United States Copyright Office
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May 2, 2013

Cary J. Deaton, Attorney at Law
Attn: Cary Deaton
3524 16th Street, Suite F
Metairie, La. 70002

RE: Memory Necklace
CORRESPONDENCE ID: 1-9SP22F

Dear Mr. Deaton:

On behalf of the Copyright Office Review Board I am responding to your request for reconsideration of the Registration Program's refusal to register a copyright claim in a design entitled "MEMORY NECKLACE." The Review Board has examined the application, the identifying photographs, and all the correspondence in this case. After careful consideration of the arguments in your letter, the Board affirms the denial of registration of this copyright claim because the work does not contain a sufficient amount of original and creative sculptural authorship in either the treatment or arrangement of the elements to support a copyright registration.

I. ADMINISTRATIVE RECORD

A. Initial submissions

On December 27, 2009, the Copyright Office received from you a VA application, identifying photographs, and a fee to register the above work on behalf of Shelley Landry. On your client's application, the material excluded was identified as: "This piece of jewelry incorporates an engagement ring." As for material included in the claim, the application stated: "An engagement ring was cut and inserted inside a solid wedding band and a bale attached." By letter dated April 6, 2011, Registration Specialist Kathryn Sukites refused registration for this work, stating that it lacked the authorship necessary to support a copyright claim. Letter from Sukites to Deaton of 4/6/2011 at 1. Ms. Sukites stated that copyright protects original works of authorship, meaning that works of the visual arts must contain a minimum amount of pictorial, graphic, or sculptural authorship. She also noted the absence of protection for ideas, concepts, and familiar symbols and shapes as well as minor variations thereof, citing 17 U.S.C. § 102(b) and 37 C.F.R. § 202.1. She concluded that the above work failed to meet these standards.

B. First request for reconsideration

By letter dated June 8, 2011, you filed for first reconsideration of the refusal to register "MEMORY NECKLACE," and asserted that the necklace should be registered. You cited *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951), for the proposition that originality for copyright purposes amounts to "little more than a prohibition of actual copying. No matter how poor the author's addition, it is enough if it be his own." Letter of Deaton to Sukites of 6/8/2011 at 1. You also cited 1 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 2.01[B] ("*Nimmer*") and *Rockford Map Publishers, Inc. v. Directory Service Company*, 768 F. 2d 145 (7th Cir. 1985), which provided that the amount of time spent on the work is irrelevant, as copyright may adhere "in the work of an instant."

You identified your client's authorship as severing an engagement ring and incorporating it into a necklace. You indicated that a prominent jeweler stated that he had never seen anything like it. You asserted your view that there was adequate originality to support a copyright registration.

After reviewing your first request for reconsideration, Attorney-Advisor Virginia Giroux-Rollow responded in a letter dated October 28, 2011. She upheld the refusal to register the work on the grounds that it did not contain a sufficient amount of original and creative artistic or sculptural authorship in either the treatment or arrangement of its elements to support a copyright registration. Letter from Giroux-Rollow to Deaton of 10/28/2011 at 1.

Ms. Giroux-Rollow began by stating that section 102(b) of the copyright law provides that "in no case does copyright protection extend to an idea or concept regardless of the form in which it is described, explained, illustrated, or embodied in a work." 17 U.S.C. § 102(b). Therefore, it is not the idea of creating a work that symbolizes certain elements that can be the subject of copyright protection. Instead, it is the actual expression that is examined for copyrightable authorship. *Id.* at 1.

Citing *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 347 (1991), she stated that a work must not only be original, but must possess more than a *de minimis* quantum of creativity. Citing *Alfred Bell & Co.*, 191 F.2d 99, she elaborated that originality, as interpreted by the courts, means that the authorship must constitute more than a trivial variation of pubic domain elements. She added that because the Copyright Office does not make aesthetic judgments, neither the attractiveness of a design, its uniqueness, its visual effect or appearance, the time, effect, and expense it took to create, nor its commercial success in the marketplace are factors in the examining process.

Ms. Giroux-Rollow then described the work as a basic circular gold band inset with the severed gemstone portion of an engagement ring, consisting of a center cushion cut stone flanked by two round cut stones on either side, with a standard bale set on the outside of the band to make the whole suitable for wear on a necklace. She stated that circles, or any minor variations

thereof, are common and familiar geometric shapes which are in the public domain. *Id.* at 2.

Ms. Giroux cited a number of cases supporting her conclusion. These authorities included *John Muller & Co. v. New York Arrows Soccer Team, Inc.*, 802 F.2d 989 (8th Cir. 1986) (a logo consisting of four angled lines forming an arrow with the word "arrows" in cursive script below not protectable); *Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q.2d 1074 (D.D.C. 1991) (upholding refusal to register chinaware design pattern composed of simple variations or combinations of geometric designs due to insufficient creative authorship to merit copyright protection); *Jon Woods Fashions, Inc. v. Curran*, 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988) (a design consisting of two-inch stripes, with small grid squares superimposed upon the stripes not protectable); and *DBC of New York, Inc. v. Merit Diamond Corp.*, 768 F. Supp. 414 (S.D.N.Y. 1991) (a simple jewelry design not copyrightable). Letter from Giroux-Rollow to Deaton of 10/28/2011 at 2.

Ms. Giroux-Rollow conceded that it is true that even a slight amount of creativity will suffice to obtain copyright protection, but cited *Nimmer* in support of her refusal. *Nimmer* provides that "there remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright." *Nimmer* § 2.01[B].

In closing, Ms. Giroux-Rollow observed that while there may be other ways in which the elements in this work could have been selected and arranged, it is not the possibility of choices that determines copyrightability, but instead whether the particular resulting expression or product contains copyrightable authorship. She determined that the design elements in this work, either individually or in combination, did not contain a sufficient amount of original and creative authorship to support a copyright registration. *Id.* at 3.

C. Second request for reconsideration

In a letter dated January 19, 2012, you filed a second request for reconsideration of the refusal to register "MEMORY NECKLACE." You begin your argument by repeating from your first letter of reconsideration the citation to *Alfred Bell* providing that originality for copyright purposes amounts to "little more than a prohibition of actual copying. No matter how poor the author's addition, it is enough if it be his own." Letter of Deaton to Review Board of 1/19/2012 at 1. You also repeat your citations to *Nimmer* § 2.01[B] and *Rockford*, 768 F.2d 145 (amount of time spent on a work is irrelevant).

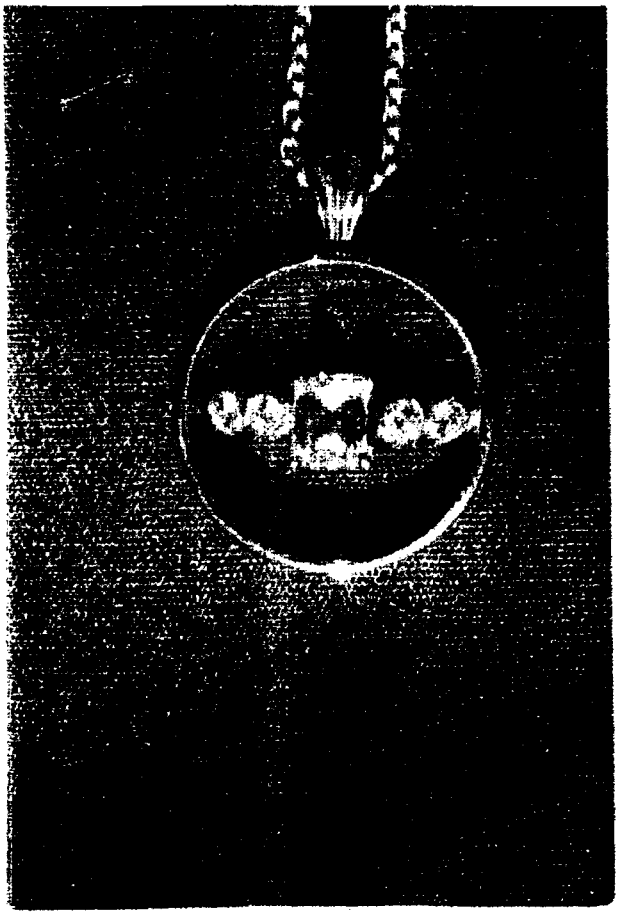
You characterize your client's authorship as follows: "She severed an engagement ring and attached it inside a ring, attached a bale and put the creation on a jewelry chain." Letter of Deaton to Review Board of 1/19/2012 at 1. You repeated the assertion that a prominent jeweler stated that he had never seen anything like it. You buttress this argument by providing two affidavits of acquaintances of your client attesting to the uniqueness of the design. You close your argument citing to *Feist* for the proposition that even a slight amount of originality will suffice. *Id.* at 2.

II. DECISION

A. Description of the work

Before proceeding with our discussion of the Review Board's determination, we will briefly describe the work reflected in the identifying material you submitted.

The work is a plain circular ring, with an attached bale, into which a severed engagement ring has been inserted and attached horizontally. The severed engagement ring bisects the open circle into two proportionally equal half circles. The engagement ring, consisting of several stones, appears to be preexisting, since the ring is identified in the application as excluded. The claimed authorship identified in the application is cutting and inserting the preexisting engagement ring into a solid wedding band, and attaching a bale. A photographic image of the deposit appears below:



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

The Board recognizes that jewelry designs can be eligible for copyright protection as "pictorial, graphic, and sculptural works." 17 U.S.C. § 102(a)(5); *Compendium II* § 502. Further, a derivative work based on a preexisting work, which appears to be the case in this instance, may be subject to copyright protection only if the modifications to the preexisting work represent an original work of authorship. 17 U.S.C. § 101.

While some jewelry designs or derivative works qualify for copyright protection, others do not. All copyrightable works, be they jewelry designs, derivative works, or otherwise, must also constitute "original works of authorship." 17 U.S.C. § 102(a). As used with respect to copyright, the term "original" consists of two components: independent creation and sufficient creativity. *Feist*, 499 U.S. at 345. First, the work must have been independently created by the author, *i.e.,* not copied from another work. *Id.* The Board does not dispute the fact that your client severed an engagement ring, attached it inside another ring, and attached a bale in order to serve as part of a necklace. Therefore, the first component of the term "original" as defined by the Supreme Court in *Feist* is not at issue in the analysis set forth herein. The second *Feist* requirement is that a work must possess sufficient creativity. *Id.* For the reasons set forth below, the Board has determined that "MEMORY NECKLACE" does not meet *Feist's* sufficient creativity standard and, thus, is not entitled to copyright protection.

C. Creativity threshold

In determining whether a work has a sufficient amount of original pictorial or sculptural authorship necessary to sustain a copyright claim, the Board adheres to the standard set forth in *Feist*, where the Supreme Court held that only a modicum of creativity is necessary to support a copyright. *Feist* at 345. However, the Court in *Feist* also recognized that some works (such as the work at issue in that case) fail to meet even this low standard. The Court observed that "as a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity," and that there can be no copyright in a work in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Feist*, 499 U.S. at 359, 362-63; *see also* 37 C.F.R § 202.10(a) ("In order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form."); *see also Diamond Direct LLC v. Star Diamond Group, Inc.,* 116 F. Supp. 2d 525, 528 (S.D.N.Y. 2000) ("So the level of creativity necessary to support copyright is modest indeed. While no precise verbal formulation can capture it, there is some irreducible minimum beneath which a work is insufficiently original to find protection."); *Nimmer* § 2.01[B] ("There remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright."). While "the standard of originality is low, . . . it does exist." *Feist* at 362. Additionally, *Feist* confirmed the exclusion of "ideas" from copyright protection. Quoting *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 556 (1985), the *Feist* court affirmed: "[N]o author may copyright facts or ideas." *Feist* at 550.

Even prior to the *Feist* decision, the Office recognized the modest, but existent, requisite level of creativity necessary to sustain a copyright claim. *Compendium II* states that "[w]orks that lack even a certain minimum amount of original authorship are not copyrightable." *Compendium II* § 202.02(a). With respect to pictorial, graphic, and sculptural works, the class within which jewelry designs fall, *see* 17 U.S.C. § 102(a)(5), *Compendium II* further states that a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." *Compendium II* § 503.02(a). *Compendium II* recognizes that it is not aesthetic merit, but the presence of creative expression that determines the copyrightability of a work, and that "registration cannot be based upon standard designs which lack originality, ... Similarly, it is not possible to copyright common geometric figures or shapes in three-dimensional form, such as the cone, cube or sphere . . . [t]he creative expression capable of supporting copyright must consist of something more than the mere bringing together of two or three standard forms or shapes with minor linear or spatial variations." *Compendium II* § 503.02(b). *See also Compendium II* § 503.02(a) and 37 C.F.R. § 202.1(a) ("familiar symbols or designs" are "not subject to copyright and applications for registration of such works cannot be entertained.").

The Office and courts have also consistently found that trivial variations of standard designs, figures and geometric shapes are not sufficiently creative to support a copyright claim. In *Vogue Ring Creations, Inc. v. Hardman*, 410 F. Supp. 609 (D.R.I. 1976), the issue was raised whether a derivative ring contained more than a trivial variation from a ring in the public domain. The Court concluded that in spite of some differences in ornamentation, width, and shape, the differences were trivial. Other cases include *Tompkins Graphics, Inc. v. Zipatone, Inc.*, 222 U.S.P.Q. 49 (E.D. Pa. 1983) ("[B]asic geometric shapes have long been in the public domain and therefore cannot be regulated by copyright."); *Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc.*, 634 F. Supp. 769 (W.D. Pa. 1986) (envelopes with black lines and words "gift check" or "priority message" did not contain minimal degree of creativity necessary for copyright protection); *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-lys held not copyrightable); *Bailie v. Fisher*, 258 F.2d 425 (D.C. Cir. 1958) (cardboard star with two folding flaps allowing star to stand for retail display not copyrightable work of art); *Homer Laughlin China*, 22 U.S.P.Q.2d 1074 (upholding refusal to register chinaware design pattern composed of simple variations or combinations of geometric designs due to insufficient creative authorship); and *Past Pluto Prods Corp. v. Dana*, 627 F. Supp. 1435 (S.D.N.Y. 1986) (hat entitled "Crown of Liberty" consisting of seven identical, evenly-spaced foam spikes that radiate from the hat's arcuate perimeter not protectable).

As noted, you cite *Alfred Bell & Co.*, 191 F.2d 99, for the point that originality for copyright purposes is little more than a prohibition on actual copying. Letter from Deaton of 1/19/2012 at 1. However, this case also stated that what "is needed to satisfy both the Constitution and the statute is that the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own.'" *Alfred Bell*, 191 F.2d at 102-3. It is the

Board's opinion that merely severing a preexisting engagement ring in order to place it inside another preexisting ring, and adding a standard bale in order to convert that into a necklace, is merely a trivial variation on preexisting jewelry designs. While your letter for second reconsideration cites to a number of acquaintances of the designer attesting to the work's "uniqueness," the work's alleged uniqueness is attributable to the *idea* of converting two existing rings into a necklace, rather than new authorship. Ideas, however, are not copyrightable. *See* 17 U.S.C. §102(b); *Feist*, 499 U.S. at 550; *see also Diamond Direct LLC*, 116 F. Supp. 2d at 529 ("[T]he idea of a ballerina ring with a small cluster of stones at the center is not protectable.").

D. Selection, coordination, and arrangement

Although none of the elements comprising the jewelry design at issue here when examined individually exhibit sufficient creative authorship to support a copyright, the Board recognizes the principle that some combinations of common or standard shapes or designs may contain sufficient creativity with respect to how the common elements are combined or arranged to support a copyright. *See Feist*, 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.").

However, as Ms. Giroux-Rollow noted in her correspondence, merely combining non-protectable elements does not automatically establish creativity where the combination or arrangement itself is simplistic or minor in its overall configuration. Letter from Giroux-Rollow to Deaton of 10/28/2011 at 3. For example, in *Jon Woods Fashions*, 8 U.S.P.Q.2d 1870, the district court upheld the Register of Copyrights' decision that a fabric design consisting of striped cloth over which a grid of 3/16-inch squares was superimposed, even though distinctly arranged and printed, did not contain the minimal amount of original artistic material to merit copyright protection. Similarly, in *DBC of New York, Inc.*, 768 F. Supp. 414, the district court upheld the Register's refusal to register two rings. After examining in detail the individual elements that made up the rings' designs, the Court found that the "two rings, on the whole, [are] not exceptional, original, or unique." *Id.* at 416. In so holding, the court recognized that familiar and common shapes and symbols are not copyrightable in themselves. *Id.* at 416. In similar fashion, the Eighth Circuit upheld the Register's refusal to register a simple logo consisting of four angled lines which formed an arrow with the word "Arrows" in cursive script below the arrow. *See John Muller*, 802 F. 2d 989.

In instances where the number of elements is small, and the arrangement is simple, merely combining the non-protectable elements does not establish creativity for purposes of copyrightability. In *Satava v. Lowry*, the Ninth Circuit held unprotectable sculptural arrangements which combined elements not copyrightable in themselves. 323 F.3d 805 (9th Cir. 2003). The court explained that not "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.* at 811. A similar result was reached in *Lamps Plus, Inc. v. Dolan*, 345 F.3d 1140 (9th Cir. 2003), where the Ninth Circuit held that the mechanical combination of four preexisting ceiling lamp elements with a preexisting lamp base did not constitute original authorship

The Board notes that an author creating any work has an unlimited choice of alternatives. However, it is not the possibility of choices that determines copyrightability, but whether the resulting expression contains copyrightable authorship. *See Florabelle Flowers, Inc. v. Joseph Markovits, Inc.*, 296 F. Supp. 304, 307 (S.D.N.Y. 1968) (an "aggregation of well known components [that] comprise an unoriginal whole" cannot support a claim to copyright). The fact that an author had many choices does not necessarily mean that the choice the author made meets even the modest creativity requirement of the copyright law.

E. Analysis of the work

Your client's work consists of a combination of two preexisting rings. Your client severed an engagement ring and attached it inside another ring at the widest point. She then attached a standard bale and put the work on a jewelry chain. Attaching a bale in this instance was a functional decision since the bale was required in order to convert the work into a necklace. While the Review Board concedes that while some might find the design to be aesthetically pleasing, or of symbolic importance, the basic design is too simple and trivial to support a claim to copyright.

In your letter for second reconsideration, you cite to a number of acquaintances of the designer who attest to the "uniqueness" of the design. Letter of Deaton to Review Board of 1/19/2012 at 1. *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." *Compendium II* § 503.02(b). The fact that this work may be aesthetically pleasing, commercially appealing, or symbolically significant are not factors in determining the copyrightability of a work. As the court in *Paul Morelli Design, Inc. v. Tiffany and Co.* observed: "Works may experience commercial success even without originality and works with originality may enjoy none whatsoever." 200 F. Supp. 2d 482, 488 (E.D. Pa. 2002).

III. CONCLUSION

The Board has reviewed this design in its entirety and as to its elements, both individually and combined, has determined that the work cannot be registered because it contains insufficient artistic or sculptural creativity to support copyright registration. Accordingly, for the reasons stated above, the Review Board affirms the refusal to register this design. This decision constitutes final agency action.

Sincerely,

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