United States Copyright Office
Library of Congress · 101 Independence Avenue SE · Washington, DC 20559-6000 · www.copyright.gov

April 23, 2014

Moses & Singer LLP
Attn: David M. Rabinowitz
The Chrysler Building
405 Lexington Ave.
New York, NY 10174-1299

RE: EG001W
Correspondence ID: 1-EKXS5P

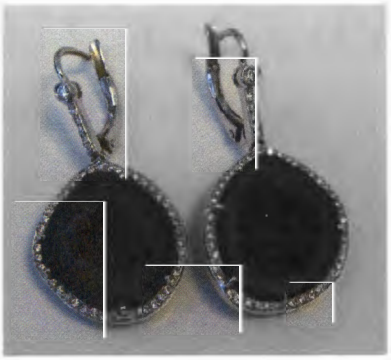
Dear Ms. Rabinowitz:

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 work entitled: *EG001W*. You submitted this request on behalf of your client, ROCKRAS LLC, on October 16, 2013.

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, the Board affirms the Registration Program's refusal to register this copyright claim. 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 WORK

EG001W (the "Work") is an earring design consisting of a geode that has been split into two pieces. The exposed center surface of the geode has been polished, and the geode is surrounded by a band of pavé diamonds. A traditional loop and clasp is mounted to the top of the geode. The front-facing portion of the loop and clasp is encrusted with pavé-set diamonds. Below is a photographic reproduction of the Work from the deposit materials:



II. ADMINISTRATIVE RECORD

On January 23, 2013, the United States Copyright Office (the "Office") issued a letter notifying ROCKRAS LLC (the "Applicant") that it had refused registration of the Work. *Letter from Rebecca Barker, Registration Specialist, to Meredith Schorr* (Jan. 23, 2013). In its letter, the Office stated that it could not register the Work because it "lacks the authorship necessary to support a copyright claim." *Id.*

In a letter dated April 22, 2013, you requested that the Office reconsider its refusal to register the Work pursuant to 37 C.F.R. § 202.5(b). *Letter from David Rabinowitz to Copyright RAC Division* (Apr. 22, 2013) ("First Request"). Upon reviewing the Work in light of the points raised in your letter, the Office concluded that the Work "does not contain a sufficient amount of original and creative artistic or sculptural authorship." *Letter from Stephanie Mason, Attorney-Advisor, to David Rabinowitz* (Aug. 2, 2013).

In a letter dated October 16, 2013, you requested that the Office reconsider its refusal to register the Work pursuant to 37 C.F.R. § 202.5(c). *Letter from David Rabinowitz to Copyright R&P Division* (Oct. 16, 2013) ("Second Request"). In arguing that the Office improperly refused registration, you claim that the Work includes 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 3. In support of this argument, you claim that the Applicant's selection and arrangement of constituent elements possess a sufficient amount of creative authorship to warrant registration under the Copyright Act. Specifically, you assert that the Applicant's claim of copyright is directed to the unique arrangement of this specific "combination of petite geodes and pavé diamonds" which is "unprecedented in the long history of the jewelry industry." *Id.* at 4. In your *Second Request*, you state "in the long history of jewelry design, no previous designer has combined small cut and polished geodes with a ring of diamonds to create earrings or, for that matter, any kind of fine jewelry." *Id.* at 1.

In addition to *Feist*, you cite several cases in support of the general principle that, to be sufficiently creative to warrant copyright protection, a jewelry design need only possess a "modicum of creativity." *Id. passim.* You also cite several cases stating that jewelry designs comprised of otherwise unprotectable elements may be entitled to copyright protection if the selection and arrangement of elements satisfies the requisite level of creative authorship. *Id.* at 4-7.

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). In this context, the term "original" consists of two requirements: independent creation and sufficient creativity. *See Feist*, 499 U.S. at 345. First, the work must have been independently created by the author, meaning that it must not be copied from another work. *Id.* Second, the work must possess a sufficient amount of creative expression. *Id.* While only a modicum of creativity is necessary, the Supreme Court has ruled that some works (such as the telephone directory at issue in *Feist*) fail to meet the creativity requirement. *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 Copyright Act and in the *Feist* decision. *See* 37 C.F.R. §§ 202.1(a), 202.1(b) (prohibiting registration of "familiar symbols or designs" and "[i]deas, plans, methods, systems, or devices, as distinguished from the particular manner in which they are expressed or described in a writing"); *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 that a work of jewelry may be entitled to 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, a simplistic arrangement of non-protectable elements does not automatically demonstrate 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 copyrightability of a combination of standard design elements depends on whether the selection, coordination, or arrangement is done in such a way that the design as a whole constitutes a work of original authorship. *See Atari Games Corp. v. Oman*, 888 F.2d 878 (D.C. Cir. 1989).

To be clear, common and simplistic arrangements of unprotectable elements do not satisfy this requirement. For example, in *DBC of New York v. Merit Diamond Corp.*, 768 F. Supp. 414 (S.D.N.Y. 1991) the Office refused to register a ring 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 court explained that familiar symbols or designs are not entitled to copyright protection (citing 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.*

Finally, Copyright Office Registration Specialists and the Board 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 Work*

After carefully examining *EG001W* and applying the legal standards discussed above, the Board finds that the Work fails to satisfy the requirement of creative authorship.

The Board finds that none of the Work's constituent elements, considered individually, are sufficiently creative to warrant protection. These elements include: (1) a naturally occurring geode, which has been split in half and polished; (2) several diamonds of similar shape and size; (3) a standard setting for the gemstones; and (4) a standard loop and clasp.

The copyright law only protects "the fruits of intellectual labor" that "are founded in the creative powers of the mind." *The Trade-Mark Cases*, 100 U.S. 82, 94 (1879). It does not protect works produced by nature, such as naturally occurring geodes and gemstones. It does not protect any functional aspect of a jewelry design, such as the loop and clasp that attach these earrings to the body and hold them in place. *See* 37 C.F.R. § 202.1(b). Likewise, standard cuts, settings, and polishing techniques are public domain shapes or designs that are ineligible for copyright protection. *See* 37 C.F.R. § 202.1(a). Accordingly, the constituent elements of this Work do not qualify for registration under the Copyright Act.

The Board also 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 jewelry designs comprised of combinations of unprotectable elements may be eligible for copyright registration. But in order to be registered, such combinations must contain some distinguishable variation in the selection, coordination, or arrangement of their elements that is not so minor or obvious that the "creative spark is utterly lacking or so trivial as to be nonexistent." *Feist*, 499 U.S. at 359; *see also Atari Games,* 888 F.2d at 883 (finding a work should be viewed in its entirety, with individual noncopyrightable elements judged not separately, but in their overall interrelatedness within the work as a whole).

The Work consists of a geode that has been split in half, polished, and connected to a standard loop and clasp. Both the edge of the geode and the piece that connects it to the loop and clasp are decorated with a single channel of diamonds in a standard pavé setting. Each of these elements is arranged in a predictable and customary manner exhibiting, at best, a *de minimis* amount of creativity. Using a polished, naturally-occurring geode as the centerpiece for a set of earrings is merely an idea that is not eligible for copyright protection. The Board sees no creativity in the piece that connects the gemstone to the functional loop and clasp, and placing a single row of diamonds on the surface of this piece and along the edge of the stone is entirely typical for an earring design. Accordingly, we conclude that the Work, as a whole, lacks the requisite "creative spark" necessary for registration. *Feist,* 499 U.S. at 359.

Finally, you claim that the selection and arrangement of the Work's elements is unique and "unprecedented in the long history of the jewelry industry." *Second Request* at 1, 4. The Board examines each work in isolation to determine whether it contains the requisite amount of original authorship necessary for registration, but as discussed above, we do not consider novelty or uniqueness in making this determination. *See Boisson v. Banian, Ltd.* 273 F.3d 262, 268 (2d Cir. 2001) ("Originality does not mean that the work for which copyright protection is sought must be either novel or unique, it simply means [that] a work [must be] independently created by its

author."). Thus, even if your assertions are accurate, the fact that the Work contains a unique "combination of petite geodes and pavé diamonds" would not establish that the Work, as a whole, is copyrightable.

In sum, the Board finds that both the individual elements that comprise this Work, as well as the Applicant's selection, organization, and arrangement of those elements lack sufficient creativity to warrant registration under the Copyright Act.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register *EG001W*. This decision constitutes final agency action on this matter. 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

BY: _____
Erik Bertin
Copyright Office Review Board