United States Copyright Office
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September 20, 2013

589 Jewelry Design, Inc. d/b/a Cassis
Attn: Ms. Elizabeth Kahakyan, Designer/VP
2 West 45th Street, Suite #1108
New York, New York 10036

Re: Correspondence ID: 1-CWC29T
Cassis Style #FB837, -838, -839, -840, -841, -842, -843, -844, -845, -846, -847, -848, -849, -850, -851, -852, and -853
Original Correspondence ID: 1-BY103R

Dear Ms. Sahakyan:

The Review Board of the United States Copyright Office (the "Board") is in receipt of your second request for reconsideration of the Registration Program's refusal to register the above-referenced works (the "Works"). You filed the request on behalf of 589 Jewelry Design, Inc. d/b/a Cassis ("the Registrant"). It was received by this office on August 28, 2012. I apologize for the lengthy delay in the issuance of this determination. After periods of inaction, staff departures, and budgetary restrictions, the Register of Copyrights has appointed a new Board and we are proceeding with second appeals of registration refusals as expeditiously as possible.

The Board has examined the application, the deposit copies, and all of the correspondence in this case. After careful consideration of the arguments in your second request for reconsideration, we affirm the Registration Program's decision to deny registration of the Works in the referenced jewelry collection/group. The Board's reasoning is set forth below. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action on this matter.

I. DESCRIPTION OF THE WORKS

The Works were filed as a group. Each Work is a bracelet of the same or very similar design as the other Works in the group. The design consists of a belt-like band of "exotic skin" formed to circle a wrist. Attached to the two ends of the band are metal pieces that form a decorative metal clasp. The Works differ from one another in that their bands are of differing colors and their metal clasps vary in being mono-toned gold, rose gold, or silver. The deposit copy of the group of bracelets does not include a photograph of the underside of the clasp pieces.

From the top view, the "positive" end of the clasp appears to be comprised of a thin braid of twisted metal on the inner side of the clasp, with a space through which the "exotic skin" is exposed attached underneath the band to two thin, fused braids of twisted metal with

a flat, perpendicular side edge of metal at the end of the band. The braid pieces appear to be connected underneath the band by one flat piece of metal, so the entire piece forms a horizontal "D" shape with cut-outs on the top portion. From the flat perpendicular end protrudes a flat oval-shaped disc of the same metal (on the same plane as the braids) that is attached to the piece by a small flat stem.

From the top view, the "negative" end of the clasp appears to be comprised of a thin braid of twisted metal on the inner side, with a space through which the "exotic skin" is exposed attached underneath the band to two thin, fused braids of twisted metal with a flat, perpendicular side edge of metal at the end of the band. Again, the braid pieces appear to be connected underneath the band by one flat piece of metal. To this flat end is attached a rectangular band of metal that has a hinged "lid" on the outer half of the piece. There are various elements of this negative part of the clasp that are either decorative, useful, or both in that, on the bottom, the metal piece is indented with a shape into which the positive end of the clasp can be slid or snapped. The hinged upper portion of the outer half of the negative side consists of a type of lid piece that will snap down to cover the clasping mechanism. From the top view, this cover is a square of metal into which very small diamond stones are embedded in a grid pattern. Most of the works have clasp covers consisting of a grid of six diamonds by six diamonds. The remaining square-shaped covers consist of a grid of eight diamonds by eight diamonds.

The below image is a photographic reproduction of the Works from the deposit materials:





CASSIS® STYLE# FB837

II. ADMINISTRATIVE RECORD

On February 10, 2011, the United States Copyright Office (the "Office") issued a letter notifying you that it had refused registration of the above mentioned Works. *Letter from Registration Specialist, Shawn Thompson, to Elizabeth Sahakyan* (February 10, 2012). In its letter, the Office indicated that it could not register the Works because they lack the authorship necessary to support copyright claims. *Id.*

In a letter dated March 9, 2012, you requested that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusal to register the Works. *Letter from Elizabeth Sahakyan to Register of Copyrights* (March 9, 2012) ("First Request"). Your letter set forth the reasons you believed the Office improperly refused registration. *Id.* Upon reviewing the Works in light of the points raised in your letter, the Office concluded that the elements which compose the Works "individually, and [in] their particular arrangement and configuration, simply do not contain a sufficient amount of original and creative sculptural or artistic expression to support copyright registration." Therefore, the Office again refused registration. *Letter from U.S. Copyright Office to Elizabeth Sahakyan* (June 12, 2012).

Finally, in a letter dated August 18, 2012, you requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Works. *Letter from Elizabeth Sahakyan to the Register of Copyrights* (August 18, 2012) ("Second Request"). In arguing that the Office improperly refused registration, you claim that: (1) the trademarked "Cassis Design" is based upon the Registrant's "own consistent specifications," and all materials in the design are "specially cut, twisted, and hand manipulated" to the Registrant's design specifications; (2) the design's clasp mechanism is "an original design and specially created for the Works; (3) the "exotic skin" is "custom designed[,] stitched and cut," and implemented to fit the clasp mechanism; (4) the metal

roping is of "specific gauges" and is hand twisted; (5) the diamond areas are made of "specific sizes" and the diamonds are "hand set"; (6) the design demonstrates more than a de minimus quantum of creativity because it is "a designed and functional mechanism created and implemented within (stet) a … combination of originally designed materials" and is a "creation of design and function."

III. DECISION

A. The Legal Framework

1. Originality

All copyrightable works must qualify as "original works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a). As used in the copyright context, the term "original" consists of two components: independent creation and sufficient creativity. *Feist Publ'ns, Inc. v. Rural Tel. Serv. 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.* Second, the work must possess sufficient creativity. *Id.* While only a modicum of creativity is necessary to establish the requisite level, the Supreme Court has ruled that some works (such as the telephone directory at issue in *Feist*) fail to meet this threshold. *Id.* The Court observed that "[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity." *Id.* at 363. It further found that there can be no copyright in a work in which "the creative spark is utterly lacking or so trivial as to be nonexistent." *Id.* at 359.

The Office's regulations implement the long-standing requirements of originality and creativity set forth in the law and, subsequently, the *Feist* decision. *See* 37 C.F.R. § 202.1(a) (prohibiting registration of "familiar symbols or designs."); *see also* 37 C.F.R. § 202.10(a) (stating "[i]n order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form").

A work that reflects a simple arrangement fails to meet the low standard of minimum creativity required for copyright. *Feist*, 499 U.S. at 362-63. For example, in *Todd v. Montana Silversmiths, Inc.*, the court determined that a barbed-wire style bracelet and earrings were not copyrightable because the arrangement of uncopyrightable elements in the jewelry too closely resembled the arrangement of public domain barbed-wire. 323 F.3d 805, 811 (9th Cir. 2003); s*ee also Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) ("It is true, of course, that a combination of unprotectable elements may qualify for copyright protection. But it is not true that any combination of unprotectable elements automatically qualifies for copyright protection. Our case law suggests, and we hold today, that 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."). *Id.* (internal citations omitted) (emphasis original).

In applying these standards of originality, the Office examines the work to determine if it contains any elements – either alone or in combination – that would support a registration. The uniqueness or attractiveness of the design, the visual effect or impression of the design, the time, effort, and expense involved in creating the design, or its commercial success in the marketplace are irrelevant to the examination process. In the case of works of jewelry, the fact that the designs may be made with precious metals or gemstones is irrelevant to the issue of copyrightability. Instead, the relevant issue is whether the work contains a sufficient amount of original and creative sculptural authorship within the meaning of the copyright law and settled case law. *See Feist,* 499 U.S. at 364 (it is clear that "copyright rewards originality, not effort.").

Copyright Office Registration Specialists (and the Board, as well) do not make aesthetic judgments in evaluating the copyrightability of particular works. They are not influenced by the attractiveness of a design, the espoused intentions of the author, the design's uniqueness, its visual effect or appearance, its symbolism, the time and effort it took to create, or its commercial success in the marketplace. *See* 17 U.S.C. § 102(b); *see also Bleistein v. Donaldson*, 188 U.S. 239 (1903). The fact that a work consists of a unique or distinctive shape or style for purposes of aesthetic appeal does not automatically mean that the work, as a whole, constitutes a copyrightable "work of art."

2. Separability

Copyright protection does not generally extend to useful articles, *i.e.*, "article[s] having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." 17 U.S.C. § 101. However, works of artistic authorship, which may be useful articles themselves or incorporated into a useful article, can receive protection as pictorial, graphic, or sculptural works pursuant to 17 U.S.C. § 102(a)(5). This protection is limited, though, in that it extends only "insofar as [the designs'] form but not their mechanical or utilitarian aspects are concerned." *Id.* at § 101.

Under this principle, a design incorporated into a useful article is only eligible for copyright protection to the extent that the design includes "pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, utilitarian aspects of the article." *Id.*; *see also Esquire, Inc. v. Ringer,* 591 F.2d 796, 800 (D.C. Cir. 1978), *cert. denied,* 440 U.S. 908 (1979) (holding copyright protection is not available for the "overall shape or configuration of a utilitarian article, no matter how aesthetically pleasing that shape may be"). The Board employs two tests to assess separability: (1) a test for "physical separability"; and, (2) a test for "conceptual separability." *Id.; see also Custom Chrome, Inc. v. Ringer*, 35 U.S.P.Q. 2d 1714 (D. D.C. 1995) (finding that the Copyright Office's tests for physical and conceptual separability are

"a reasonable construction of the copyright statute" consistent with the words of the statute, present law, and the legislature's declared intent in enacting the statute).

To satisfy the test for "physical separability," a work's pictorial, graphic, or sculptural features must be able to be physically separated from the work's utilitarian aspects, by ordinary means, without impairing the work's utility. *See, e.g., Mazer v. Stein*, 347 U.S. 201 (1954) (holding a sculptured lamp base depicting a Balinese dancer did not loose its ability to exist independently as a work of art when it was incorporated into a useful article); *and see, Ted Arnold, Ltd. v. Silvercraft Co.*, 259 F. Supp. 733 (1966) (upholding the copyright in a sculpture of an antique telephone that was used as a casing to house a pencil sharpener because the sculpture was physically separable from the article without impairing the utility of the pencil sharpener). To satisfy the test for "conceptual separability," a work's pictorial, graphic, or sculptural features must be able to be imagined separately and independently from the work's utilitarian aspects without destroying the work's basic shape. *See, e.g.,* H.R Rep. No. 94-1476 (1976), U.S. Code Cong. & Admin. News 1976, p. 5668 (indicating a carving on the back of a chair or a floral relief design on silver flatware are examples of conceptually separable design features). A work containing design features that fail to qualify as either physically or conceptually separable from the work's intrinsic utilitarian functions are ineligible for registration under the Copyright Act.

B. *Analysis of the Works*

After carefully examining the Works and applying the legal standards discussed above, the Board determines that the Works are not sufficiently creative to warrant copyright protection.

First, the Board finds that none of the elements that comprise each of the Works, considered individually, are sufficiently creative to warrant protection under the Copyright Act. As noted, 37 C.F.R § 202.1(a), prohibits the registration of "familiar symbols or designs" and "coloring." The bracelets at issue in this second appeal are comprised of (1) a simple band of "exotic skin"; and (2) a two-piece metal clasp mechanism with a hinged lid a one end. The clasp mechanism is embellished with several thin braids of twisted metal. The hinged lid of the clasp mechanism is a square of metal into which very small diamond stones are embedded in a grid pattern. The band, metal braiding, and square grid of small diamonds qualify as "familiar symbols or designs" used in jewelry construction, and are unprotectable. *See Yurman Design, Inc. v. PAJ, Inc.,* 262 F.3d 101 (2d Cir.2001) (separate elements of jewelry, including silver, gold, exist individually in the public domain and are not copyrightable); *see also Boisson v. Banian, Ltd.*, 273 F.3d 262, 271 (2d Cir. 2001) (indicating mere coloration cannot support a copyright claim). Thus, none of the constituent elements in the Works are eligible for registration.

Second, the Board finds that the bracelet's clasp element is a useful article that does not contain the requisite separable authorship necessary to sustain a copyright registration.[1] As described above, the law requires that the designs of useful articles must be either physically or conceptually separable from the utilitarian aspects of the work. *See Esquire*, 591 F.2d at 800. Here, it is apparent that the clasp is physically separable from the bracelet. While the hinged lid of the clasp is physically separable from the rest of the clasp, no element of the lid design is sufficiently creative to qualify for copyright protection. The square shape and grid of tiny diamonds on the lid constitute familiar designs used in jewelry construction and are not copyrightable. The remaining portions of the clasp pieces are not physically or conceptually separable from the utilitarian function of the clasp. To separate their design elements from the clasp would destroy the basic shape of the clasp. Moreover, such a separation would render the clasp useless. The clasp pieces, therefore, are not copyrightable.

Third, the Board finds that each of the Works, considered as a whole, fail to meet the creativity threshold set forth in *Feist*. 499 U.S at 359. The Board accepts the principle that combinations of geometric shapes containing 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" may be eligible for registration. *Feist,* 499 U.S at 359; *see also Atari Games,* 888 F.2d at 883. The overall design of the Works, however, does not meet this grade. As noted, the design of the Works embodies the simple combination of a common bracelet or belt strap, common metal design features of thin lines of braided or twisted metal and a square metal lid covered in small diamonds set in a grid, and a common metal clasp. This ordinary pairing of common lines with a clasp under a square lid embellished with small diamonds demonstrates *de minimis* original expression and lacks the requisite "creative spark" for copyrightability. *See Feist*, 499 U.S. at 359; *see also* 37 C.F.R. §§ 202.1(a), 202.10(a).

In arguing that the Office improperly refused registration, you suggest that the fact that the design of the Works' constituent components were made to your client's specifications and portions were handmade or handset by individual artisans should in some way weigh in favor of copyrightability. However, as noted above, the attractiveness of a design, the espoused intentions of the author, the design's uniqueness, its visual effect or appearance, its symbolism, the time and effort it took to create, or its commercial success in the marketplace are not determinative of copyrightability. *See* 17 U.S.C. § 102(b); *see also Bleistein v. Donaldson*, 188 U.S. 239 (1903). The fact that your client put thought and effort into designing and manufacturing the Works does not automatically mean that each bracelet, as a whole, constitutes a copyrightable "work of art."

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[1] In your Second Request letter, you described the bracelet clasp design as "a designed and functional mechanism created and implemented within (stet) a … combination of originally designed materials" and a "creation of design and function." Thus, you appear to agree that the clasp is a useful article.

In sum, we affirm denial of the Works for lacking the sufficient level of creativity to make the work registerable under the Copyright Act.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the works entitled Cassis Style #FB837, -838, -839, -840, -841, -842, -843, -844, -845, -846, -847, -848, -849, -850, -851, -852, and -853. This decision constitutes final agency action on this matter. 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

BY: Andrea Zizzi

Andrea Zizzi
Copyright Office Review Board