United States Copyright Office
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December 20, 2012

GrayRobinson, P.A.
Attn: Daniel C. Crilly
401 East Las Olas Boulevard, Suite 1850
Fort Lauderdale, Florida 33301-2209

Re: WILDWOOD BRACELET
Copyright Control Number: 61-406-1459(C)

Dear Mr. Crilly:

I write on behalf of the Copyright Office Review Board ("Board") in response to your letter, received on September 5, 2006, in which you requested a second reconsideration of the Copyright Office's ("Office") refusal to register a bracelet design entitled "WILDWOOD BRACELET" ("the Design"). We apologize for the delay in responding. The Board has carefully examined the application, the deposit, and all correspondence concerning this application, and affirms the denial of registration of this work.

I. DESCRIPTION OF THE WORK

"WILDWOOD BRACELET" is a jewelry design comprised of a simple, flat silver band with the letter "W" in cursive or script placed at the ends of the band, forming the clasp for the bracelet. Each of the design elements identified as a "W" could also be described heart-shaped elements, with the tip or bottom of the first heart (*i.e.*, the top of the leftmost "W") encircled by a series or stack of seven adjacent gold bands and the tip or bottom of the second heart being slightly open with a curved end to serially interlock with the first heart. A photographic image of "WILDWOOD BRACELET" appears below:



II. ADMINISTRATIVE RECORD

A. Initial Submission and Office's Refusal to Register

On August 22, 2005 the Copyright Office received a Form VA application along with the required deposit and fee for the work: "WILDWOOD BRACELET." The submission was made by you on behalf of your client, Montesino International, Corp. In a letter dated January 21, 2006, Copyright Examiner, Wilbur King, refused registration of the Design. Letter from King to Crilly (Jan. 21, 2006). Mr. King found that the Design lacks the authorship necessary to support a copyright claim.

In determining that the Design was not copyrightable, Mr. King cited the Supreme Court's discussion of the copyright law's originality requirement found in *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991). Mr. King noted that in order for a work to be copyrightable, it must have been independently created by the author and contain a certain amount of creative authorship. Additionally, Mr. King cited the delineation of material not subject to copyright in 37 C.F.R. § 202.1, which excludes familiar symbols or designs, typographical ornamentation, lettering, coloring, and mere variations thereof. He further stated that under section 102(b) of the copyright law, Title 17 of the United States Code, copyright does not extend to any idea, concept, system, or process which may be embodied in a work. Citing *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903), he added that the determination of whether a work is copyrightable has nothing to do with aesthetic or commercial value.

B. First Request for Reconsideration

In a letter dated April 20, 2006, you requested reconsideration of the decision to refuse registration of the Design. Letter from Crilly to Examining Division (Apr. 20, 2006), at 1. In this letter, you noted that the Examiner did not allege that the Design was copied from any other work. You added that the Applicant did not in fact copy from another work, and that Applicant's employee utilized his own artistic judgment to create the Design. You also noted the Examiner's finding that the work did not include the minimal amount of creativity for the work to be original under the standard set by the Supreme Court in the *Feist* decision.

You disagreed with the Examiner's finding and argued that the Design does in fact include the minimum amount of creativity to support registration as established in *Feist*. In doing so you described the Design, taking note that "the letters "W" and "W" are placed sideways in cursive or script form and are uniquely and artistically curved and interlocked to form an original work of applied art," and that "[the] hearts interlock from top to bottom, as opposed to simply resting side by side." *Id.* at 2. In addition to describing the Design, you enclosed a color photo of the Design.

You then asserted that the Design is not "merely a familiar symbol or design (such as a single heart), basic geometric shape, or a simple combination of letters, . . . [but] rather . . . the

result of Applicant's artistic ingenuity." *Id.* You further claim that the Design satisfies the *Feist* standard because the Design "involved more than a minimal degree of creativity, to arrange the "W" and "W" together into a stylish, interlocking hearts configuration that incorporates a series of bands at the base of one of the hearts." *Id.*

C. Examining Division's Response to First Request for Reconsideration

After receiving your letter dated August 10, 2006, Attorney Advisor, Virginia Giroux-Rollow, of the Examining Division reexamined the application and the deposit. Ms. Giroux-Rollow determined that the Design does not contain a sufficient amount of original and creative artistic or sculptural authorship upon which to support a copyright registration. Letter from Giroux-Rollow to Crilly of (Aug. 10, 2006), at 1.

Ms. Giroux-Rollow began by explaining that the Copyright Office does not dispute that jewelry designs are works of art that fall within the subject matter of copyright. However she also noted that not all jewelry designs are copyrightable. She added that "all works, no matter what category they fall into, must contain a sufficient amount of original and creative authorship." *Id.*

Ms. Giroux-Rollow went on to clarify that the Office does not dispute that the work was independently created by the author. However, citing *Feist*, Ms. Giroux-Rollow stated that a work must not only be independently created, but it must also possess more than a *de minimis* quantum of creativity. In addition, she cited *Feist* for its confirmation that some works fail to meet this admittedly low standard. *Id.* She also referenced *Nimmer on Copyright*, § 2.01(B), which states that "there remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright." *Id.* at 2.

She then concluded the Design at issue fell within this narrow area. In explaining this conclusion, she stated that the Copyright Office believed even the low requisite level of creativity required by *Feist* was not met, noting that a certain amount of artistic or sculptural authorship in the work must originate with the author. *Id.* at 2-3. She elaborated that originality, as interpreted by the courts, meant that the authorship must constitute more than a trivial variation of public domain elements, citing *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951). *Id.* at 1.

She stated that in applying the *Feist* standard, the Copyright Office examines a work to determine whether it contains any elements, either alone or in combination, on which a copyright can be based. She added that because the Copyright Office does not make aesthetic judgments, the attractiveness of a design, its uniqueness, its visual effect or appearance, the time, effort, and expense it took to create, or its commercial success in the marketplace, are not factors in the examining process. *Id.* The question, she said, is whether there is a sufficient amount of original and creative authorship within the meaning of the copyright law and settled case law. *Id.*

Ms. Giroux-Rollow described the work in question as a bracelet that consists of the same two letters "W" and "W" placed sideways, stylized, interlocked, and configured in such a way that the combination creates two somewhat heart shaped elements incorporating a series of seven circular gold bands at the tip of one of the heart shapes." She then made note that hearts, circles, or any minor variation thereof, are common and familiar shapes, in the public domain, and are not copyrightable, citing Copyright Office regulation, 37 CFR § 202.1. *Id.* at 2. Moreover, citing the same regulation, she noted that lettering is also not copyrightable. She elaborated that the fact that lettering may be stylized or embellished does not mean that it falls outside the noncopyrightable category of lettering. She stated that the combination of and arrangement of the "W" and "heart" shapes coupled with the series of seven bands at the tip of one of the hearts is not sufficiently original and creative to support copyright registration. *Id.* Finally, she noted that the design is *de minimis* consisting of public domain elements arranged in a rather simple configuration, citing *Compendium II, Copyright Office Practices*, § 503.02(a) (hereinafter "*Compendium II*"). *Id.*

Ms. Giroux-Rollow stated that the above principles are confirmed by several judicial decisions, including *John Muller & Co. v. N.Y. Arrows Soccer Team, Inc.*, 802 F2d 989 (8th Cir. 1986) (a logo consisting of four angled lines forming an arrow, with the word "arrows" in cursive script below lacked the minimal required creativity to support registration); *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); *Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q.2d 1074 (D.D.C. 1991) (upholding refusal to register "gothic" pattern composed of simple variations and 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 a design consisting of two inch stripes, with small grid squares superimposed upon the stripes). *Id.*

Ms. Giroux-Rollow recognized that there may have been other ways in which the elements of the Design, their shape, size, positioning, orientation, and configuration could have been chosen. She noted, however, that it is not the possibility of choices that determines copyrightability. Rather, it is whether the resulting expression contains copyrightable authorship. She noted that the elements in the Design, individually, and in their particular configuration do not contain a sufficient amount of original and creative artistic or sculptural expression to support a copyright registration. *Id.* at 3.

Moreover, she acknowledged that the author, in designing the work, was attempting to create a unique and distinctive expression. However, she noted that while uniqueness may be applicable to patent protection, the fact that it may be unique or novel does not mean that it is copyrightable. *Id.*

D. Second Request for Reconsideration

In a letter dated November 15, 2006, you submitted a second request for reconsideration

in which you argued that the previous refusal to register erred in citing cases that preceded the *Feist* decision in its explanation for reliance upon *Compendium II*. Letter to the Review Board of (Nov. 15, 2006), at 1. You noted that pursuant to the *Feist* decision, originality is the touchstone of copyright protection. You cited *Feist's* conclusion that in order for a work to be original, the work must not have been copied from another and that the work must display some minimal level of creativity. *Id.* at 2.

You pointed out that the Office does not dispute that the Design was independently created, and was therefore not copied from another. You then concluded that the sole basis for the Second Refusal was the Office's determination that the Design does not contain a sufficient amount of "creativity" to support copyright. In disputing this determination you cited *Feist's* statement that the "requisite level of creativity is extremely low; even a slight amount will suffice." *Id.* at 2, citing *Feist*, 499 U.S. at 369. Additionally you referenced *Feist's* observation that the "vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be." *Id.* citing *Feist*, 499 U.S. at 369.

On the other hand, you acknowledged that copyright does not protect familiar symbols or designs, basic geometric shapes, or words and short phrases, such as names, titles, and slogans, citing 37 C.F.R. § 202.1. However, you went on to assert that given the extremely low creativity threshold standard in *Feist*, "the Copyright Office regulations cannot be construed as a carte blanche ban on creative combinations of familiar or basic symbols, designs, and/or geometric shapes." *Id.* You stated that almost all artistic impression is a combination of lines, circles, arcs, rectangles, and other basic geometric shapes, and that the Office's regulations clearly do not bar such works. You concluded that the line between a familiar design/basic shape and a copyrightable work was established in *Feist* at an extremely low level of creativity. *Id.*

You added that in *Bleinstein v. Donaldson*, 188 U.S. 239 (1903), Justice Holmes also recognized an extremely low level of creativity standard. You noted that *Bleinstein* indicated that "it would be a dangerous undertaking for persons trained only in the law to constitute themselves final judges of the worth of pictorial illustrations, outside the narrowest and most obvious limits." *Bleinstein*, 188 U.S. at 251. You asserted that the minimal creativity standard makes sense because the protection afforded by copyright is extremely narrow. This narrow scope of protection is indicated in *Feist's* recognition that copyright does not mean that each element of the work is protected and that protection only applies to those components or arrangements that are original to the author.

You again described the Design. In doing so, you acknowledged that a heart or circle by itself or in trivial combination is not copyrightable and that the Design is not a work of fine art. However, you asserted that the hearts in the Design create an overall impression and provide the overall expression of one heart hanging onto another heart, and that this second heart is neither "familiar" nor "basic," but rather a unique design of a heart. You also maintain that, viewed in its entirety, the modification of the heart and serial interlocking of the modified heart designs create a visually attractive piece of jewelry that possesses the minimal or extremely low level of

creativity needed to sustain a copyright registration. You also suggest that the Office has run afoul of *Bleinstein*'s admonition against having persons trained only in the law becoming the final judge of the Design's worth. Therefore you have requested that the refusal to Applicant's Design be reversed and the registration be allowed.

III. DECISION

After reviewing the application and deposit submitted for registration and the arguments that you have presented, the Board affirms the Examining Division's refusal to register the Design "WILDWOOD BRACELET." The Board concludes that the Design does not contain sufficient creative authorship to support registration.

The Creativity Threshold

As you correctly noted, the term "original" as used with respect to copyright consists of two components: independent creation and sufficient creativity. Letter from Crilly to Chief, Receiving and Processing Division (Apr.20. 2006), at 2 (citing *Feist*, 499 U.S. at 358). First, the work must have been independently created by the author, *i.e.*, not copied from another work. The Copyright Office accepts at face value your assertion on the application for registration that your client Montesino International Corp. is the author of the Design. Therefore, the first component of the term "original" is not at issue in the analysis set forth herein. Second, the work must possess sufficient creativity. For the reasons set forth below, the Board has determined that the Design fails to embody the requisite amount of creativity, and therefore is not entitled to copyright registration.

In determining whether a work embodies a sufficient amount of creativity 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. The Court explained that the "requisite level of creativity is extremely low; even a slight amount will suffice." *Feist*, 499 U.S. at 345.

You do not dispute the application of the *Feist* standard and note that the requisite quantum of creativity necessary is "not particularly stringent." Letter from Crilly to Review Board of (Nov.10, 2006), at 4. However, the Supreme Court in *Feist* also 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* 1 Melville B. Nimmer and David Nimmer, *Nimmer on Copyright* § 2.01(B) (Matthew Bender, Rev. Ed.) ("[T]here remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright.") and *Diamond Direct LLC v. Star Diamond Grp., Inc.*, 116 F. Supp. 2d 525, 528 (S.D.N.Y. 2000) ("[T]he 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."). In fact, 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 material 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.

Nevertheless, it is true that some combinations of unprotectable elements can embody sufficient creativity with respect to how the elements are selected, coordinated and 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). Indeed case law recognizes instances in which jewelry has enjoyed copyright protection for "the artistic combination and integration" of constituent elements that, considered alone, are unoriginal. *Yurman Design Inc. v. PAJ Inc.*, 262 F.3d 101, 109 (2d Cir. 2001). However, merely arranging non-protectable elements does not automatically establish creativity where the arrangement itself is simplistic.

Courts have consistently found that standard designs, figures, and geometric shapes are not sufficiently creative to meet the required quantum threshold. For example, in *Jon Woods Fashions, Inc. v. Curran*, 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988), 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, the Eighth Circuit upheld the Register's refusal to register a simple logo consisting of four angled lines which formed an arrow and the word "Arrows" in cursive script below the arrow. *John Muller & Co. v. N.Y. Arrows Soccer Team*, 802 F.2d 989, 990 (8th Cir. 1986). *See also Nimmer on Copyright*, § 2.01[B]... *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 Prods. Inc. v. Oman*, 924 F.2d 346 (D.C. Cir. 1991).

You, however, seem to discount the Office's reliance on such cases decided prior to *Feist* even though you acknowledge that earlier cases did recognize creativity was needed to sustain a copyright even though the amount of creativity needed was extremely low, and that these cases remain good authority today. Letter from Crilly to Review Board of (Nov. 10, 2006), at 2 (citing to *Bleistein*). As you recognize, *Feist* did not set a new standard for copyrightability. Rather it articulated clearly the standard that had been developed by the courts below and it reaffirmed the Office's position 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 Indus. v. Jason Maxwell, Inc.* 972 F.2d 1031, 1033 (9th Cir. 1992), citing a pre-*Feist* case, *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 102-103 (2d Cir. 1951) ("No 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.'") *North Coast*, 972 F.2d at 1033. However, that does not mean that every work of the visual arts is automatically copyrightable, or that a minimum standard for copyrightability does not exist. In *Bell*, the court clearly stated that an author must contribute "something more than a 'merely trivial' variation" in order to satisfy the originality requirement. 191 F.2d at 103. Forty years later, *Feist* confirmed that the "standard of originality is low, but it does exist." 499 U.S. at 362. *See also Compendium II*, § 503.02(a) ("Registration 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.") and *Compendium II*, § 503.02(b) ("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."). Thus, your assertion that the cases cited by the Examining Division are no longer good law because they pre-date *Feist* is incorrect.

Analysis of the Design

The Board has considered the work under the *Feist* standard, considering both the elements in the bracelet and the work as a whole. In doing so, the Board has determined that the jewelry design, in which the letters "W" and "W" are placed sideways in cursive or script form to generally form the shape of interlocking hearts, with the tip of the first heart formed by a series of bands and the tip of the second heart being slightly open to form a clasp for the bracelet, does not contain the requisite level of creative authorship. Whether viewed as the letters "W" or as heart-shaped designs, these elements are at best variations on simple common shapes that are not copyrightable. *See* 37 CFR § 202.1.

The Board also accepts the principle that eligibility for copyright protection is not necessarily limited to the constituent parts of a work. Some combinations of words and geometric shapes may be eligible for copyright protection if they contain some distinguishable variation in the selection, coordination, or arrangement of elements that is not so obvious or minor that the "creative spark is utterly lacking or so trivial as to be nonexistent." *Feist*, 499 U.S. at 359; *see also Atari Games Corp. v. Oman*, 888 F.2d 878,,883 ("simple shapes, when selected or combined in a distinctive manner indicating some ingenuity, have been accorded copyright protection by both the Register and in court."). Nevertheless, the Board has determined that the simple arrangement of the two side-by-side heart-shaped elements in conjunction with the seven gold bands on one of these elements does not contain sufficient authorship to support a copyright registration. This simple arrangement of two common elements, the rings and the heart-shaped elements/letters lacks the required creative spark. As the Ninth Circuit has explained, "a combination of unprotectable elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship." *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003). Merely combining non-protectable elements does not satisfy this requirement where the combination or arrangement is simplistic or trivial as in the work at issue here.

Any finally, contrary to your suggestion that the Office has run afoul of *Bleinstein's* admonition against having persons trained only in the law becoming the final judge of the Design's worth, the Board has considered only the clearly stated originality threshold, without entering into any judgment of the esthetic or commercial worth. The commercial success of a work or its symbolic value cannot be taken into account in determining the copyrightability of this work. In evaluating whether a work meets the creativity threshold required by copyright law, it is necessary to examine the actual elements of the work, individually and in combination. However, in the case of a work of visual art, that review is limited to the actual appearance of the work, and does not extend to whatever symbolic significance the work might have in the mind of someone looking at it. Section 503.02(b) of the *Compendium II* states that: "the requisite minimal amount of original sculptural authorship necessary for registration in Class Va does not depend upon the aesthetic merit, commercial appeal, or symbolic value of a work." [Emphasis added]. Recently, *Paul Morelli Design, Inc. v. Tiffany & Co.*, 200 F. Supp.2d 482, 488 (E.D. Pa 2002) cited this provision of *Compendum II* with approval. The Court observed as follows:

> Works may experience commercial success even without originality and works with originality may enjoy none whatsoever. Nothing has been presented to us showing any correlation between the two.

Id. at 488.

IV. CONCLUSION

For the reasons stated herein, the Copyright Office Review Board affirms the refusal to register the work entitled, "WILDWOOD BRACELET." This decision constitutes final agency action on this matter.

Sincerely,

Tanya M. Sandros
Deputy General Counsel,
for the Review Board
United States Copyright Office