United States Copyright Office
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April 30, 2013

Warren A. Sklar
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1621 Euclid Avenue, Nineteenth Floor
Cleveland, Ohio 44115-2191

RE: Jewelry Earring Jacket Style No. 27715
(Correspondence ID Nos. 1-96V933, 1-B6BZLH)

Jewelry Earring Jacket Style No. 28159
(Correspondence ID Nos. 1-96V933, 1-B6BZLH)

Jewelry Earring Jacket Style No. 28334
(Correspondence ID Nos. 1-982UTH, 1-B6BZLH)

Jewelry Earring Jacket Style No. 27936
(Registration No. VA 1754058)

Jewelry Earring Jacket Style No. 28136
(Registration No. VA 1790769)

Dear Mr. Sklar,

I am writing on behalf of the Copyright Office Review Board in response to your letter dated January 18, 2012, requesting a second reconsideration of a refusal to register three works titled Earring Jacket Style Nos. 27715, 28159, and 28334 on behalf of your client, Gottlieb & Sons, Inc. The Board affirms the refusal to register, because these works contain an insufficient amount of creative authorship to support a copyright registration.

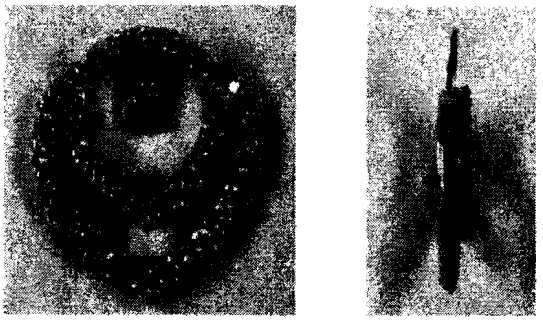
In addition, the Board has examined the works titled Jewelry Earring Jacket Style Nos. 27936 and 28136, which were mentioned in your request for reconsideration. The Office issued a registration for both of these designs, which have been designated Registration Nos. VA 1754058 and VA 1790769, respectively.

The Board has determined that Jewelry Earring Jacket Style Nos. 27936 and 28136 are not creative enough to warrant copyright protection. Your client is hereby given 30 days from the date of this letter to show cause why the registrations for these designs should not be cancelled. As discussed in Section V. Registration No. VA 1754058 and 1790769 will be cancelled if your client fails to respond within the time allowed, or if after considering your client's written response (if any) the Board maintains its current conclusion that these registrations were made in error.

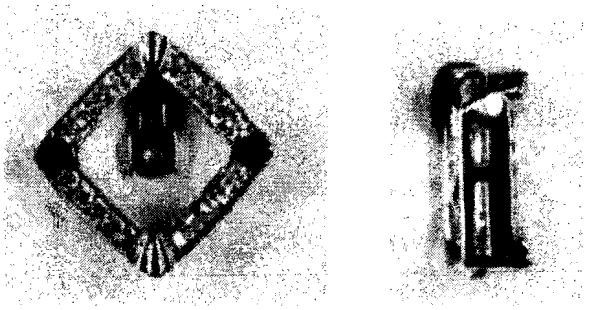
I. DESCRIPTION OF THE WORKS

This request for reconsideration involves three earring designs. In addition, the Board has considered two other earring designs that were previously approved for registration.[1]

As you note in your letters, Style No. 28159 consists of two inverted "pear" or "tear-drop shapes." You note that one of these shapes is "slightly smaller" than the other, with the smaller shape "overlapping or overlaying" a portion of the larger shape. There is "a single row of diamonds" on the top of each shape, and the side of each shape has "a smooth finish." *See* Letter from Warren A. Sklar dated Apr. 15, 2011 concerning Correspondence ID No. 1-96V933 ("First Request") at 8; Letter from Warren A. Sklar dated Jan. 18, 2012 concerning Correspondence ID No. 1-B6BZLH, at 4 ("Second Request"). A picture of this design is shown below:



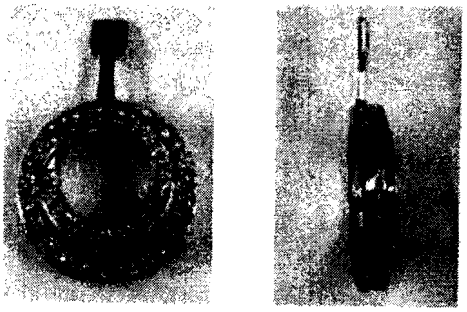
You describe Design No. 28334 as a "rectangular" or "rhombus" shape with a "two-toned body." There are five diamonds on each "leg" of the rhombus, which are bordered on each side with "uniformly beaded rims that are generally flush with the diamonds." In each corner of the rhombus there are three straight lines "protruding from a common base" and "flaring outward" toward the "outside edge" of the design. The side of the design has "a smooth finish" *See* First Request at 11. A picture of this design is shown below:



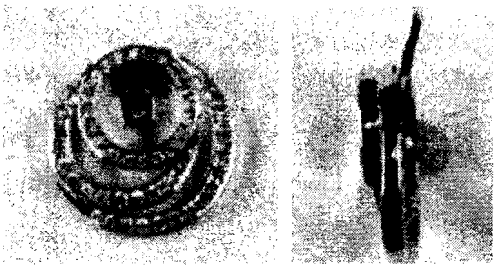
You describe Style No. 27715 as a "spiral shape design" containing two loops, "one slightly smaller than the other." The narrower loop "is positioned slightly atop" – and slightly off-center from – the larger loop. The surface of each loop contains "a single row of diamonds," which is

[1] When referring to the works at issue in this appeal the Board uses the title that your client provided in its applications, namely, "Earring Jacket Style No. [Number]" or the abbreviation "Style No. [Number]."

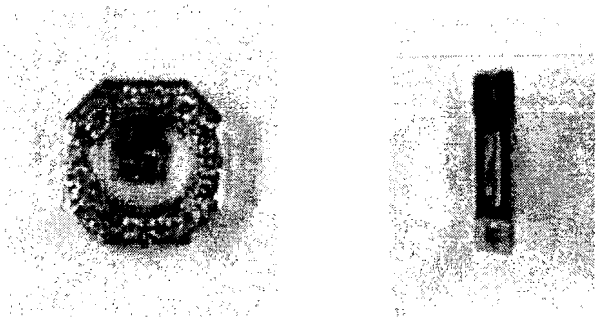
"bordered on both sides by uniformly beaded rims." The side of each loop has a "smooth finish." *See* First Request at 10; Second Request at 2-3. A picture of this design is shown below:



In your first request you asked the Office to reconsider its refusal to register Style No. 28136, and in your second request you stated that this work "has some similarity" to Jewelry Earring Jacket Style No. 27715. You note that one of the primary differences between designs numbers 27715 and 28136 "is that the latter includes three off-center" loops with different diameters, "whereas the former includes two" off-center loops. *See* Second Request at 2-3. Like Style No. 27715, the surface of this design is decorated with "a single annulet of diamonds," but unlike Style No. 27715, the rim "is generally flush with the diamonds" and there is no beading along the edges. A picture of design number 28136 is shown below:



In your first request for reconsideration you noted that the Office issued a registration for Style No. 27936. This design consists of an octagon with a circular opening in the center of the design. The surface of the design is encrusted with diamonds, while the inner and outer edges of the design are bordered with a beaded rim. The side of the design has a smooth finish. A picture of this design is shown below:



II. ADMINISTRATIVE RECORD

A. The Applications and the Office's Refusal to Register

On December 19 and 20, 2010, the Office received applications to register 29 jewelry designs, including four designs which were designated Jewelry Earring Jacket Style Nos. 27715, 27936, 28136, 28159, and 28334, along with the required deposits and fees. All of these applications were filed by your firm on behalf of your client, Gottlieb & Sons, Inc. ("Applicant").

The Office registered 11 of these designs, including Jewelry Earring Jacket Style No. 27936.[2]

The 18 remaining applications were reviewed by three different registration specialists, including Style Nos. 27715, 28136, 28159, and 28334. In each case, the specialist refused registration, because the designs lack the creative authorship necessary to support a copyright claim.[3] Each of the refusal letters was essentially identical. *See* Letter from Annette Coakley to Warren Sklar dated Jan. 18, 2011;[4] Letter from Wilbur King to Warren Sklar dated Feb. 1, 2011;[5] Letter from Larisa Pastuchiv to Warren Sklar dated Jan. 25, 2011.[6]

The specialists explained that copyright protects original works of authorship, which means that the work must possess at least a minimum degree of creativity. A work of the visual arts satisfies this requirement if it contains at least a minimum amount of pictorial, graphic, or sculptural authorship. *See* Compendium of Copyright Office Practices § 503 (hereinafter "Compendium II"). The specialists explained that the aesthetic appeal or commercial value of a work, and the amount of time and effort involved in creating a work are not relevant to this determination (citing *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991) and *Bleistein v. Donaldson,* 188 U.S. 239 (1903)). They explained that copyright does not protect familiar symbols or designs; basic geometric shapes; words and short phrases, such as names, titles, and slogans; or mere variations of typographic ornamentation, lettering, or coloring (citing 37 C.F.R. § 202.1). They also noted that copyright does not extend to any idea, concept, system, or process which may be embodied in a work (citing 17 U.S.C. § 102(b)). Applying these standards, the specialists concluded that these 18 designs – including Style Nos. 27715, 28136, 28159, and 28334 – do not contain sufficient creative authorship within the meaning of the copyright statute or the settled case law to support a copyright claim.

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[2] Specifically, the Office registered Jewelry Earring Jacket Style Nos. 27533 (Reg. No. VA 1754276), 27807 (Reg. No. VA 1754275), 27869 (Reg. No. VA 1754277), 27936 (Reg. No. VA 1754058), 28117 (Reg. No. VA 1754282), 28120 (Reg. No. VA 1754274), 28333 (Reg. No. VA 1754278), 28346 (Reg. No. VA 1754049), 28351 (Reg. No. VA 1797077), 28356 (Reg. No. VA 1754279), and 28369 (Reg. No. VA 1754063).

[3] Specifically, the Office refused to register Jewelry Earring Jacket Style Nos. 27340, 27456, 27715, 27746, 27809, 27865, 27957, 28121, 28136, 28159, 28174, 28203, 28300, 28307, 28330, 28334, 28371, and 28382.

[4] The Office assigned Correspondence ID No. 1-96V933 to this refusal to register.

[5] The Office assigned Correspondence ID No. 1-982UTH to this refusal to register.

[6] The Office assigned Correspondence ID No. 1-95U3X6 to this refusal to register.

B. The Applicant's First Request for Reconsideration

On April 19, 2011 the Office received a first request for reconsideration concerning the refusal to register Jewelry Earring Jacket Style Nos. 27715, 28136, 28159, and 28334.[7] *See* Letter from Warren A. Sklar dated Apr. 15, 2011 concerning Correspondence ID No. 1-96V933; Letter from Warren A. Sklar dated Apr. 15, 2011 concerning Correspondence ID No. 1-982UTH. The requests for reconsideration were essentially identical.[8]

You began by noting that jewelry may be eligible for copyright protection under Section 102(a)(5) of the Copyright Act. Specifically, a piece of jewelry may qualify for copyright protection if it is "original as to its author and possess[es] a minimum level of creativity." *See* First Request at 1. You noted that "the requisite level of creativity is extremely low" and that "even a slight amount will suffice." *See id.* at 2 (quoting *Feist*, 499 U.S. at 1287).

You stated that a jewelry design may be registered even if it "consist[s] wholly of unoriginal elements," provided that the selection, coordination, or arrangement of those elements is sufficiently creative. *See id.* (citing *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1003 (2d. Cir. 1995), *Institute for Development of Earth Awareness v. People for Ethical Treatment of Animals*, 2011 WL 838902, at *7 (S.D.N.Y. Mar. 10, 2011), and *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101 (2d Cir. 2001), among other cases). You also noted that the registration specialists did not cite any cases relating "specifically to copyright protection for the particular subject matter at issue – jewelry designs," but instead cited two Supreme Court decisions involving the copyrightability of telephone directories and posters (namely, *Feist* and *Bleistein*). *See id.* at 2-3.

You acknowledged that certain elements of your client's ("Applicant's") jewelry designs "may be known," such as "the use of diamonds" and "beaded edges." *Id.* at 2. However, you asserted that these works embody "the required level of creativity and originality," based on "the creative ways Applicant has fashioned and adapted those constituent elements." *Id.* at 2, 3. You then described the sculptural authorship that your client contributed to each of these designs.

You stated that Style No. 28159 is an earring that consists of two "inverted tear-drop shapes" and that one of these shapes is "slightly smaller" than the other. *Id.* at 8. You noted that the smaller shape "is positioned atop the larger drop," and that "[t]he vertical axes of the drops are aligned," although the top of the smaller drop extends slightly beyond the top of the larger drop. *Id.* You noted that there is a single row of diamonds on the top of each shape, and that the edge of each shape has a smooth finish. You also noted that there is a scalloped rim at the top of each edge that is "generally flush with the diamonds." *Id.*

You stated that Style No. 27715 consists of "two tapering helical bodies, one slightly smaller than the other" and one positioned on top of the other. *Id.* at 10. Although the vertical axes are aligned, one of these elements is slightly askew compared to the other element. You noted that the sides of these elements have a smooth finish and that there is a single row of diamonds on top, which

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[7] In addition, you asked the Office to reconsider the refusal to register 15 other earring designs titled Jewelry Earring Jacket Style Nos. 27957, 28174, 28121, 28307, 28382, 28371, 27456, 27809, 27865, 27746, 27340, 28203, 28300, and 28330.

[8] The citations provided in this letter refer to the Applicant's letter concerning Correspondence ID No. 1-96V933 (referred to herein as the "First Request"), unless indicated otherwise.

is bordered on both sides by "uniformly beaded rims." *Id.* Style No. 28136 contains similar elements. You explained that the primary difference is that this design consists of "three separate annular bodies" (rather than two) and the edges of the design are smooth (rather than beaded). *See* Letter from Warren A. Skar dated Apr. 15, 2011 concerning Correspondence ID No. 1-982UTH, at 5.

You stated that Style No. 28334 is an earring that consists of a four-sided "rhombus shape" with a "two-toned body." Five diamonds are mounted on the top of each side, which are bordered by "uniformly beaded rims that are generally flush with the diamonds." *Id.* at 11. The corners feature ribbed, gold vertices, which are raised slightly above the diamonds. The edge of each side has a smooth finish. *See id.*

In a chart attached to your request for reconsideration, you noted that the Office issued a registration for Style No. 27936, which has been designated Reg. No. VA 1754058. Although you provided a photograph of this design, you did not provide a written description of the work.

C. The Office's Response to the Applicant's First Request for Reconsideration

In a letter dated October 20, 2011, Attorney-Advisor Virginia Giroux-Rollow of the Registration Program responded to the Applicant's first request for reconsideration concerning Style Nos. 27715, 28136, 28159, and 28334. She determined that Style No. 28136 contains a sufficient – albeit minimal – amount of original and creative sculptural authorship to support a copyright registration.[9] The Office assigned registration number VA 1790769 to this design. However, Ms. Giroux-Rollow upheld the refusal to register the remaining works because they do not contain a sufficient amount of original and creative sculptural authorship in either the shape or in the arrangement of their elements.[10] *See* Letter from Virginia Giroux-Rollow to Warren A. Sklar dated Oct. 20, 2011, at 1.[11]

In order to be copyrightable, Ms. Giroux-Rollow explained, a work must be independently created by the author and it must "possess more than a de minimis quantum of creativity." *See id.* at 2 (quoting *Feist*, 499 U.S. at 363). In the case of a jewelry design, the work must contain a certain minimum amount of sculptural expression that originated with the author. She explained that "[o]riginality, as interpreted by the courts, means that the authorship must constitute more than a trivial variation or arrangement of public domain, pre-existing, or noncopyrightable elements." *Id.* (citing *Alfred Bell v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951)). In applying these standards, the Office examines the work to determine if it contains any elements – either alone or in combination – that would support a registration. Ms. Giroux-Rollow explained that 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

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[9] Ms. Giroux-Rollow also approved three other works for registration, namely, Style Nos. 28203, 28300, and 28330, which are not at issue in this appeal. The registration numbers for these designs are VA 1790766, VA 1790768, and VA 1790767, respectively.

[10] In addition, Ms. Giroux-Rollow upheld the refusal to register 11 other works, namely, Jewelry Earring Jacket Style Nos. 27957, 28174, 28121, 28159, 28307, 28334, 28382, 28371, 27456, 27809, 27865, 27746, and 27340. The Applicant has not asked the Office to reconsider that decision, and as a result, they are not at issue in this appeal.

[11] The Office assigned Correspondence ID No. 1-B6BZLH to this letter.

to the examination process. Likewise, 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 id.* at 2.

Ms. Giroux-Rollow described the Applicant's designs as "jewelry earring jackets" composed of square, circular, triangular, and heart shapes. *See id.* Citing 37 C.F.R. § 202.1, she stated that common and familiar shapes – or minor variations on common and familiar shapes – are not eligible for copyright protection. Likewise, gemstones and beads are not copyrightable, "no matter what their size, cut, or color." *Id.* Applying these principles, Ms. Giroux-Rollow concluded that the Applicant's simple combination and arrangement of shapes and gemstones does not contain "a sufficient amount of original and creative expression to support a copyright registration.'" *See id.* at 2 (citing Compendium II §§ 503.02(a) & (b)).

In support of her decision, Ms. Giroux-Rollow cited a number of cases where the courts upheld the Office's refusal to register claims involving *de minimis* designs. *See id.* at 2-3 (citing *John Muller & Co. v. New York Arrows Soccer Team, Inc.*, 802 F.2d 989 (8th Cir. 1986) (upholding the Office's refusal to register a logo consisting of four angled lines forming an arrow combined with the word "arrows" in a cursive script, noting that a pictorial, graphic, or sculptural work must embody some creative authorship in its "delineation of form"); *Forstmann Woolen Co. v. J.W. Mays, Inc.*, 89 F. Supp. 964 (E.D.N.Y. 1950) (holding that a label containing the words "Forstmann 100% Virgin Wool" interwoven with three fleur-de-lis was not copyrightable); *Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q.2d 1074 (D.D.C. 1991) (upholding the Office's refusal to register a "gothic" dinnerware pattern containing simple variations and combinations of geometric shapes because the creative authorship was insufficient to merit copyright protection); *Jon Woods Fashions, Inc. v. Curran*, 8 U.S.P.Q. 2d 1870 (S.D.N.Y. 1988) (upholding the Office's refusal to register a fabric design consisting of a small grid of squares superimposed on a series of stripes because the design did not meet the minimal level of creative authorship necessary for copyright protection); *DBC of New York Inc. v. Merit Diamond Corp.*, 768 F. Supp. 414 (S.D.N.Y. 1991) (upholding the Office's refusal to register a ring, noting that the individual elements of the design and the design as a whole were not entitled to copyright protection)). In addition, she distinguished the cases cited in your first request, finding the jewelry designs at issue in *Yurman Design, Inc. v. Paj, Inc.*, 263 F.3d 101 (2d Cir 2001) and *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980) to be more creative than the Applicant's designs.

Ms. Giroux-Rollow conceded that the requisite level of creativity is very low and that even a slight amount of original authorship will suffice (citing *Feist* and *Knitwaves*). However, she noted that "there remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright." *See id.* at 3 (quoting Melville B. Nimmer & David Nimmer, 2 *Nimmer on Copyright* § 2.01(B) (hereinafter "*Nimmer*")). She concluded that the jewelry designs at issue in this appeal – consisting of a few elements presented in a simple arrangement – fail to meet even the low threshold for copyrightable authorship. Likewise, when your client's works are viewed in their entirety and the noncopyrightable elements of each work are judged "not separately, but rather in their overall inter-relatedness within the work as a whole," Ms. Giroux-Rollow found "that the simple treatment and combination of the few elements embodied in each work" failed to support a registerable claim to copyright. *See id.* at 3 (citing *Atari Games Corp. v. Oman*, 888 F.2d 878 (D.C. Cir. 1989)).

Although there may have been other ways to arrange the few elements employed in these designs, Ms. Giroux-Rollow explained that this does not affect the copyrightability analysis. "[A]ll designs involve choices," she wrote. However, "[i]t is not the possibility of choices that determines copyrightability, but rather whether the particular resulting expression or product contains copyrightable authorship." *See id.* at 4. In this case, "[t]he few elements embodied in these works, as well as their arrangement, simply do not contain a sufficient amount of original and creative sculptural authorship upon which to support a copyright registration." *Id.*

Finally, Ms. Giroux-Rollow declined to consider the other jewelry earring jacket designs that you cited in your first request for consideration. She explained that the Office does not compare works submitted for registration with works that have been registered or refused in the past. Instead, each work is examined independently and on its own merits. *See id.*

D. The Second Reconsideration Request

On January 20, 2012, the Office received a second request for reconsideration concerning the refusal to register Style Nos. 27715, 28159, and 28334. *See* Letter from Warren Sklar concerning Correspondence ID No. 1-B6BZLH ("Second Request").[12] You contend that these designs "contain a sufficient amount of original and creative sculptural authorship in either their shape or in the arrangement of the elements" to support a copyright registration. *Id.* at 1. Your letter provides "a summary of the relevant law," which is identical to the legal analysis set forth in your first request for reconsideration. You state that your client's designs are sufficiently creative to warrant registration based on the elements discussed in your first request for reconsideration and the elements described below.

Style No. 28159

You acknowledge that this earring consists of two inverted "pear shape" elements – one with a "smaller," "tighter" diameter, and the other with a "larger," "looser" diameter. You note that the angle at the apex of the smaller pear shape is narrower than the apex of the larger pear shape. Because these shapes overlap each other, you contend that the design "tends to show unification" when viewed from above, while it provides "a sense of depth" when viewed from the side. Finally, you contend that "[t]he open space created in the central area of the smaller pear gives a sense of openness and freedom, and the smaller space between the respective pairs of bottom legs almost gives an uplifting or smiling appearance creating a warm feeling to the artwork of the pieces." *See id.* at 4-5.

Style No. 28334

You contend that this earring consists of a "rectangular shape." You state that each side of the design includes "a relatively heavy rough hewn elongate central extent," and "a much finer rough hewn edge portion." The pieces that appear in each corner are described as "three fingers protruding from a common base" and "flaring outward toward the . . . outside edge" of the design. You contend that the placement of this "tapered design" in each corner "tends to provide a smoothing effect to the otherwise relatively straight legs/sides." You also contend that the "relatively smooth texture" of

[12] As discussed above, your client did not appeal the refusal to register any of the other designs cited in your first request for reconsideration.

these corner pieces creates a contrast with the "heavy and finer rough hewn parts" that make up the "legs/sides" of the design. *See id.* at 3-4.

Style No. 27715

You acknowledge that this earring consists of a "spiral shape design." You contend that the surface of each loop is "relatively heavy rough hewn," while the edges are "finer hewn." You contend that the loops are slightly off-center from each other, which creates the impression of an "almost . . . endless looping arrangement." You also contend that the "off-center arrangement of the loops present a creative modern free spirit impression," unlike "standard concentric loops" where each loop is equidistant from each other. *See id.* at 2-3.

Finally, you contend that this design "has some similarity to earring jacket design No. 28136, which was approved for registration." A primary difference between these designs is that No. 27715 contains two loops, while No. 28136 contains three loops. You contend that "the creativity in the design of the respective loops, whether two or three of them," contains "a substantial degree of creativity" and that a registration is warranted for design No. 27715 as well as design No. 28136. *See id.* at 3.

III. DECISION

When considering a second request for reconsideration, the Review Board carefully reviews the works that have been submitted for registration. The Board considers the application to register each work and all of the Applicant's written submissions concerning these works, including the arguments set forth in your first and second requests for reconsideration.

The refusal to register is subject to *de novo* review, which means that the Board will take a fresh look at whether each work is copyrightable and whether it can be registered. In evaluating each work, the Board considers both the individual elements of the work as well as the work as a whole.

The Board affirms the refusal to register Earring Jacket Style Nos. 28159, 28334, and 27715, because they do not contain sufficient creative authorship to support a registration. For the same reasons, the Board is proposing to cancel the registrations for Jewelry Earring Jacket Style Nos. 27936 and 28136, because these designs contain only a *de minimis* amount of expression.

A. The Legal Framework for Evaluating the Copyrightability of Jewelry Designs

The copyright law only protects "original works of authorship." 17 U.S.C. § 102(a). As the Supreme Court explained in *Feist*, originality requires "independent creation plus a modicum of creativity." *Feist*, 499 U.S. at 346. In this context, "independent creation" means that the author created his or her work without copying from another. *Id.* at 345. Based on your representation that Gottlieb & Sons, Inc. is the author of these jewelry designs, the Board finds that the independent creation requirement has been met. Therefore, the Board focuses on the second aspect of the originality requirement, namely, that the designs must possess a sufficient amount of creativity.

B. The Creativity Requirement

Jewelry designs may be protected by copyright as pictorial, graphic, and sculptural works. *See* 17 U.S.C. § 102(a)(5); Compendium II § 502 (explaining that the term "pictorial, graphic, and sculptural works" includes "works of artistic craftsmanship, such as jewelry"). In determining whether a particular design contains a sufficient amount of pictorial, graphic, or sculptural authorship, the Board applies the legal standard set forth in *Feist*.

Feist reaffirmed that originality is a Constitutional requirement and that a work must possess "some minimal degree of creativity" in order to sustain a copyright claim. 499 U.S. at 362. You correctly stated that the requisite level of creativity is "extremely low" and that "even a slight amount will suffice." First Request at 1 (quoting *Feist*, 499 U.S. at 345). However, that does not mean that every work is automatically copyrightable, or that a minimum standard for copyrightability does not exist. The Supreme Court recognized 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," 499 U.S. at 363, and that there can be no copyright in a work where the "creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359 (citing *Nimmer* § 2.01[B] ("[T]here remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright.")).

In your first request for reconsideration you criticized the Office for citing *Feist* and *Bleistein* as a basis for refusing to register your client's works, because these cases involved the copyrightability of a telephone directory and advertisement rather than a jewelry design. *See* First Request at 2-3. *Feist* held that an alphabetical white pages directory failed to meet the creativity standard, but it also clarified the basic principles for evaluating the originality of any copyrightable work, regardless of its form of embodiment. *Bleistein* held that a circus poster is worthy of copyright protection, but it also recognized that aesthetic or commercial value is not relevant to the copyrightability analysis, regardless of the nature of the work. *See Bleistein,* 188 U.S. at 251-52. Courts routinely follow these decisions in cases involving the copyrightability of jewelry designs. *See, e.g., Yurman Design,* 262 F.3d at 109 (citing *Feist* for the proposition that "[c]opyright law may protect a combination of elements that are unoriginal in themselves," and noting that this principle applies to jewelry); *Diamond Direct LLC v. Star Diamond Group, Inc.*, 116 F.Supp.2d 525, 528 (2000) (citing *Bleistein* for the proposition that "the quantum of originality necessary to invoke copyright protection is very small" and applying this principle to a dispute involving a jewelry design). In fact, you cited *Feist* for the proposition that "the requisite level of creativity is extremely low," and you encouraged the Board to apply this standard in this appeal. First Request at 1-2.

Even before the *Feist* decision, the Office recognized that a modest – but requisite – level of creativity is required to sustain a copyright claim. Copyright Office regulation 202.1(a) states that "familiar symbols or designs" are "not subject to copyright and applications for registration of such works cannot be entertained." 37 C.F.R § 202.1(a). Compendium II states that "[w]orks that lack even a certain minimum amount of original authorship are not copyrightable," and in a case involving a jewelry design or any other pictorial, graphic, or sculptural work, "a certain minimal amount of original creative authorship is essential for registration . . . ." Compendium II §§ 202.02(a); 503.02(a). In applying these standards, the Office has determined that common figures and geometric shapes do not meet the creativity requirement. *Id.* § 503.02(b) ("[I]t is not possible to copyright common geometric figures or shapes in three-dimensional form, such as the cone, cube, or square."); *id.* § 503.02(a) ("[R]egistration cannot be based upon the simplicity of standard

ornamentation . . . . Similarly, it is not possible to copyright common geometric figures or shapes . . . ."); *id.* § 502.02(j) ("Familiar symbols or designs . . . are not copyrightable."); *id.* § 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 . . . ."). Likewise, simply combining or arranging a small number of standard geometric shapes with trivial spatial alterations does not establish the requisite level of original creative authorship to support a copyright claim. *See id.* § 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.").

C. Analysis of the Works

1. The Individual Elements of Each Design are Uncopyrightable

Rectangles, rhombuses, octagons, circles, spirals, and tear drops are basic geometric shapes. They are among the simplest building blocks for pictorial and graphic works, and as such, they are not copyrightable when considered individually. *See Id.* § 202.02(j).

You acknowledge that Style No. 28334 consists of a rectangle or rhombus, that Style No. 28159 consists of a tear drop or pear shape, and that Style Nos. 27715 and 28156 consist of a helix or a spiral. You also acknowledge that these designs contain other common geometric figures and elements, such as loops, straight lines, corners, and angles.

You apparently concede that the individual elements comprising these designs are not copyrightable. In your first and second request, you did not assert a claim to copyright in any of these elements. Instead, you claim that "[i]t is not required that the individual elements of a jewelry design be original" because "the originality in Applicant's designs inheres in the creative ways Applicant has fashioned and adapted those constituent elements." *See* First Request at 2; Second Request at 6. You also claim that a jewelry design "consist[ing] wholly of unoriginal elements" may be registered, provided there is "originality . . . in the creative selection, coordination, or arrangement" of those elements. *See id.* (citing *Yurman Designs*, 262 F.3d at 110, for the proposition that "the court specifically rejected an examination of originality for jewelry on the basis of specific design elements, such as twisted cable and particular gemstones").

The Board agrees that the constituent elements comprising Style Nos. 27715, 27936, 28156, 28334, and 28159 are simple geometric figures and shapes. As such, those elements are not eligible for copyright protection when viewed on an individual basis. Instead, the relevant question is whether the combination of these familiar figures and shapes contains a sufficient amount of creative sculptural expression to warrant a copyright registration.

2. Selection, Coordination, and Arrangement of Unprotectable Elements

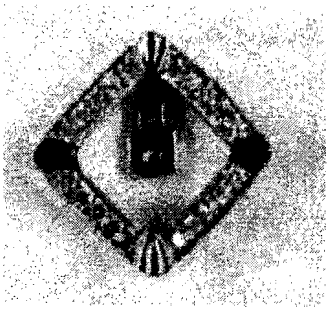
The Board recognizes that a combination of geometric figures and shapes may satisfy the low standard for copyrightability if there is sufficient creativity in the selection, coordination, or arrangement of elements, or if there is recognizable creative authorship in the overall design of the work as a whole. *See Atari Games Corp. v. Oman*, 979 F.2d 242, 245 (D.C. Cir. 1992). However, it is not true that *any* combination of unprotectable elements automatically qualifies for copyright protection. As the Ninth Circuit explained, "a combination of unprotectable elements is eligible for

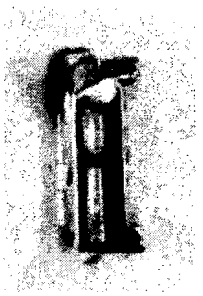
copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship." *Satava v. Lowry*, 323 F. 3d 805, 811 (9th Cir. 2003).

Merely combining non-protectable elements does not satisfy this requirement where the combination or arrangement is simplistic or trivial. For example, in *DBC of New York v. Merit Diamond Corp.*, the Copyright Office refused to register a ring design consisting of three elements, namely, a set of gemstones flanked by two triangular-cut gemstones with triangular indentations in the band on opposite sides of the stone setting. In a subsequent infringement action, the plaintiff contended that the ring contained sufficient originality to support a finding of copyrightability. The district court explained that familiar symbols or designs are not entitled to copyright protection (citing Copyright Office regulation 37 C.F.R. § 202.1), and that no copyright may be claimed in squares, rectangles, or other shapes. *See* 768 F. Supp. 2d at 416. The court also rejected the plaintiff's "gestalt theory that the whole is greater than the sum of its parts," because "on the whole," the plaintiff's rings were "not exceptional, original, or unique." *Id.*

The Board examined the selection and arrangement of elements in each of the jewelry designs at issue in this appeal, and concluded that none of them possesses the requisite level of creativity necessary to support a copyright registration. The simple arrangement of a few elements in these designs does not contain the admittedly low quantum of copyrightable authorship needed to support a copyright registration under *Feist*. The Board's reasoning for each design is set forth below, along with an image of the deposit material for each work.

a. Earring Jacket Style No. 28334





Style No. 28334 is an earring that consists of a gold and silver toned rhombus encrusted with a single row of inset diamonds, a uniformly beaded rim along the inner and outer edges, and an identical accent piece in each corner. Each element is used in this earring in a predictable and customary way exhibiting, at best, a *de minimis* amount of creativity.

The overall shape of the work is nothing more than a standard rhombus, and the sides of the earring are smooth and unadorned. The use of two contrasting colors, namely gold and silver, is typical for a jewelry design. The Board sees no creativity in the pieces that appear in each corner of this design. Each corner piece contains three etchings, which are arranged in a simple, symmetrical pattern, and each piece is placed in the corners of the rhombus in an obvious and predictable manner.

The arrangement of diamonds on the face of this earring is routine and familiar. There is a single row of five diamonds arranged in a straight line on each "leg" of the rhombus. Similarly, the

rim of the earring consists of a string of repetitive, identical, bead-like shapes, and the arrangement of these elements along the inner and outer edges merely echoes the rhomboid shape of the earring.

These commonplace elements fail to demonstrate the spark of creativity needed to support a copyright claim. Likewise, there is an insufficient amount of authorship in the simplistic combination of these few elements, because the selection, coordination, and arrangement is obvious and typical for a jewelry design.

b. Earring Jacket Style No. 28159





As you note in your letters, Style No. 28159 is an earring that consists of two inverted tear drop shapes, which are encrusted with a single row of diamonds. One of these shapes is slightly smaller than the other, with the smaller shape superimposed on top of the larger shape.

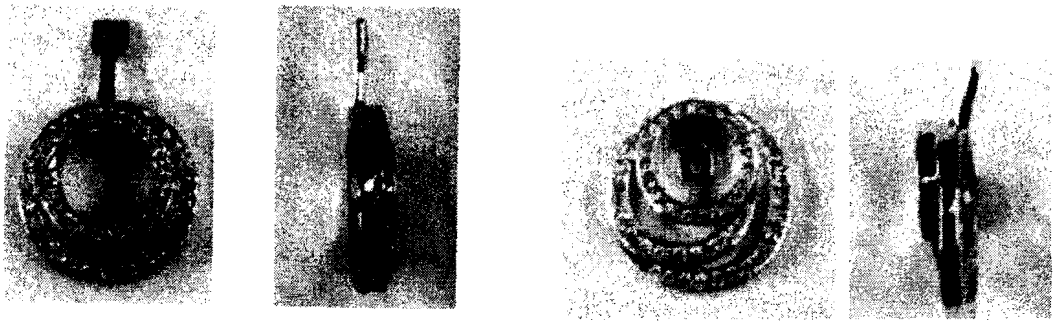
As discussed above, tear drops are common geometric shapes that are not eligible for copyright protection. However, the Board agrees that a work's eligibility for copyright protection is not limited to its constituent parts, but instead, should be based on the composition as a whole. The following passage from *Atari Games Corp. v. Oman*, 888 F.2d 878 (D.C. Cir. 1989) is instructive: "[S]imple shapes, when selected or combined in a distinctive manner indicating some ingenuity, have been accorded copyright protection by both the Register and in court."[13] *Id.* at 883.

The arrangement of tear drop shapes in this design represents *de minimis* authorship – even when the work is viewed in its entirety. The fact that one tear drop is slightly larger than the other is a minor spatial or linear variation that does not provide the requisite amount of creativity to support a registration. The fact that one shape has been superimposed on top of the other is a simple combination of two familiar shapes arranged in a routine and symmetrical manner. Placing a single row of diamonds on the surface of an earring is a standard design arrangement, and the Board sees no creativity in the sides of this earring, which are smooth and unadorned. The overall arrangement is extremely basic and lacks any distinguishing sculptural or design variation for which a registration can be made.

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[13] *Atari Games Corp. v. Oman*, 888 F.2d 878 (D.C. Cir. 1989) involved an audiovisual work in which the *movement* of individual elements, taken together, comprised a substantial portion of the copyrightable expression. The Board does not consider the design at issue here to be comparable.

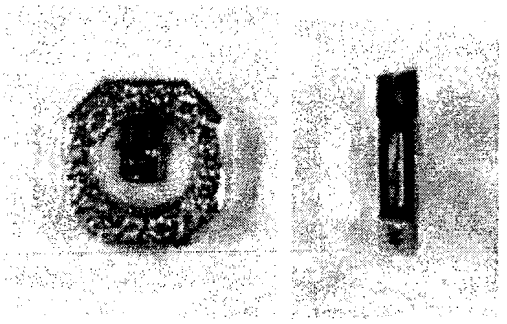
c. Earring Jacket Style Nos. 27715 and 28136



Style Nos. 27715 and 28136 are earrings consisting of two or three circular loops. Each loop is a slightly different size than the others and all of the loops are superimposed on top of each other. A single row of diamonds appears on the surface of each loop. The edges of Style No. 27715 are uniformly beaded while the edges of Style No. 28136 are smooth.

As you acknowledge in your letters, these designs may be characterized as a spiral or loop, which is a standard and familiar shape that is not eligible for copyright protection. The fact that one loop is slightly larger or smaller than the others is a minor variation. Likewise, the fact that the loops have been superimposed on top of each other and the fact that some of the loops are slightly askew is a minor spatial or linear variation for which no registration can be made. As with the other designs at issue in this appeal, the placement of a single row of diamonds on the surface of the earring is a routine and standard design. There is no creativity in the sides of the earring or the edges of Style No. 28136, which are smooth and unadorned. Nor is there any creativity in placing a string of repetitive, uniformly shaped beads along the inner and outer edges of Style No. 27715. Simply put, the overall combination of the common elements in these earrings is not sufficiently creative to support a copyright registration.

d. Earring Jacket Style No. 27936



Style No. 27936 is an earring that consists of an octagon with a circular opening in the center of the design. There are uniformly-shaped beads along the inner and outer edges of these geometric shapes, while the sides of the earring are smooth and unadorned. The surface of the earring is encrusted with diamonds.

The overall shape of this work consists of a standard, symmetrical octagon, and the circular opening in the center of the design is entirely typical for an earring. The minor variations in these

common geometric shapes are not sufficient to support a registration. As with the other designs at issue in this appeal, the Board sees no creativity in the arrangement of diamonds on the surface of this earring or in the use of repeating, uniformly-shaped beads along the inner and outer edges of the design.

Whether the Board focuses on the few basic elements of this work or the selection, coordination, and arrangement of those elements, the end result is a garden variety jewelry design that lacks the spark of creativity needed to support a copyright registration.

D. Case law

In your first and second request for reconsideration you contend that the Applicant's jewelry designs are similar to the works at issue in *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101 (2d Cir. 2001).[14] "As in Yurman, although the distinct elements of Applicant's jewelry may be known, including the use of diamonds, twisted cable, and beaded edges, the originality in Applicant's designs inheres in the creative ways Applicant has fashioned and adapted those constituent elements." First Request at 2; Second Request at 6. In *Yurman Design* the Second Circuit considered a collection of bracelets and earrings consisting of gold and silver twisted cable combined with cabochon-cut colored stones. The court found these designs to be copyrightable because of the way Yurman "recast and arranged those constituent elements." 262 F.3d at 110. The court described the jewelry as an "artistic combination and integration of these elements," including the particular way in which the gemstones and precious metals "are placed, balanced, and harmonized." *Id.* at 109.

Unlike the *Yurman* case, the jewelry designs at issue in this appeal do not feature a creative balance of gold and silver cable and colored stones. The Board acknowledges that three of your client's designs contain beaded edges, but as discussed above, this design is uniformly shaped and the placement of those shapes along the edge of each design is entirely routine. Nor does the Board find any recasting, combining, or arrangement of any elements warranting copyright registration. Each design is essentially a minor variation on a commonplace and simple jewelry configuration, such as a spiral-shaped earring consisting of two or three loops and a single row of diamonds, bordered on each side by a simple beaded rim; an earring consisting of two linearly-placed tear drops encrusted with a single row of diamonds; a gold and silver toned earring made of contiguous diamonds arranged in a rhombus shape with a simple design in each corner and uniform beading along the edge; and a simple octagon shape with a circular opening in the center and uniform beading along the rims. Although jewelry must be viewed in its entirety, the overall design of these works is not copyrightable. Each design contains only a few elements and they are arranged in simple, ordinary ways that could fairly be described as "garden variety" and without the requisite creativity. *Feist*, 499 U.S. at 362.

E. The Remaining Factors Cited in the Second Request for Reconsideration Are Not Determinative

Finally, you argue that your client's jewelry designs should be registered based on factors that have no bearing on whether these works are copyrightable.

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[14] You also cited a number of cases in a footnote, but you did not discuss any of those cases or explain why they might be relevant to the designs at issue in this appeal. *See* First Request at 2, n.1; Second Request at 6, n.1.

You contend that the off-center arrangement of loops in Style No. 27715 provides "a creative modern free spirit impression" that is unlike a standard concentric spiral where the size of each loop is the same and each loop is "equidistant from a common central axis." Second Request at 3. A spiral is still a common, ordinary shape, regardless of whether it is symmetric or asymmetric. Moreover, the number of possible design alternatives that the author may have considered is irrelevant to the issue of copyrightability. Instead, the Office focuses solely on the work that the author actually created and determines whether that work contains a sufficient amount of original and creative authorship within the meaning of the statute and settled case law. Ms. Giroux-Rollow aptly noted that the process of creating these designs presumably included choices, and there may have been other ways in which the spirals and loops could have been selected or arranged. However, these types of choices are present in every jewelry design. *See* Letter from Virginia Giroux-Rollow to Warren A. Sklar at 4. It is not the variety of choices available to the author, but the design elements in the actual work that must be assessed. *Id.*

You also contend that three of the designs create a specific visual impression that is worthy of copyright protection. You contend that the off-center loops in Style No. 27715 suggest an "almost . . . endless looping arrangement" that conveys a "modern free spirit impression." *See* Second Request at 2-3. You contend that the "tapered design" that appears in the corners of Style No. 28334 creates "a smoothing effect" that contrasts with the straight lines and right angles in the design. *See id.* at 4. You also contend that the open spaces in Style No. 28159 create "a sense of openness and freedom," while the open space between the tear drop shapes gives the design "an uplifting or smiling appearance" that evokes "a warm feeling." *See id.* at 5.

Evaluating the symbolic meaning or impression of a work is not the type of determination that the Copyright Office undertakes in the examination process. *See* Compendium II § 503.02(a) ("[R]egistration cannot be based upon . . . the attractiveness of a conventional fleur-de-lys design, or the religious significance of a plain, ordinary cross"). The relevant question is whether the combination and arrangement of common and familiar shapes demonstrates the modicum of creativity necessary for copyright protection. Therefore, the Office focuses solely on the actual jewelry designs that have been submitted for registration, including the individual elements of those designs and the designs as a whole. *See id.* § 503.02(a) ("Copyrightability depends upon the presence of creative expression in a work, and not upon aesthetic merit, commercial appeal, or symbolic value."). As discussed above, the components of these designs are not "numerous enough" nor is the "selection and arrangement [of those components] original enough" to warrant copyright registration. *See Satava*, 323 F.3d at 811.

IV. CONCLUSION

For the foregoing reasons, the Copyright Office Review Board concludes that Earring Jacket Style Nos. 28334, 28159, and 27715 cannot be registered for copyright protection. This decision constitutes the final agency action concerning these works. In addition, for the reasons described above, the Board is proposing to cancel your client's registrations for Earring Jacket Style Nos. 27936 and 28136. The claimant of record for these registrations, Gottleib & Sons, Inc., is hereby given 30 days from the date of this letter to show cause why Registration Nos. VA 1754058 and

1790769 should not be cancelled. *See* 37 C.F.R. § 201.7(c). Your client's written response to this proposal (if any) should be sent to the following address:

U.S. Copyright Office
Review Board
Copyright GC/I&R
P. O. Box 70400
Washington, DC 20024

Registration Nos. VA 1754058 and 1790769 will be cancelled if your client fails to respond within the time allowed, or if, after considering your client's written response (if any), the Office maintains its current conclusion that these registrations were made in error. *See id.*

Sincerely,

Jacqueline Charlesworth
Senior Counsel to the Register
for the Review Board
United States Copyright Office