The Register of Copyrights of the United States of America
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000 · (202) 707 8350

September 14, 2010

Louis S. Ederer, Esq.
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399 Park Avenue
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Re: Bridal Collection I 2005
Bridal Collection II 2005
Pave Diamond Collection 2005
Cushion on Point Collection III 2005
Cushion on Point Collection II 2005 Items NO7335, NO7336, EO07260
Linked Renaissance Collection 2005

Copyright Office Control Number 61-405-7859 (E)

Dear Mr. Ederer:

I write on behalf of the Copyright Office Review Board [hereinafter "Board"] in response to your letter dated February 26, 2007, in which you requested the Copyright Office to reconsider for a second time its refusal to register the jewelry works of the Yurman Studios, Inc, your client, which are listed above. We apologize for the delay in our response.

The Board has carefully examined all applications, deposit materials, and all correspondence concerning these jewelry design works. After careful consideration of the arguments in your letter, the Review Board affirms the Examining Division's denial of registration of "Bridal Collection I – 2005," "Bridal Collection II – 2005," "Cushion on Point Collection III - 2005," and "Pave Diamond Collection 2005." The Board also upholds the Examining Division's decision to register, with a warning, the works entitled "Linked Renaissance Collection - 2005" and the "Cushion on Point Collection II – 2005."

I. ADMINISTRATIVE RECORD

A. Initial submission and refual to register

On October 28, 2005 the Copyright Office received 12 completed VA applications from Applicant, Yurman Studios, Inc., to register copyright in various jewelry design collections. In a letter dated January 11, 2006, Visual Arts Supervisory Examiner William R. Briganti accepted for registration 4 collections entitled "Confetti Collection II – 2005," "Jewel Bead Collection II – 2005," "Mosaic Collection 2005," and "Turquoise Collection

2005." In the same letter, Mr. Briganti refused copyright registration for six of the collections: "Bridal Collection I – 2005," Bridal Collection II – 2005," Clinched South Sea Pearl Collection II – 2005," "Cushion on Point Collection III – 2005," "Linked Renaissance Collection 2005," and "Pave Diamond Collection 2005." Registration was rejected because each work lacked the requisite creativity necessary to support a copyright claim. Letter from Briganti to Susan Spagna of 1/11/2006, at 1.

Mr. Briganti 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. He cited *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), as well as the copyright statute itself at 17 U.S.C. § 102(b). In addition, he noted that copyright does not protect familiar symbols and designs; basic geometric shapes; words or phrases such as names, titles and slogans; or mere variations of typographic ornamentation, lettering or coloring. *See* 37 C.F.R. § 202.1. Lastly, he pointed out that neither the aesthetic appeal nor the commercial value of a work nor the amount of time and effort expended to create the work are cogent factors in the copyrightability analysis and cited *Bleistein v. Donaldson*, 188 U.S. 239 (1903). Briganti Letter of 1/11/20-06, at 1-2.

The remaining two collections entitled "Clinched South Sea Pearl Collection I – 2005" and "Cushion on Point Collection II – 2005" were registered because at least one work in each collection would support an independent claim to copyright.[1] However, Mr. Briganti warned that some of the works, if considered separately, would not support an independent claim. Such works would not be protected by copyright because they lack the requisite degree of authorship as explained in the refusal. Briganti Letter 0f 1/11/2006, at 2.

B. First request for reconsideration

On April 11, 2006, you requested, on behalf of Yurman Studios, Inc., that the Office reconsider its refusal to register "Bridal Collection I – 2005," "Bridal Collection II – 2005," "Cushion on Point Collection III - 2005," "Pave Diamond Collection 2005," "Linked Renaissance Collection 2005" and items numbered N07335, N07336, and E07260 within "Cushion on Point Collection II." You asserted that the Yurman jewelry designs that are the subject of this request for reconsideration contain more than the minimum amount of creative "spark," or authorship, required under the Copyright Act to qualify for protection. Letter from Ederer to Briganti of 4/11/2006, at 1-2.

In your April 11, 2006 Letter, you point out that in order to be copyrightable, a work must constitute copyrightable subject matter under the Copyright Act and the work must be original. You then cite cases that support your contention that jewelry designs constitute

[1] For "Clinched South Sea Pearl Collection I – 2005 these items are numbered N07320, B07324, and E07320. For "Cushion on Point Collection II – 2005" these items are numbered N07335, N07336, and E07260.

such copyrightable subject matter including *Trifari, Krussman & Fishel Inc. v. Charel, Co.* 134 F. Supp. 603 (S.D.N.Y. 1955) and *Dan Kasoff, Inc. v. Palmer Jewelry Mfg. Inc. v. Alpern*, 171 F. Supp. 603 (S.D.N.Y. 1959). You point out that under the low standard articulated in *Feist*, works subject to copyright protection need not be unique or novel. You specifically note that all that is required is that the author contribute more than a mere trivial variation, and something that is recognizable as his own. Letter from Ederer of 4/11/2006, at 3.

You highlight the fact that works comprised of common, public domain elements do not preclude registration so long as the particular combination results in original creative expression, citing *Compendium of Copyright Office Practices, Compendium II,* § 503.02(b) (1984). You further argue that the essential creativity inherent in jewelry design dictates that the design choices made, and the arrangement of shapes thereby created, are more likely than not to result in copyrightable expression. Letter from Ederer of 4/11/2006, at 3-4. You then cite a number of jewelry design cases in support of your arguments including *Yurman Design, Inc., v. PAJ, Inc.* 262 F.3d 101, 109 (2nd Cir. 2002), *Weindling International Corp. v. Kobi Katz*, 56 U.S.P.Q.2d 1763 (S.D.N.Y. 2000), and *Maggio v. Liztech Jewlery*, 912 F. Supp. 216 (E.D. La. 1996). These cases are put forward to the Board for the purpose of reasoning that the courts have found combinations and arrangements of preexisting elements and jewelry sub-pieces to be copyrightable as long as those constituent elements were "recast in an original way" such that the admittedly low level of required creativity is met under *Feist*. Letter from Ederer of 4/11/2006, at 4. Finally, after describing each design in detail, you offer the Hayward declaration to assert that each unique, new arrangement of preexisting elements is the result of numerous creative choices and deliberate authorship and should, thus, be granted registration. *Id.* at 4-8.

C. Examining Division's response to first request for reconsidertion

In a letter dated November 27, 2006, Attorney-Advisor Virginia Giroux–Rollow of the Examining Division determined that at least one jewelry design within the "Linked Renaissance Collection – 2005" contained a sufficient amount of original authorship to support a copyright registration. The collection was registered with the warning that "though the Copyright Office will register the claim without removing the noncopyrightable items, if most of the items in the collection were sold separately, outside the context of the collective work, as a whole, these items would not be protected by copyright." Letter from Giroux-Rollow to Louis Ederer of 11/27/2006, at 1. Ms. Giroux-Rollow then upheld the denial of registration for the remaining four collections and the individual items in the "Cushion on Point Collection II" because none of the items contain a sufficient amount of original and creative authorship, either individually, or in their particular recasting and arrangement of the constituent elements, to support a copyright registration. *Id.* at 2.

While Ms. Giroux-Rollow did not refute the fact that David Yurman had created the designs in these works, she explained that:

> In 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 the 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. Ms. Giroux-Rollow then described each of the design collections in detail. She concluded that all of the items in each collection are derived from the same "family" of designs made famous by David Yurman except for minor variations in materials used and their arrangement. *Id.* at 2-3. Moreover, she noted that, as explained in 37 C.F.R. § 202.1 of the Copyright Office regulations, "circles, squares, any traditional chain design, as well as the cable design used, or any minor variation thereof, are common and familiar shapes or designs, in the public domain, and are, therefore, not copyrightable." Letter from Giroux-Rollow of 11/27/2006, at 3. As such, the designs fail to meet the admittedly low threshold for authorship and creativity set fourth in *Alfred Bell* and *Feist*, respectively. She concluded that the works did not rise to the level of copyrightability needed to support a claim even when viewed in their entirety. *Id.* at 4, citing *Atari Games Corp. v. Oman*, 979 F.2d 242 (D.C. Cir. 1992); *Knitwaves, Inc. v. Lollytogs, Ltd.*, 71 F.3rd 996 (2d Cir. 1996). Ms. Giroux-Rollow distinguished the cases you cited because they involved "combinations of more complexity and extent of authorship than the works at hand, and are therefore, not comparable." Letter from Giroux-Rollow of 11/27/2006, at 5.

Lastly, Ms. Giroux-Rollow explained that in determining copyrightability, the fact that an author had many choices to make in an effort to achieve a unique and distinctive "look" does not mean that the choices the author made meet even the modest creativity requirement under the copyright law. *Id.* She summarized her position by stating "[b]ecause there are no artist or sculptural elements or features in any of the items in these four collections, individually, or in their particular arrangement and configuration, upon which new registrations are possible, we regret that we must again refuse copyright registration for these particular collections of jewelry." *Id.* at 5.

D. Second request for reconsideration

In a letter dated February 26, 2007, you requested that the Office reconsider its refusal to register "Bridal Collection I - 2005," " Bridal Collection II - 2005," "Cushion on Point Collection III - 2005" and "Pave Diamond Collection - 2005." You argue that each of the items at issue in this second request meet and exceed the standards established in *Feist*. Your February 26, 2007 Letter states that the jewelry designs at issue here "contain design features that are unique sculptural works capable of individually supporting a copyright registration" and that each of the jewelry collections at issue here "combine design elements... in an artistic and original way." Letter from Ederer of 2/26/2007, at 3. You have also submitted a Declaration on the characteristics of this jewelry by Sue Anne Newberg, vice president of merchandising, at Yurman Studios, Inc.

You argue that all that is required for copyright protection is that an author contribute more than a mere trivial variation on what previously existed and something that is recognizable as his own. Letter from Ederer of 2/26/2007, at 3, 5. You support your argument by citing case law, such as *Yurman Design, Inc. v. Golden Treasures Imports, Inc.*, 275 F.Supp.2d 506 (S.D.N.Y. 2003), demonstrating the court's willingness to extend copyright protection to jewelry designs that are an arrangement of constituent elements which in themselves may be common and not copyrightable. Letter from Ederer of 2/26/2007, at 6. You then dispute Ms. Giroux-Rollow's findings that the combination and arrangement of design elements in the collections and enumerated items at issue here do not contain the same amount of original authorship as those which were the subject of *Weindling*. You, instead, assert that the designs at issue fall squarely within the reasoning of the *Weindling* decision because "each design contains artistic or sculptural features or elements, either alone or in new combinations, that constitute artistic authorship sufficient to support copyright registration." Letter from Ederer of 2/26/2007, at 6.

You also take issue with Ms. Giroux-Rollow's assertion that the designs in question are not comparable to Yurman's designs that were protected in *PAJ* and *Golden Treasure Imports*. You argue that each jewelry design in question before the Review Board is, indeed, comparable or exceeds the designs at issue in *PAJ* and *Golden Treasure Imports* because each collection or individual jewelry design contains creative expression that are more than trivial variations of preexisting or previously published works. *Id.* at 7. You further describe each collection in detail and argue that each has surpassed the minimum level of creativity required for copyright protection because of the unique arrangement of elements into original designs as required under *PAJ, Golden Treasure Imports*, and *Weindling*. Letter from Ederer of 2/26/2007, at 5 - 12.

Finally, you request that the warning attached to the registration of "Cushion On Point Collection II 2005," Items Nos. N07336, N07335 & E07260 and "Linked Renaissance 2005" be removed because "these pieces spotlight Yurman's ability to combine cable,

space, shapes, jewels and color … to produce a combination of elements resulting in a new creative, artistic expression." *Id.* at 12.

II. DECISION

After reviewing the applications and arguments you presented, the Review Board affirms the Examining Division's refusal to register four of the collections, "Bridal Collection I - 2005," " Bridal Collection II - 2005," "Cushion on Point Collection III - 2005" and "Pave Diamond Collection - 2005," because they do not contain a sufficient amount of original and creative authorship to support a registration. The Review Board also upholds registration with a warning of the "Cushion on Point Collection II – 2005" and "Linked Renaissance Collection 2005" because at least one item in each collection contains a sufficient amount of original and creative authorship in its shape and/or arrangement of elements but the Board notes that most of the items in these collections, if sold separately, would not support an independent claim to copyright.

A. 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); *Compendium II*, § 502 (1984): works of art which may be the subject of copyright registration include works of artistic craftsmanship such as jewelry. 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, Co.*, 499 U.S. 340, 345 (1991). First, the work must have been independently created by the author, *i.e.*, not copied from another work. *Id.* The Board does not dispute the fact that David Yurman created the jewelry designs in the collections at issue here. Therefore, the first component of the term "original" as defined by the Supreme Court in *Feist* is not at issue in the analysis set forth herein. The second *Feist* requirement is that a work must possess sufficient creativity. *Id.* For the reasons set forth below, the Board has determined that none of the jewelry designs in the four jewelry collections, "Bridal Collection I – 2005," "Bridal Collection II – 2005," "Cushion on Point Collection III - 2005," and "Pave Diamond Collection - 2005," meet *Feist's* originality rquirement and, thus, are not entitled to copyright protection.

B. Creativity threshhold

In determining whether a work has a sufficient amount of original pictorial 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. *Feist* at 345. You cite *Yurman Designs, Inc. v. Golden*

Treasure Imports, Inc., 275 F. Supp. 2d 506 (S.D.N.Y. 2003), *Yurman Designs, Inc. v. PAJ, Inc.*, 262 F.3d 101 (2d Cir. 2002), *and Weindling International Corp. v. Kobi Katz*, 56 U.S.P.Q.2d 1763 (S.D.N.Y. 2000) as further support that works containing even a small amount of creative expression can sustain a copyright registration. Letter from Ederer of 2/26/2007, at 5-7. The Board agrees with this general legal principle. However, the Court in *Feist* also held 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," 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." *See Feist* at 359, 362-363; *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."); 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* 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." § 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* further states that a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." § 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. *Id.* ("[R]egistration cannot be based upon the simplicity of standard ornamentation . . . . Similarly, it is not possible to copyright common geometric figures or shapes . . ."); *Id.* at § 502.02(j) ("Familiar symbols or designs . . . or coloring, are not copyrightable."); *Id.* at § 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. *See Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102-103 (2d Cir 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, again, 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.").

In response to Ms. Giroux-Rollow's analysis concluding that "none of the items in these collections contained a sufficient amount of original and creative authorship to support a copyright registration," you contest the Examining Division's decision that "the items derive from past Yurman designs without any additional artistic originality worthy of new copyright protection." Letter from Ederer of 2/27/2007, at 3, citing Letter from Giroux-Rollow of 11/27/2006, at 3. You have stated that "each collection or jewelry design contains creative expression that are more than the trivial variations of pre-existing or previously published works." *Id.*, citing Newberg Decl., ¶17. We agree that a work need not be complex, ornate, or otherwise complicated in its authorship or composition in order for it to enjoy copyright protection. Again, *Feist* laid to rest the notion that more than a modest level of creativity is needed for copyright protection. However, the authorship present in the jewelry designs at issue here does not meet the modest *Feist* requirement.

As we have noted above, *Compendium II*, § 503.2(a) speaks of the need for more than a "simple combination of a few standard symbols…with minor linear or spatial variations." And, concerning three dimensional authorship, which is present within the sculptural lines of the jewelry works here, *Compendium II*, § 503.2(b) similarly states that:

> Copyrightability is based upon the creative expression of the author, that is, the manner or way in which the material is formed or fashioned. Thus registration cannot be based upon standard designs which lack originality, such as common architectural moldings, or the volute used to decorate the capitals of Ionic and Corinthian columns. Similarly, it is not possible to copyright common geometric figures or shapes in three-dimensional form, such as cone, cube, or sphere. The mere fact that a work of sculpture embodies uncopyrightable elements, such as standard forms of ornamentation or embellishment, will not prevent registration. However, the creative expression capable of supporting copyright must consist of something more than the mere bringing together of two or three standard forms or shapes with minor linear or spatial variations.

You admit in your February 26, 2007 Letter that the jewelry designs are composed of "cable, space, shapes, jewels and color, each perhaps not copyrightable in and of itself" but argue that the "combination of elements" results in "new creative, artistic expression." Letter from Ederer of 2/26/2007, at 12. The Board finds that the jewelry designs at issue here consist of a combination of familiar designs and shapes in the public domain, none of which exhibit sufficient original authorship when examined individually. The Board agrees that the question to be decided is whether the combination of these familiar designs and shapes in any of the jewelry collections exhibit creative sculptural or design authorship.

C. Selection, coordination, and arrangement

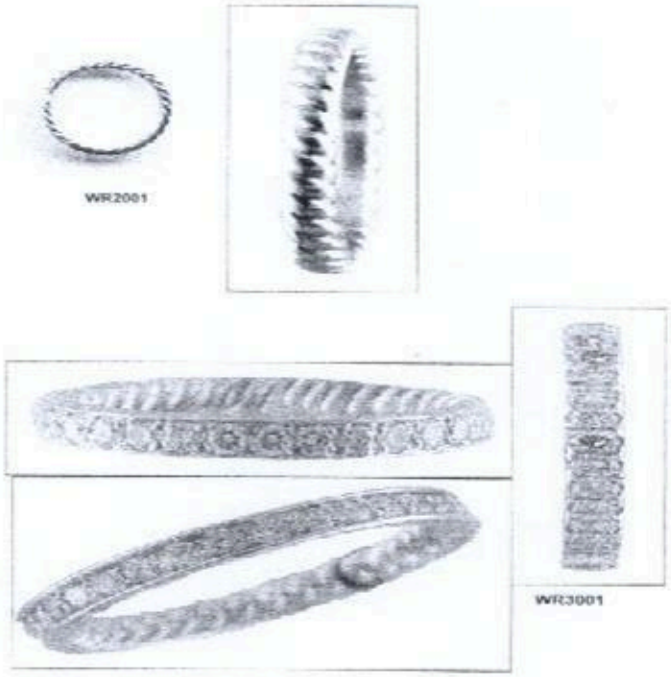
Although none of the elements comprising the jewelry designs at issue here when examined individually exhibit sufficient creative authorship to support a copyright, the Board recognizes the principle that some combinations of common or standard shapes or designs may contain sufficient creativity with respect to how the common elements are combined or arranged to support a copyright. *See Feist* at 358 (the Copyright Act "implies that some 'ways' [of compiling or arranging uncopyrightable material] will trigger copyright, but that others will not.")

However, as Ms. Giroux-Rollow 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. Giroux-Rollow Letter of 11/27/2006, at 3-5. For example, in *Jon Woods Fashions*, 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. 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988). Similarly, in *DBC of New York v. Merit Diamond Corp.*, the District Court upheld the Register's refusal to register the two Marquise-Trillion rings in question in that case. 768 F.Supp. 414 (S.D.N.Y. 1991). 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." *Id.* at 416. In so holding, the court recognized that familiar and common shapes and symbols are not copyrightable in themselves. 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. *See John Muller & Co. Inc. v. New York Arrows Soccer Team Inc*, 802 F.2d 989 (8th Cir. 1986). Upon a close examination of this precedent, the Board has determined that none of the remaining four jewelry design collections, "Bridal Collection I – 2005," "Bridal Collection II – 2005," "Cushion on Point Collection III - 2005," "Pave Diamond Collection 2005," embody the requisite level of creativity with respect to the combination of its constituent elements; we set forth our reasoning below in more detail, accompanied by an image of the deposit materials of each work for which registration is sought.

D. Analysis of Works

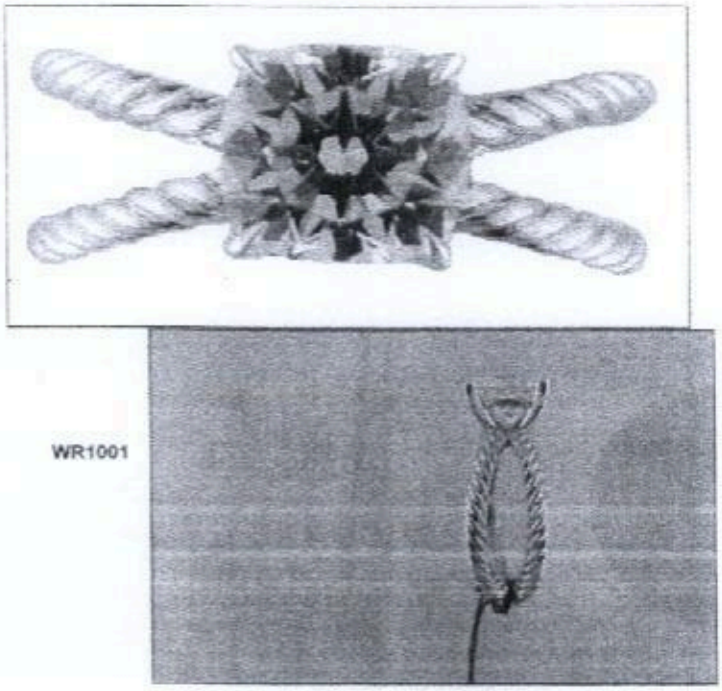
The Review Board has examined each of the jewelry designs at issue in the four jewelry collections, "Bridal Collection I – 2005," "Bridal Collection II – 2005," "Cushion on Point Collection III - 2005," and "Pave Diamond Collection 2005," in terms of their component elements as well as in their entirety and has determined that none possesses the requisite level of creativity necessary to support a copyright registration.

1. Bridal Collection I – 2005



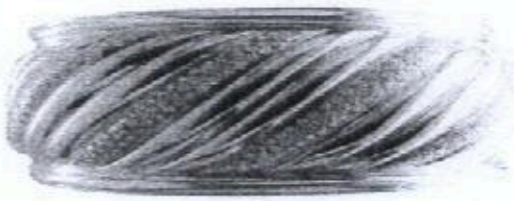
Bridal Collection I – 2005 consists of two wedding bands. One incorporates the well-known Yurman cable design on both the inside and outside of the band, while the other ring features the same cable design around the inside of the band and inset diamonds in a straight row around the outside of the band. The Board agrees with Ms. Giroux-Rollow that these works are comprised of familiar shapes in the public domain, such as the twisted cable designs and the inset diamonds, which are not individually copyrightable under 37 C.F.R. § 202.1. In addition, the arrangement of each design is routine and symmetrical. For instance, placing a row of inset diamonds around the outside of the band can fairly be considered a standard design and arrangement. Furthermore, the designs are made no less routine by placing the cable design on the inside as well the outside of the band. Thus, the jewelry designs here merely bring together one or two standard shapes with minor variations thereof, and such combinations fail to rise to the level of creativity required to support a copyright registration. *Compendium II* § 503.02.

2. Bridal Collection II – 2005



Bridal Collection II – 2005 consists of a diamond solitaire ring incorporating a double cable design band that crosses at the base of the ring. Again, the well-known cable design, the cross-over shape, and solitaire diamond may be said to be common and familiar shapes. The arrangement of the design is routine and symmetrical, a single stone placed at the center of the criss-crossed band. Placing a solitaire stone (a diamond or any other gemstone) at the center of a ring band is a standard arrangement. Overall, the design is a simple combination of a very few familiar shapes with minor linear variations for which no registration can be made. *Id.*.

3. Pave Diamond Collection – 2005

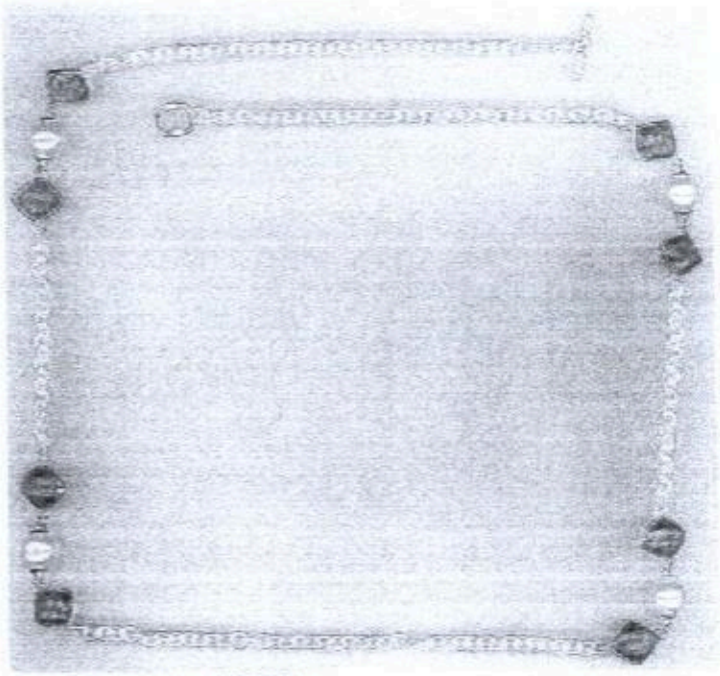






Pave Diamond Collection – 2005 consists of a bracelet and two pairs of earrings. The outer portion of the bracelet consists of Yurman's signature cable design positioned diagonally and interspersed with rows of solidly-positioned pave diamonds; the bracelet as a whole is bordered with the same simple gold-tone metal as the cables within the bracelet proper. The fact that the size and width of the cable design marginally differ from cable designs used in earlier Yurman works is immaterial. The overall arrangement is extremely simple and lacks any distinguishing sculptural or design variation. Each set of earrings contains a layered combination of pave diamonds with a metal border centering the diamonds and an ending border. The ending border for the square-shaped earrings consists of a two-step plain metal border; the ending border for the rounded earrings consists of a two-step border, the first step metal material, the second step small cable markings. The individual elements comprising the earring designs, such as the cable, squares, circles and diamonds (with no alterations from their usual appearance) are in the public domain and within these earring designs are arranged in a simplistic manner that is not sufficiently creative to warrant registration. Each design in this collection merely brings together two or three standard shapes with minor variations thereof. As such, registration must be denied for these works.

4. Cushion on Point Collection III - 2005



N07260

Cushion on Point Collection III – 2005 consists of only one item, a long length necklace composed of a small, simple link chain. At four separate intervals throughout the length of the simple chain are sets of three stones consisting of a pearl, itself bordered by two flat metal pieces and, on either side of the pearl, a blue gemstone cut in a diamond-like shape with a plain, metal border all around the gemstone. The Review Board finds that the repetition of two design elements– pearl and blue gemstone– with minor spatial variations present here placed along the length of the necklace at regular intervals does not provide the necessary combination of elements to sustain a claim in the overall jewelry design.

In jewelry designs, the selection and arrangement of materials and/or the number of stones used may represent creative choice, but overall, the creativity in the jewelry designs at issue here is too minimal to sustain registration. The few elements involved in these works and the simple, common arrangements of the constituent elements of the ring, earrings, and necklace design warrant the conclusion that the works are not copyrightable. The Review Board recognizes the principle stated in *Atari*, that, given "a choice and ordering of the elements that, in and of themselves, may not qualify for copyright protection, the author's *selection and arrangement*, however, may entail [the] minimal degree of creativity needed to bring the work within the protection of copyright laws." *Atari*, 979 F.2d at 245. The works at issue here, however, fail to meet the copyrightability standard necessary to support registration.

E. Case law

We address the several cases you cited in your February 26, 2007 second request for reconsideration. In support of your request, you cite both *PAJ* and *Golden Treasure Imports*. (See summary of reconsideration requests, above.) The jewelry works at issue in *PAJ*, consisted of silver, gold, cable twist, and cabochon cut colored stones. The jewelry works at issue in *Golden Treasure Imports* consisted of yellow gold collars with colorful semi-precious stones on a twisted, sterling silver cable. In both cases, the Court found that the jewelry designs in question were copyrightable because of the way "Yurman has recast and arranged those constituent elements." *PAJ*, 262 F.3d at 110. Concerning the jewelry at issue in *PAJ*, the Second Circuit described the jewelry as an "artistic combination and integration of these elements," *i.e.*, the particular way in which the elements "are placed, balanced, and harmonized." *Id.* at 109. In *Golden Treasure Imports*, the Court in analyzing the Yurman jewelry designs at issue again held that what was protected in those designs were the "design combinations that result from combining those common elements, citing *PAJ* that the 'copyright law may protect a combination of elements that are unoriginal in themselves." *Golden Treasure Imports*, 275 F. Supp 2d at 515; and, although the following statement lies within the infringement analysis of the case, the Yurman jewelry designs at issue there were "protected in their entirety" because of the "combination of the common elements." *Id.* at 517.

The Review Board does not find such original recasting, combining, or arrangement, sufficient under *Feist*, to sustain registration for the jewelry designs collections currently before the Board: "Bridal Collection I – 2005," "Bridal Collection II – 2005," "Cushion on Point Collection III - 2005," and "Pave Diamond Collection 2005." Instead, these designs essentially are minor variations on commonplace and simple jewelry configurations such as a single-band ring made up of small, contiguous cable shapes [the fact that the cable goes "through" the ring, both touching the finger and lying on top of the finger, does not add an element sufficient to get it over the *Feist* fence for copyrightability]; a single-band ring made up of linearly-placed gemstones bordered on both sides by simple metal; a double-band ring, the bands made up of the small, contiguous cable shapes with a center-placed diamond or gemstone; earrings made of contiguous, small gemstones which are placed in either a round or square shape with the shape emphasized by a center-placed round or square metal divider-border; a simple chain necklace with four sets consisting of a tiny pearl and two diamond-shaped gemstones on either side of the pearl, the gemstones all of the same color. Although a jewelry design is to be viewed in its entirety, as in any other work of authorship, these particular Yurman jewelry works before the Board simply do not form overall designs that are copyrightable: the designs contain very few elements and they are arranged in simple, ordinary ways that could fairly be called, in the words of *Feist*, "garden variety... devoid of even the slightest trace of creativity." *Feist*, 499 U.S. at 362.

You have also asserted that the *Charles Garnier*, *Maggio*, and *Severin Montres* cases stand for the proposition that jewelry designs may still be copyrightable when comprising "an arrangement of constituent elements which in themselves may be common and not copyrightable." Letter from Ederer of 2/26/2007, at 5. We agree that an original combination of elements, each of which individually is unoriginal, *i.e.*, uncopyrightable, may meet the creativity threshhold if that combination in itself meets the minimal standards of creativity, but the designs at issue here in the collections "Bridal Collection I – 2005," "Bridal Collection II – 2005," "Cushion on Point Collection III - 2005," and "Pave Diamond Collection - 2005," do not, for the reasons we have explained above, represent such a case. Again, *Compendium II*, § 503.02(a) states that a simple combination of a few standard symbols such as a circle, a star and a triangle, with minor linear or spatial variations, is not copyrightable; and, §503.02(b) states that the mere bringing together of two or three standard shapes with minor linear or spatial variations is not copyrightable. Again, we understand that a work must be reviewed in its entirety (rather than judging its individual elements separately), but when a combination of individual elements taken as a whole lacks sufficient creative expression, copyright registration must be denied. *Feist, 499 U.S.* at 362; *see also Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q.2d 1074, 1076 (D.D.C. 1991) (upholding refusal to register chinaware design pattern of simple variations, combinations of geometric designs and responding to plaintiff's contention that the Office failed to view the pattern in its entirety). The Review Board agrees with the Examining Division's comment (in response to the first request for reconsideration) that the *Charles Garnier* and *Maggio* cases addressed works that reflected more complexity and extent of authorship than the items in the jewelry collections currently before the Board. Letter from Giroux-Rollow of 11/27/2006, at 5.

You have also urged the Review Board to consider the *Weindling* Court's decision to uphold the Office's registration of a diamond ring. Letter from Ederer of 2/26/2007, at 6-7. In the *Weindling* case, the Court looked at several factors in the decision-making process including the design options available to the designer; whether the designer's choices were dictated by function alone or also by design considerations; and whether the combination of components has an "overall distinctive feel." The court concluded that the diamond bridge ring contained a sufficient amount of originality in the "unique combination and arrangement of otherwise copyrightable elements." *Weindling International Corp. v. Kobi Katz, Inc., 2000 U.S. Dist. Lexis 14255* (S.D.N.Y. 2000). You have argued that the application of these factors to the jewelry designs at issue here would result in a finding that, like the ring in *Weindling*, the designs meet the minimum threshold of creativity and deserve copyright protection. In support of your assertion you state "the essential creativity inherent in jewelry designs dictates that the design choices made are more likely than not to result in copyrightable expression." Letter from Ederer 2/26/2007, at 6. While *Weindling* certainly found the element of choice was relevant to the issue of copyrightability, it specified the element of choice when it spoke to the number of design choices in the ring at issue in that case were "considerably more numerous" than narrow authorial choices in other works; when it stated that the ring design choices do not appear to be dictated by function alone but

by consideration of design; when it stated that the overall combination of the components has an overall 'distinctive feel' – granted, a vague description which the Court, nevertheless, particularized throughout the opinion: metals and stones, shape and size of diamonds, size of supports within the ring, kind of setting for the marquis diamond. *Weindling,* at *9. The Review Boards does not see the kind of numerous design elements in any of the four works noted above, as the individual elements were put together and arranged in overall designs, that meets the exremely low *Feist* grade of copyrightability. *Weindling*, at *10, citing *Feist* at 345. Straight-line gemstones around the band of a ring, gemstones covering the surface of earrings where the only other notable design element is a circle or a square within the same-shaped circle or square earrings, a simple chain necklace with four fairly evenly-spaced small single pearls with a gemstone– same color– on each side, the signature cable shape on the surace of a ring alternated with gemstones covering the entire alternate field– all such overall designs fail the very low requirement of creativity needed for registration of a copyrightable work of authorship.

The Board notes that, in theory, an author creating any work of authorship has an unlimited choice of constituent elements. It is not, however, the possibility of choices that determines copyrightability, but whether the resulting expression contains copyrightable authorship. *See, e.g., Florabelle Flowers, Inc. v. Joseph Markovits, Inc.*, 296 F. Supp. 304, 307 (S.D.N.Y. 1968) (an "aggregation of well known components [that] comprise an unoriginal whole" cannot support a claim to copyright). The Board finds that the jewelry designs here, upon examination of their elements individually and as a whole, do 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 choices the author made meet the modest creativity requirement of copyright law.

Citing the *Trifari* and *Dan Kasoff* cases, you have also asserted that to meet the *Feist* standard of creativity, "[a]ll that is required is that the author contribute more than a mere trivial variation, and something that is recognizable as his own." Letter from Ederer 2/26/2007, at 5. This principle may be traced to the Second Circuit's hallmark decision in *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99 (2d Cir. 1951). The Board recognizes the principle that only a very small contribution of authorship is need for copyright protection. *Catalda*, requiring a "distinguishable variation" in a work of authorship from what came before it [*Catalda*, 191 F.2d at 102-103] is, in fact, reflected in the Supreme Court decision that "the originality requirement is not particularly stringent." *Feist*, at 358. In explanation of this principle, the Court held that a work consisting of the bringing together of elements already in existence which is, in esesence, a compilation, does not require novelty: "originality requires only that the author make the selection or arrangement independently... and that it display some minimal level of creativity." *Id.* For the reasons we have pointed out, above, the Yurman jewelry works at issue here do not meet that minimal level of creativity; and, *Feist* admits the existence of such works. *Feist*, at 359.

F. 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 the Yurman works at issue here. You offer the Hayward and Newberg declarations to support the contention that the works "feature new and original" combinations of design elements that "have never been placed together in this fashion before." Letter from Ederer of 02/26/2007, at 8. 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 *Feist* clarified, 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*, at 359-360.

In several of your descriptions of the jewelry designs at issue here, 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 Act. For instance, you offer both the Hayward and Newberg declaration descriptions of the "Cushion on Point Collection II – 2005" to assert that the works are "unique, artistic combinations unlike designs previously created by Yurman, and unlike other earring designs seen in the market place." Letter from Ederer of 02/26/2007, at 12. Novelty and uniqueness are not copyright considerations; instead, these concepts relate to the inquiry of whether an item can enjoy patent protection. 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 copyright registration. *Compendium II*, §§ 503.01, 503.02(a).

Finally, you state that the Yurman works at issue here all have "similar themes" and incorporate both "signature Yurman cushion cut gemstones" and "signature cable" in their overall designs. Letter from Ederer of 02/26/2007, at 8. However, you argue that unlike earlier Yurman designs, these components are not the "focus" of the designs and are only elements that are combined with other elements to create new and original designs. *Id.* In arguing *Golden Treasure Imports*, you note that the court followed the reasoning from *PAJ* and found that the arrangement of preexisting jewelry elements were a unique design worthy of protection. Letter from Ederer 2/26/2007, at 6. Clearly the manner of arranging and recasting is directly connected with whether common, stock jewelry design elements may comprise a copyrightable work.

Where the arrangement is original and creative, the first time the elements are used in that particular way, they will be registered as a copyrightable arrangement. However, when the same arrangement is subsequently used in other jewelry designs, it is unoriginal, and thus such "new versions" or "derivative works" can only be registered when the subsequent version contains some expression of additional authorship that reflects "a copyrightable difference distinguishable under the copyright law." *Compendium II*, § 610.

This is not the case with the designs here at issue. The Board considers these jewelry designs non-registrable, either as derivative or as original works when measured against the quantum level of authorship required because, under the *Feist* standard, they do not contain sufficient creative content in their composition as a whole. It is the *composition as a whole that constitutes the jewelry "work" that is the subject of the Board's analysis and judgment.* We emphasize this factor in order to point out, again, that the copyright law defines 'compilation' as the collecting and assembling of preexisting materials (or data) in such a way that the resulting work as a whole constitutes an original work of authorship. 17 U.S.C. § 101 (definitions). The House Report to the 1976 Copyright Act, in explaining 'compilation' authorship and the resultant work stated that a "compilation results from a process of selecting, bringing together, organizing, and arranging previously existing material of all kinds, regardless of whether the individual items in the material have been or ever could have been subject to copyright." H.R. Rep. No.1476, 94th Cong., 2d Sess. at 57 (1976). For a particularly cogent explanation of the authorship that must be present in a given work when a creator brings together preexisting elements to form an original whole, *see, e.g., Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir.2003): "It is true, of course, that a *combination* of unprotectible elements may qualify for copyright protection. But it is not true that any combination of unprotectible elements automatically qualifies for copyright protection. Our case law suggests, and we hold today, that a combination of unprotectible 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."

All jewelry works for which copyright protection is sought where such jewelry consists of preexisting elements must meet this guiding principle of numerous enough constituent elements fixed in a selection and arrangement itself creative enough to meet the *Feist* standard. The Yurman jewelry works cited above do not.

G. Claims previously registered with warning

The Board has also examined each of the jewelry designs at issue in the two jewelry collections "Cushion on Point Collection II – 2005" and "Linked Renaissance Collection 2005" and affirms the Examining Division's previous decisions[2] to register both collections because at least one item in each collection contains a sufficient, although minimal, amount of original and creative authorship in its overall shape and arrangement of elements. We note, however, that most of the items in these collections, if sold separately, would not support an independent claim to copyright.

[2] Letter to Ederer of 10/28/2005 at 2 (Notification of registration for "Cushion on Point Collection – 2005") and Letter to Ederer of 11/27/2006 at 1 (Notification of registration for "Linked Renaissance Collection 2005" as of 10/28/2005).

The designs at issue in the Cushion on Point Collection II – 2005 consists of necklaces, earrings, and a bracelet. The necklaces consists of a lariat-style single or double-rope chain whose two endpoints are composed of a drop consisting of one pearl flanked by two, same-color gemstones, or of oval links whose endpoint is comprised of a gemstone and a single pearl with a cable motif bar at its closure. A pair of dangling earrings, consists of a traditional Shepherd's hook for attachment to the ear, and a large single gemstone attached by a cable hook to a single pearl's cap and connector element. A bracelet and a necklace are similar in that they contain a few small round gemstones in each with two linking sub-chains.

5. Cushion on Point Collection II - 2005



Cushion on Point Collection II - 2005



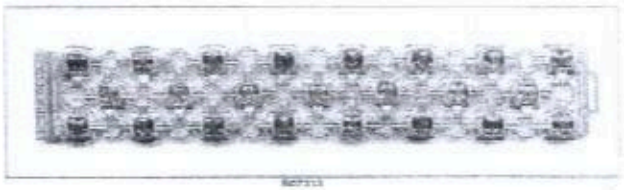
B07312



B07312

The Linked Renaissance Collection consists of bracelets, necklaces, earrings and pendants. The bracelets are comprised of rows of gemstones having plain metal borders around the rectangular or square gemstones and linked together, vertically or horizontally or both, by oval hoops of Yurman's signature cable and plain metal connectors. The only difference between the bracelets is the number of rows: one, two or three, and the color of the gemstones (but within a given bracelet the gemstones are either of the same color or of merely two different colors.) Concerning the necklace designs, each has the same horizontallly-connected gemstones, of the same-color or merely two-color stones within a given necklace, each gemstone connected to the next by circles of Yurman's signature cable and each stone or, alternatively, a gemstone-shape with pave stones on its surface. Each is bordered by plain metal and linked together horizontally. The earring designs consist of a round Yurman cable connector to the ear insertor with a single gemstone having a 2-step plain metal border with a second step of the border being the Yurman cable design. The two pendant designs consist of a larger center gemstone surrounded by a border comprised of four smaller gemstones each with a plain metal border and linked together by hoops of Yurman signature cable to form a diamond shaped piece. The only distinction between the two pendant designs is that one has a plain metal border surrounding the center gemstone, while the other has a paved rim of diamonds/gemstones.

6. Linked Renaissance Collection 2005





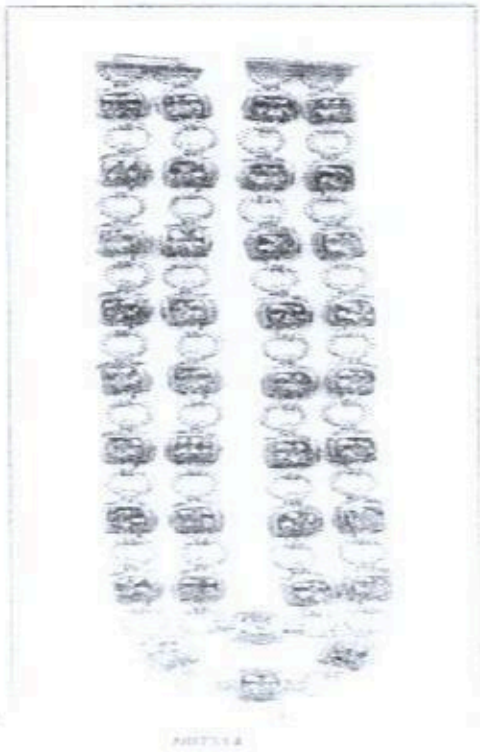


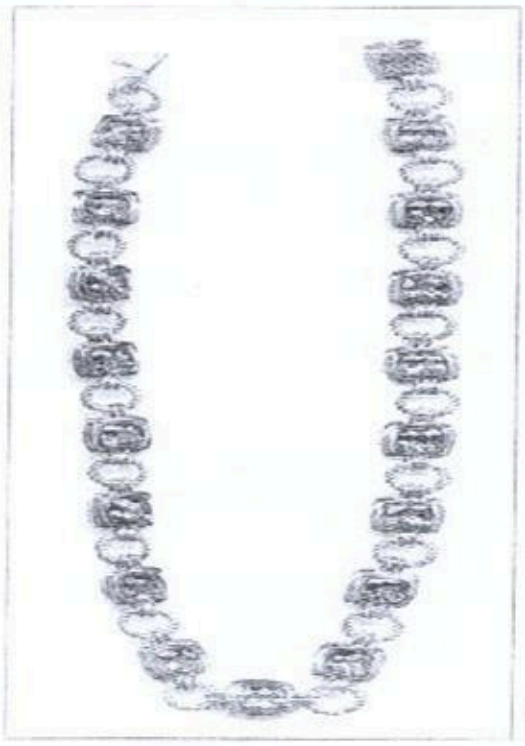


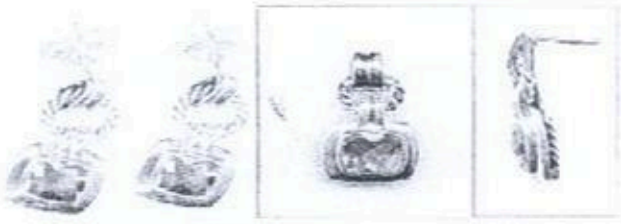









N07318







D07344D



D07344D

The individual elements comprising the above works, such as the cable and hoop elements, gemstones, and pearls, are all in the public domain. As explained earlier, such familiar shapes are not copyrightable. *Compendium II* § 503.20. However, the Board affirms Ms. Giroux-Rollow's decision to register both collections, "Cushion on Point Collection II – 2005" and "Linked Renaissance Collection 2005," because at least one jewelry item in each collection contains a sufficient, although minimal, amount of original and creative sculptural and/or arrangement authorship in its shape and arrangement of constituent elements that may be regarded as copyrightable and, therefore, supports a copyright registration. With regard to the former collection, the copyrightable item is identified as E07260 (dangling earrings) in addition to the previously identified pieces (see above); with regard to the latter collection, the copyrightable item is identified as D07344D (pendant with center gemstone and paved rim of diamonds). In light of our registration practice concerning collections, if one or more items in a collection will support a separate claim to copyright, the Copyright Office will register the claim without removing the non-copyrightable items or requesting that the claim be limited to the copyrightable items.

We also emphasize Ms. Giroux-Rollow's warning that most of the items in each collection, if considered separately, would not support an independent claim to copyright. Therefore, if most of the items in these collections were to be sold separately, outside of the context of the collection as a whole, those items would not be protected by copyright.

CONCLUSION

The Board has reviewed the jewelry designs in collections "Bridal Collection I – 2005," "Bridal Collection II – 2005," "Cushion on Point Collection III - 2005," and "Pave Diamond Collection 2005," in their entirety and as to their individual elements and has determined that they cannot be registered because they contain insufficient authorship to support copyright registration. Accordingly, for the reasons stated above, the Review Board affirms the Examining Division's refusal to register the jewelry designs.

The Review Board also affirms the Examining Division's registration with warning of "Cushion on Point Collection II – 2005" and "Linked Renaissance Collection 2005" because at least one item in each collection contains a sufficient amount of original authorship in its shape and arrangement of constituent elements; but, the Review Board notes that most of the items in these collections, if sold separately, would not support an independent claim to copyright. This decision constitutes final agency action.

Sincerely,

/s/
Nanette Petruzzelli
Associate Register for
Registration & Recordation Program
for Review Board
United States Copyright Office