-103 (2d Cir. 1951)] ("[n]o large measure of novelty is required... [A]ll that 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) ("[r]egistration cannot be based on a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations.") Similarly, "the creative expression capable of supporting copyright must consist of something more than the mere bringing together of two or three standard forms or shapes with minor linear or spatial variations." *Compendium II,* § 503.02(b).

There is substantial support in case law for the Board's conclusions that the eyewear design is not copyrightable. Many cases can be cited in which courts have upheld the Office's copyrightability analysis. *Homer Laughlin China Co. v. Oman,* 22 U.S.P.Q.2d 1074 (D.D.C. 1991) (upholding refusal to register chinaware design pattern composed of simple variations or combinations of geometric designs due to insufficient creative authorship to merit copyright protection); *Jon Woods Fashions, Inc. v. Curran,* 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988) (upholding refusal to register fabric design consisting of striped cloth with small grid squares superimposed on the stripes where Register concluded design did not meet minimal level of creative authorship necessary for copyright); *John Muller & Co. v. N.Y. Arrows Soccer Team, Inc.*, 802 F.2d 989 (8th Cir. 1986) (upholding a refusal to register a logo consisting of four angled lines forming an arrow, with the word "arrows" in cursive script below, noting that the design lacked the minimal creativity necessary to support a copyright and that a "work of art" or a "pictorial, graphic or sculptural work ... must embody some creative authorship in its delineation of form."); *see also Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc.*, 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 copyright protection); Bailie v. Fisher (cardboard star with two folding flaps allowing star to stand for retail display not copyrightable work of art); and *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 three *fleur-de-lis* held not copyrightable). Moreover, the fact that a work may consist of a unique or distinctive shape for purposes of aesthetic appeal does not mean that the work, as a whole, is copyrightable. The fact that a design could have been designed differently is not a relevant consideration in determining copyrightability. *Compendium II,* § 505.05.

IV. CONCLUSION

For the reasons stated above, the Copyright Office Review Board concludes that the Hogies eyewear design cannot be registered for copyright protection. This decision constitutes final agency action.

Sincerely,

/s/

Maria Pallante
Associate Register,
Policy & International Affairs
for the Review Board
United States Copyright Office