United States Copyright Office
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July 24, 2013

Marshall, Gerstein & Borun, LLP
Attn: Sara Kalemeris
233 South Wacher Drive
6300 Willis Tower
Chicago, IL 60606-6357

Re: Nest Bracelet and Scale Necklace
Correspondence ID: 1-8FSZCI; 1-A5M0MM

Dear Ms. Kalemeris:

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 works entitled: *Nest Bracelet* and *Scale Necklace* (the "Works"). You submitted this request on behalf of your client, Laura Lombardi (the "Applicant"), on August 25, 2011. 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 find the following: (1) we affirm the Registration Program's decision to deny registration of the *Scale Necklace*; but, (2) we have determined that the *Nest Bracelet* warrants registration. 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 subject works are jewelry designs. The work entitled *Scale Necklace* consists of a chain containing ten brass equilateral triangles. The triangles connect to the chain with ten small, brass rings. When hanging, five slightly overlapping triangles appear on each side of the necklace chain.

The below image is a photographic reproduction of the *Scale Necklace* from the deposit materials:



The work entitled *Nest Bracelet* consists of five identical rows of vintage brass tubes joined together by cone-shaped brass studs. Each row is comprised of approximately seven brass tubes and six brass studs. The rows interweave with one another in an alternating fashion, such that the bracelet resembles a stylized version of the common bird's nest shape. A clasp joins the work together to form a bracelet.

The below image is a photographic reproduction of the *Nest Bracelet* from the deposit materials:



II. ADMINISTRATIVE RECORD

On October 28, 2010, the United States Copyright Office (the "Office") issued a letter notifying your firm that it had refused registration of the above mentioned Works. *Letter from Registration Specialist Sandra Ware to Gregory Chinlund* (October 28, 2010). 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 February 17, 2011, you requested that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusal to register the Works. *Letter from Sarah Kalemeris to Copyright RAC Division* (February 17, 2011) ("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 Works "do not contain a sufficient amount of original and creative artistic or sculptural authorship in either the treatment or arrangement of their elements to support a copyright registration" and again refused registration. *Letter from Attorney-Advisor Virginia Giroux-Rollow to Sarah Kalemeris* (May 26, 2011).

Finally, in a letter dated August 25, 2011, 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 Sarah Kalemeris to Copyright R&P Division* (August 25, 2011) ("Second Request").

In arguing that the Office improperly refused registration, you claim the Works, as a whole, include at least the minimum amount of creativity required to support registration under the standard for originality set forth in *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). *Second Request* at 1-5. In support of this argument, you claim that the Applicant carefully selected and combined the individual elements that comprise the Works to give them a meaning that is not present when their elements are evaluated independently.

III. DECISION

A. *The Legal Framework*

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 with respect to copyright, the term "original" consists of two components: independent creation and sufficient creativity. *See 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.* 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 "[w]ords and short phrases such as names, titles, slogans; familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering,

or coloring"); *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").

Of course, some combinations of common or standard design elements may contain sufficient creativity, with respect to how they are juxtaposed or arranged, to support a copyright. Nevertheless, not every combination or arrangement will be sufficient to meet this grade. *See Feist,* 499 U.S. at 358 (finding the Copyright Act "implies that some ways [of selecting, coordinating, or arranging uncopyrightable material] will trigger copyright, but that others will not"). Ultimately, the determination of copyrightability in the combination of standard design elements rests on whether the selection, coordination, or arrangement is done in such a way as to result in copyrightable authorship. *Id.*; *see also Atari Games Corp. v. Oman*, 888 F.2d 878 (D. D.C. 1989).

To be clear, the mere simplistic arrangement of non-protectable elements does not automatically establish the level of creativity necessary to warrant protection. For example, the Eighth Circuit upheld the Copyright Office's refusal to register a simple logo consisting of four angled lines which formed an arrow and the word "Arrows" in a cursive script below the arrow. *See John Muller & Co*, 802 F.2d 989 (8th Cir. 1986). Likewise, the Ninth Circuit held that a glass sculpture of a jellyfish that consisted of elements including clear glass, an oblong shroud, bright colors, proportion, vertical orientation, and the stereotypical jellyfish form did not merit copyright protection. *See Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003). The court's language in *Satava* is particularly instructional:

> [i]t 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).

Finally, 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."

B. *Analysis of the Works*

After carefully examining the Works and applying the legal standards discussed above, the Board has reached the following conclusions: (1) the *Scale Necklace* is not sufficiently creative to warrant copyright protection and is therefore unregisterable; and, (2) the *Nest Bracelet* satisfies the requirement of creativity and therefore will be registered.

(1) The Scale Necklace

First, the Board finds that none of the elements that comprise the *Scale Necklace*, 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." Here, the *Scale Necklace* is comprised of (1) a simple, thin necklace chain; (2) ten small, brass equilateral triangle pieces; and, (3) ten small, brass rings that fasten the triangle pieces to the necklace chain. These common, geometric shapes qualify as "familiar symbols or designs" and are unprotectable. *Id.*; *see also Feist*, 499 U.S. at 363. The elements' brass hue qualifies as coloring and is also unprotectable. *See Boisson v. Banian, Ltd.*, 273 F.3d 262, 271 (2d Cir. 2001) (indicating mere coloration cannot support a copyright claim). Thus, none of the *Scale Necklace's* constituent elements are eligible for registration.

Second, the Board finds that the Work, considered as a whole, fails 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 *Scale Necklace*, however, does not meet this grade. As noted, this work consists of the simple combination of a common necklace chain with common, brass equilateral triangle shapes. The Applicant has arranged these shapes so that, when hanging, five overlapping triangles appear on each side of the necklace chain. This ordinary pairing of common triangle shapes with a necklace band is *de minimis* 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).

Finally, your assertion that the Applicant's arrangement of the elements that comprise the *Scale Necklace* results in an "aesthetically pleasing flow of shapes" does not add to your claim of copyrightability. *Second Request* at 4. As discussed above, the Board does not assess attractiveness in determining whether a work contains the requisite minimal amount of original authorship necessary for registration. Thus, even if accurate, the mere fact that the *Scale Necklace* is an aesthetically appealing arrangement of familiar shapes does not qualify the work, as a whole, as copyrightable.

(2) The Nest Bracelet

The *Nest Bracelet* consists of five identical rows of vintage brass tubes joined together by cone-shaped brass studs. Each row is comprised of approximately seven brass tubes and six brass studs. The rows interweave with one another in an alternating fashion, such that the bracelet assumes a stylized version of the common bird's nest shape. A clasp joins the work together to form a bracelet.

The Board has determined that none of the *Nest Bracelet's* individual elements, alone, are eligible for registration. *See 37* C.F.R. § 202.1(a) (prohibiting the registration of "familiar symbols or designs"); *see also Boisson v. Banian, Ltd.*, 273 F.3d 262, 271 (2d Cir. 2001) (indicating mere coloration cannot support a copyright claim). However, we find that the Applicant's combination and arrangement of these unprotectable elements satisfies the "modicum of creativity" standard explained in *Feist*. 499 U.S. at 359. Specifically, we find that creativity rests in the Applicant's complex interweaving of the rows of alternating tubes and studs to form an embellished version of the common bird's nest shape. While a simple, *de minimis* arrangement of common elements, such as that of the *Scale Necklace*, is unregisterable, the *Nest Bracelet's* relatively sophisticated woven pattern of rows of brass tubes and studs meets the grade for copyright protection.

In sum, we affirm denial of the *Scale Necklace* for lacking the sufficient level of creativity to make the work registerable under the Copyright Act, but approve registration of the *Nest Bracelet.*

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the work entitled *Scale Necklace*; and, approves for registration the work entitled *Nest Bracelet*. This decision constitutes final agency action on this matter. 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

BY:

William J. Roberts, Jr.
Copyright Office Review Board