



United States Copyright Office

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

May 23, 2018

Amy B. Goldsmith, Esq.
Tarter Krinsky & Drogin LLP
1350 Broadway
New York, NY 10018

Re: Second Request for Reconsideration for Refusal to Register THE LIGHT COLLECTION; Correspondence ID: 1-1MUXUYM, SR# 1-2520268001

Dear Ms. Goldsmith:

The Review Board of the United States Copyright Office (“Board”) has considered Michal Kadar LLC’s (“Michal Kadar’s”) second request for reconsideration of the Registration Program’s refusal to register jewelry design claims in an unpublished jewelry collection titled “THE LIGHT COLLECTION” (“Works”). After reviewing the application, deposit copy, and relevant correspondence, along with the arguments in the second request for reconsideration, the Board affirms the Registration Program’s denial of registration.

I. DESCRIPTION OF THE WORKS

The Works are several pieces of gold jewelry, including four rings (one engagement ring and three stacking rings), three bracelets, four earrings, three necklace pendants, and one non-pendant necklace. They are depicted as follows:


IMAGE	TITLE	DESCRIPTION
	Tu Sole Engagement Ring	Ring with a double gold band, a circular gold setting with twelve evenly-spaced baguette diamonds, and a center round diamond.







IMAGE	TITLE	DESCRIPTION
	Sole, Solo, and Prime Bracelets	Two bracelets that are wide circular gold bands with evenly spaced baguette diamonds. One bracelet has more diamonds closer together. The other bracelet is a wide circular gold band accented with inset diamonds along its outer edge.
	Prime, Solo, and Sole Stacking Rings	Two rings with wide circular gold bands with evenly spaced baguette diamonds, with one having more diamonds closer together. A third ring that is a wide circular gold band accented with inset diamonds along its outer edge.
	Unity Earrings	This pair of earrings consists of three gold circles connected in a chain. Two of the circles are wide circular gold bands with evenly spaced baguette diamonds, with one having more diamonds closer together, and the third is a wide circular gold band accented with inset diamonds along its outer edge.

IMAGE	TITLE	DESCRIPTION
	Solo, Prime, and Sole Pendants	Two of the pendant necklaces are wide circular gold bands with evenly spaced baguette diamonds, with one having more diamonds closer together, on a chain. The third is a wide circular gold band accented with inset diamonds along its outer edge, on a chain.
	Sole Necklace	A short necklace made up of a wide circular gold band with evenly spaced baguette diamonds.
	Solo, Prime, and Solo Hoop Earrings	Two of the earrings are hoop earrings made up of wide circular gold bands with evenly spaced baguette diamonds, with one having more diamonds closer together. The other is also a hoop with a wide circular gold band accented with inset diamonds along its outer edge.

II. ADMINISTRATIVE RECORD

On July 2, 2015, Michal Kadar filed an application to register a copyright claim in the Works as an unpublished collection of jewelry designs. In a June 6, 2016 letter, a Copyright Office registration specialist refused to register the claim, finding that the Works “will not

support a claim to copyright” because they lack the requisite “minimum amount of creative pictorial, graphic or sculptural authorship.” Letter from Wilbur King, Registration Specialist, to Amy Goldsmith (June 6, 2016).

Michal Kadar then requested that the Office reconsider its initial refusal to register the Works. Letter from Amy Goldsmith to U.S. Copyright Office (Aug. 10, 2016) (“First Request”). Michal Kadar asserted that “a very modest quantum of originality will suffice to support a copyright,” and copyright protects “a combination of elements that are unoriginal in themselves.” *Id.* at 1. It also stated that the Works “were created by . . . a noted designer,” and that “[t]he incorporation of common elements into jewelry designs is not a barrier to copyrightability as is illustrated by the Copyright Office’s own past practice in issuing numerous copyright registrations for jewelry designs which have the same types of elements as the [Works] which were rejected.” *Id.* at 2. Including designs of other jewelry pieces that were granted registration, Michal Kadar argued that “there is no logical argument to be made that each of these [other] designs contains minimal creativity but The Light Collection does not.” *Id.* at 9.

After reviewing the Works in light of the points raised in the First Request, the Office re-evaluated the claims and again concluded that they did “not contain a sufficient amount of original and creative authorship to support a copyright registration.” Letter from U.S. Copyright Office to Amy Goldsmith (Jan. 31, 2017). The Office noted that “the geometrically shaped bands and geometrically shaped stones which form the designs are not themselves copyrightable,” and even when those elements are combined, the arrangements are “in symmetrical configurations that are expected, and almost inevitable, in jewelry designs” and “do not demonstrate sufficient creativity to support a claim in copyright.” *Id.* at 2–3.

Michal Kadar then submitted a second request for reconsideration of the refusals pursuant to 37 C.F.R. § 202.5(c). Letter from Amy Goldsmith to U.S. Copyright Office (May 1, 2017) (“Second Request”). Michal Kadar claimed that the Works “contain the requisite creativity to support a claim in copyright, and that their original arrangement is not simply a consequence of employing geometrical designs in the form of jewelry.” *Id.* at 1. Citing the *Compendium (Third) of U.S. Copyright Office Practices* (“COMPENDIUM (THIRD)”), Michal Kadar claimed that an arrangement of geometric shapes could be original enough to support a claim, and, as an example, its arrangement of the elements in its jewelry design for the ring was one of “millions of ways in which a center diamond can be surrounded by baguette diamonds in a ring.” Second Request at 2 (citing COMPENDIUM (THIRD) § 906.1). Michal Kadar also alleged that, like the shapes on the cheerleader uniforms addressed in *Star Athletica, LLC v. Varsity Brands, Inc.*, 136 S.Ct. 1823 (2016), the shapes used in its jewelry designs, though common, are nevertheless protectable because “to evaluate jewelry in the narrow fashion exhibited by the Copyright Office’s prior decisions here would exclude almost every jewelry design that has been issued a copyright registration in the past and might be issued a copyright in the future.” Second Request at 3.

III. DISCUSSION

A. The Legal Framework

A work may be registered if it qualifies as an “original work[] of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102(a). In this context, the term “original” consists of two components: independent creation and sufficient creativity. *See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). 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.* Only a modicum of creativity is necessary, but the Supreme Court has ruled that some works (such as the alphabetized telephone directory at issue in *Feist*) fail to meet even this low 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 virtually nonexistent.” *Id.* at 359.

The Office’s regulations implement the longstanding requirement of originality set forth in the Copyright Act and described in the *Feist* decision. *See, e.g.*, 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”); *id.* § 202.10(a) (stating “to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form”). 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 test. *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”). A determination of copyrightability in the combination of standard design elements depends 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.C. Cir. 1989).

A mere simplistic arrangement of non-protectable elements does not demonstrate the level of creativity necessary to warrant protection. For example, the United States District Court for the Southern District of New York upheld the Copyright Office’s refusal to register simple designs consisting of two linked letter “C” shapes “facing each other in a mirrored relationship” and two unlinked letter “C” shapes “in a mirrored relationship and positioned perpendicular to the linked elements.” *Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 496 (S.D.N.Y. 2005). Likewise, the Ninth Circuit has held that a glass sculpture of a jellyfish consisting of clear glass, an oblong shroud, bright colors, 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 language in *Satava* is particularly instructive:

It 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).

Similarly, while the Office may register a work that consists merely of geometric shapes, for such a work to be registrable, the “author’s use of those shapes [must] result[] in a work that, as a whole, is sufficiently creative.” COMPENDIUM (THIRD) § 906.1; *see also Atari Games Corp.*, 888 F.2d at 883 (“[S]imple shapes, when selected or combined in a distinctive manner indicating some ingenuity, have been accorded copyright protection both by the Register and in court.”). Thus, the Office would register, for example, a wrapping paper design that consists of circles, triangles, and stars arranged in an unusual pattern with each element portrayed in a different color, but would not register a picture consisting merely of a purple background and evenly-spaced white circles. COMPENDIUM (THIRD) § 906.1.

Finally, Copyright Office registration specialists (and the Board) do not make aesthetic judgments in evaluating the copyrightability of particular works. *See* COMPENDIUM (THIRD) § 310.2. The attractiveness of a design, the espoused intentions of the author, the design’s visual effect or its symbolism, the time and effort it took to create, or the design’s commercial success in the market places are not factors in determining whether a design is copyrightable. *See, e.g., Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

B. Analysis of the Works

After carefully examining the Works and applying the legal standards discussed above, the Board finds that they do not contain the originality necessary to sustain claims in copyright.

Though the Supreme Court in *Feist* established a low threshold for copyrightability, there is indeed a threshold. There are a wide variety of protectable works, including innumerable protectable jewelry designs, many of which include combinations of common shapes and other public domain element. But not all jewelry designs can surmount the low burden.

The jewelry designs at issue here include very few elements, which are merely minor variations on common shapes (here, circles and rectangles), arranged in an unoriginal manner (either on their own, or evenly spaced around a circle). For instance, the Tu Sole Engagement Ring consists of a round diamond, surrounded by a gold band, with baguette diamonds evenly spaced around it. That combination of elements is commonplace and expected in jewelry designs. Similarly, all of the bracelets, earrings, and necklaces are all perfect circles, either with their outer edge fully encrusted with diamonds, or with baguette diamonds evenly spaced around them. The combinations of elements present in these pieces likewise are commonplace and expected in jewelry designs, and therefore also do not manifest sufficient creativity for copyright protection. *See, e.g., DBC of New York, Inc. v. Merit Diamond Corp.*, 768 F. Supp. 414, 416 (S.D.N.Y. 1991) (holding the diamond rings at issue uncopyrightable because they are “on the whole, not exceptional, original, or unique”); *Todd v. Montana Silversmiths, Inc.*, 379 F. Supp. 2d 1110 (D. Colo. 2005) (holding barbed wire jewelry uncopyrightable because, despite the designer’s “aesthetic choices, the final arrangement of the elements in her jewelry still

corresponds to the arrangement of public domain barbed-wire”); *see also Homer Laughlin China Co. v. Oman*, No. 90 Civ. 3160, 1991 WL 154540 (D.D.C. 1991) (upholding refusal to register chinaware design pattern composed of simple variations of geometric designs due to insufficient creative authorship to support copyright registration). The level of creativity is thus *de minimis* and insufficient to support copyright registration. *Cf.* COMPENDIUM (THIRD) § 313.4(J) (“a work consisting of a simple combination of a few familiar symbols or designs with minor linear or spatial variations” is not copyrightable).

That Michal Kadar could have created different rings is of no consequence. It is not the possibility of choices that determines copyrightability, but rather the resulting expression. *See* COMPENDIUM (THIRD) § 310.8. And the Board examines works individually, applying uniform standards of copyrightability throughout the examination process because differences between any two works can lead to different results. *See* COMPENDIUM (THIRD) § 602.4(C) (“When examining a claim to copyright, the U.S. Copyright Office generally does not compare deposit[s] to determine whether the work for which registration is sought is substantially similar to another work.”); *see also Homer Laughlin China Co.*, 1991 WL 154540, at *2 (stating that court was not aware of “any authority which provides that the Register must compare works when determining whether a submission is copyrightable”); *accord Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 499 (S.D.N.Y. 2005) (indicating the Office “does not compare works that have gone through the registration process”). The other pieces of jewelry to which Michal Kadar points do not persuade the Board that these different works warrant copyright protection.

Overall, the Board finds that the Works are not copyrightable. The level of creative authorship involved in their configuration of elements is, at best, *de minimis*, and too trivial to support copyright registration. *See* COMPENDIUM (THIRD) § 313.4(B).

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the copyright claim in the Works. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action in this matter.



U.S. Copyright Office Review Board

Karyn A. Temple, Acting Register of Copyrights
and Director, U.S. Copyright Office

Sarang Vijay Damle, General Counsel and
Associate Register of Copyrights

Catherine Zaller Rowland, Associate Register of
Copyrights and Director, Public Information and
Education