United States Copyright Office
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September 9, 2013

Skadden, Arps, Slate, Meagher & Flom LLP
Attn: M. Oren Epstein
Four Times Square
New York, NY 10036

Re: OCA Citrine, OCA/OIE Verticale, & EXI
Correspondence ID: 1-CLCZUD

Dear Mr. Epstein:

The Review Board of the United States Copyright Office (the "Board") is in receipt of your second requests for reconsideration of the Registration Program's refusal to register the works entitled: *OCA Citrine, OCA/OIE Verticale,* and *EXI.* You submitted these requests on behalf of your client, Marina B. Holding, LLC, on August 2, 2012. I apologize for the 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 these cases. After careful consideration of the arguments in your second requests for reconsideration, the Board affirms the Registration Program's denial of registration of these copyright claims. 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

OCA Citrine, OCA/OIE Verticale, and *EXI* (the "Works") are three ring designs.

The *OCA Citrine* ring includes a circular gold band inset with a round, citrine gemstone. The band is an incomplete circle with several raised, evenly-spaced bars arranged along its surface. The below image is a photographic reproduction of the work from the deposit materials:



The *OCA/OIE Verticale* ring is similar in design to *OCA Citrine*, but is inset with a round, blue-colored gemstone rather than a citrine gemstone. The below image is a photographic reproduction of the work from the deposit materials:



The *EXI* ring includes a circular gold band with a hexagon-shaped gemstone set into the top of the band. The ring also includes six trapezoid-shaped panels that are textured with diamonds in pavé. The six panels each appear below one of the sides of the hexagon-shaped gemstone. The below image is a photographic reproduction of the work from the deposit materials:



II. ADMINISTRATIVE RECORD

On September 29, 2011, the United States Copyright Office (the "Office") issued three letters notifying Marina B. Holding, LLC (the "Applicant") that it had refused registration of the above mentioned Works. *Letters from Registration Specialist, Allan Runge, to Mary Rasenberger* (September 29, 2011). In its letters, the Office stated that it could not register the Works because they lack the authorship necessary to support a copyright claim. *Id.*

In three letters dated December 27, 2011, you requested that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusals to register the Works. *Letters from M. Oren Epstein to Copyright RAC Division* (December 27, 2011) ("First Requests"). Upon reviewing the Works in light of the points raised in your letters, the Office concluded that the Works "do not contain a sufficient amount of original and creative artistic authorship either in their shapes or in the treatment and arrangement of their elements upon which to support a copyright registration" and again refused registration. *Letter from Attorney-Advisor, Stephanie Mason, to M. Oren Epstein* (May 3, 2012).

Finally, in three letters dated August 2, 2012, you requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusals to register the Works. *Letters from M. Oren Epstein to Copyright R&P Division* (August 2, 2012) ("Second Requests"). In arguing that the Office improperly refused registration, you claim the Works 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 Requests* at *passim*. In support of this argument, you reference several cases citing the general principle that, to be sufficiently creative to warrant copyright protection, a jewelry design need only possess a "modicum of creativity." *Id.* at 1-5.

You also claim that the Applicant's careful selection and arrangement of the Works' constituent elements possess a sufficient amount of creative authorship to warrant registration under the Copyright Act. *Id.* at 8. In support of this argument, you reference several cases that demonstrate works comprised of otherwise unprotectable elements are acceptable for copyright protection if the selection and arrangement of their elements satisfies the requisite level of creative authorship. *Id.* at 8-9.

Regarding *OCA Citrine* and *OCA/OIE Verticale*, you suggest that the Applicant's claim of copyright includes the "tangible expression comprising the Work, which tangible form includes – but is certainly not limited to – particularized evocation of glimmering and flowing gold." *Id* at 7-8. Regarding *EXI*, you suggest that the Applicant's claim of copyright includes the "tangible expression comprising the Work, which tangible form includes – but is certainly not limited to – particularized evocation of sparkling stars and a planetary orb." *Id* at 7-8.

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").

Case law recognizes instances in which jewelry has enjoyed copyright protection for "the artistic combination and integration" of constituent elements that, considered alone, are unoriginal. *See Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101 (2d Cir. 2001). However, as noted, the mere simplistic arrangement of non-protectable elements does not automatically establish the level of creativity necessary to warrant protection. *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 unprotectable 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 in 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 finds that *OCA Citrine, OCA/OIE Verticale,* and *EXI* all fail to satisfy the requirements of creative authorship.

First, the Board finds that none of the Works' constituent elements, considered individually, are sufficiently creative to warrant protection. As noted, 37 C.F.R. § 202.1(a), identifies certain elements that are not copyrightable. These elements include: "[w]ords and short phrases such as names, titles, slogans; familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering, or coloring." *Id.* Here, all three of the Works are comprised of a combination of the following elements: (1) a circular or semi-circular ring band; (2) gemstones; and, (3) either simple trapezoid shapes or simple raised bars. Consistent with the above regulations, these elements (ordinary ring bands, gemstones, and simple geometric shapes) are all familiar, public domain symbols and/or designs that are ineligible for copyright protection. *See id.* (prohibiting the registration of basic symbols or designs). Accordingly, we conclude the Works' constituent elements do not qualify for registration under the Copyright Act.

Second, the Board finds that the Works, considered as wholes, fail to meet the creativity threshold set forth in *Feist*. 499 U.S. at 359. As explained, the Board accepts the principle that combinations of unprotectable elements may be eligible for copyright registration. However, in order to be accepted, such combinations must contain some distinguishable variation in the selection, coordination, or arrangement of their elements that is not so obvious or minor that the "creative spark is utterly lacking or so trivial as to be nonexistent." *Id.*; *see also Atari Games,* 888 F.2d at 883 (finding a work should be viewed in its entirety, with individual uncopyrightable elements judged not separately, but in their overall interrelatedness within the work as a whole).

Viewed as wholes, the *OCA Citrine* and *OCA/OIE Verticale* rings both consist of a semi-circular ring band with an oval-shaped gemstone set in the top-center portion of the band and eight plain, raised bars attached horizontally across the remainder of the band. This obvious combination of a ring band, a gemstone, and a simple ornamental design is too basic to qualify for copyright registration. Specifically, we find that the authorship involved in selecting a round gemstone and setting it within such a basic ring-band design is at best, *de minimis*, and fails to meet the threshold for copyrightable authorship. *Feist,* 499 U.S. at 359; *see also Atari Games,* 888 F.2d at 883.

Likewise, the *EXI* ring fails to satisfy the requirements for protection under the Copyright Act. As a whole, the *EXI* ring consists of a circular ring band, inset with a hexagon shaped gemstone, and garnished on each of its six sides with diamond covered trapezoids. We find the authorship involved in selecting a six-sided gemstone, setting it within an ordinary ring band, and decorating the six sides of the setting with unprotectable trapezoids textured with diamonds in pavé is, at best, *de minimis*, and fails to meet the threshold for copyrightable authorship. *Feist,* 499 U.S. at 359; *see also Atari Games,* 888 F.2d at 883. Accordingly, we conclude that the work, as a whole, lacks the requisite "creative spark" necessary for copyright registration. *Feist,* 499 U.S. at 359; *Satava*, 323 F.3d at 811.

Finally, your assertions that the Works' elements were uniquely arranged so that they create unique, "breathtaking," and "stunning" designs do not add to your claims of sufficient creativity. *Second Requests* at 6-7. Nor do your assertions that the Works are evocative of "glimmering and flowing gold" or "sparkling stars and a planetary orb. *Id.* at 7-8. As discussed above, the Board does not assess a design's attractiveness, uniqueness, visual effect or appearance, symbolism, or the espoused intentions of the author in determining whether a work contains the requisite minimal amount of original authorship necessary for registration. *See* 17 U.S.C. § 102(b); *see also Bleistein*, 188 U.S. 239. Thus, even if accurate, the mere fact that the Works consist of symbolic, aesthetically

appealing arrangements of familiar shapes and designs would not qualify the Works, as wholes, as copyrightable.

In sum, the Board finds that both the individual elements that comprise the Works, as well as the selection, organization, and arrangement of those elements lack the sufficient level of creativity to make them eligible for registration under the Copyright Act.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusals to register the works entitled: *OCA Citrine, OCA/OIE Verticale,* and *EXI.* 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