United States Copyright Office
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August 11, 2009

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RE: ROSETTE BEADED SCULPTURE
COPYRIGHT OFFICE CONTROL NO. 61-421-6974(C)

Dear Mr. Zimmerman:

On behalf of the Copyright Office Review Board I am responding to your request for reconsideration of the Examining Division's refusal to register a copyright claim in a design entitled "Rosette Beaded Sculpture." The Review Board has carefully 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 September 26, 2006, the Copyright Office received from you an application, identifying photographs, and a fee to register the above work on behalf of First Act Inc. By letter dated January 16, 2007, Visual Arts Examiner Rebecca Baker refused registration for this work, stating that it lacks the authorship necessary to support a copyright claim. Ms. Baker 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. Letter from Baker to Zimmerman of 1/16/2007.

B. First request for reconsideration

By letter dated June 7, 2007, you appealed to the Examining Division Ms. Baker's refusal to register "Rosette Beaded Sculpture" and urged its registration at the Division level. You cited *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 347 (1991) for the proposition that the standard of registration of copyright is very low, and even a slight amount will suffice. You stated that the applicant's work is not a familiar symbol or design, and while the work could be dissected into geometric shapes the work was not a basic geometric shape.

While acknowledging that basic geometric shapes are too familiar and common to be original, you asserted that compilations may possess the requisite originality. You contended that the applicant's work was a creative compilation of multiple shapes, most of which were not simple or known geometric shapes. You described the overall shape as approximately circular, but not a circle, with large and small subparts of the work repeated around the perimeter varying in radius and thickness. The small bumps vary in size and are three-dimensional. Taken as a whole, you concluded the work was a compilation of shapes, with more than a modicum of creativity in the shapes chosen, and the order which they are placed and arranged.

After reviewing your first request for reconsideration, Examining Division Attorney Advisor Virginia Giroux-Rollow responded in a letter dated November 20, 2007. She upheld the refusal to register the work on the grounds that it did not contain a sufficient amount of original and creative sculptural authorship in either the treatment or arrangement of the elements. Letter from Giroux-Rollow to Zimmerman of 11/20/07 at 1. She pointed out that it is not the material of which a work is made that determines copyrightability.

Citing *Feist*, she stated that a work must not only be original, but must possess more than a *de minimis* quantum of creativity. *Feist*, 499 U.S. at 363. She elaborated that originality, as interpreted by the courts, means that the authorship must constitute more than a trivial variation of pubic domain elements. Letter from Giroux-Rollow [citing *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951)], at 1-2. She added that because the Copyright Office does not make aesthetic judgments, the attractiveness of a design, its uniqueness, its visual effect or appearance, the time, effect, and expense it took to create, or its commercial success in the marketplace are not factors in the examining process. *Id.*

Ms. Giroux-Rollow then described the work as containing eight identical links, with each link consisting of a minor variation of an "S" shape with the top part of the "S" larger and curled to form a circle with a gemstone in its center. The bottom part of the "S" is smaller and curled to form a smaller circle with a gemstone in its center. The "S" shapes were embellished with a series of beads. She concluded that the sculptural elements themselves lacked sufficient originality and creativity, and the combination and arrangement was too simple a configuration. *Id.* at 1-2.

Ms. Giroux cited a number of cases supporting her conclusion. Such 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); *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-lis held not copyrightable); *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); and *DBC of New York, Inc. v. Merit Diamond Corp.*, 768 F. Supp.414 (S.D.N.Y. 1991)(a simple jewelry design). *Id.* at 2.

Ms. Giroux-Rollow conceded that it is true that even a slight amount of creativity will suffice to obtain copyright protection, but quoted the Nimmer Treatise in support of her refusal. Nimmer provides: "there remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright." 1 M. Nimmer & D. Nimmer, *Nimmer on Copyright*, § 2.01(B) (2002) (*Nimmer*). Likewise, she stated that the Copyright Office agrees with *Thomas Wilson & Co. v. Irving Dorfman Co.*, 433 F.2d 409 (2d Cir. 1970) regarding the modest level of creativity necessary for copyright protection. However, she explained that even the low requisite level of creativity required by *Feist* is not met by the simple "S" shaped design and its arrangement. *Id.* at 3.

In closing, Ms. Giroux-Rollow observed that while there may be other ways in which the elements in these works could have been selected and arranged, it is not the possibility of choices that determines copyrightability, but rather whether the particular resulting expression or product contains copyrightable authorship. She determined that the design elements in these works, 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 Memorandum delivered on February 20, 2008, you appealed for reconsideration to this Board on the grounds that "Rosette Beaded Sculpture" contains the minimal degree of creativity required for registration. You additionally assert that the Attorney Advisor reviewing the case in the first reconsideration impermissibly parsed the work into unregisterable elements, thereby ignoring the creativity of the work as a whole.

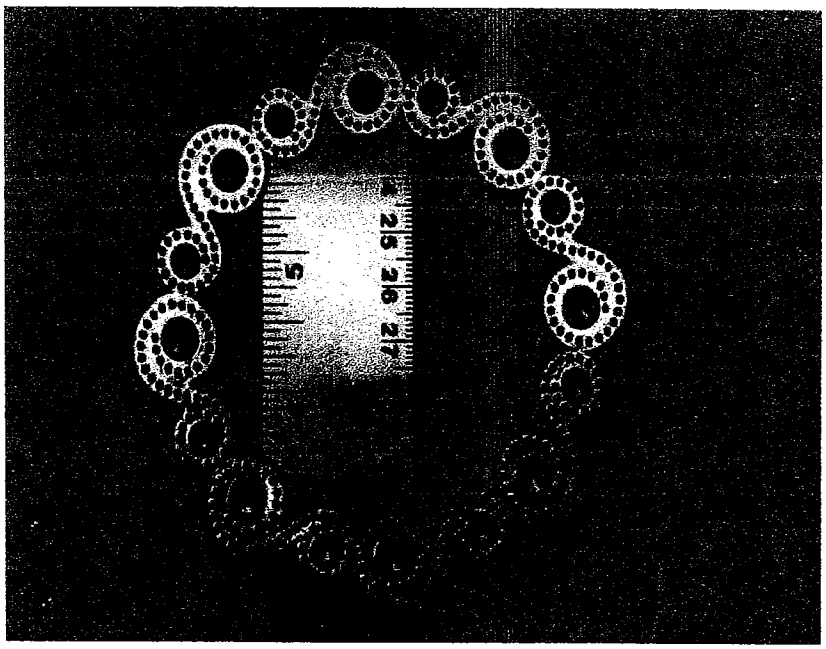
As with your letter for first reconsideration, you begin by citing *Feist* for the proposition that the standard of registration of copyright is very low and even a slight amount will suffice. Legal Memorandum of Zimmerman to the Review Board of 2/20/2008 at 1. You again state that the applicant's work is not a familiar symbol or design, and while the work could be dissected into geometric shapes, the work as a whole is not a basic geometric shape. *Id.* at 1. You assert that the applicant has made many choices. In describing the work you state that the test for the level of creativity is "extremely low," and that "[t]his work clearly possesses at least that extremely low level of creativity." *Id.* at 2. You also state that, taken as a whole, the work is a compilation of shapes clearly possessing more than the slight or extremely low level of creativity necessary to support copyright protection, citing *Atari Games Corp v. Oman*, 979 F.2d 242 (D.C. Cir. 1992). *Id.* at 4.

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.

You state in your Memorandum that while the pattern is repetitive, it is not easily described. Memorandum at 2. The work is essentially a series of figure-eight designs which creates a link. Eight of the links are arranged in a circular pattern. The top and bottom of the figure-eight designs are not uniform in size - one portion is approximately twice the size of the other. In the middle of the link are raised bumps, and gem stones are placed in the middle of each portion of the link. Image of the design are furnished below:



B. The *Feist* standard

The Review Board disagrees with your assertion that a sufficient level of creativity has been met. The Copyright Office applies the *Feist* standard when it considers whether authorship is registrable, that is, whether it is original. The fundamental basis of copyright protection is a work's originality. Although both independent creation and a certain minimum amount of creativity are components of originality, we assume for our analysis that the independent creation prong has been met, and we focus on the second prong of the *Feist* standard. As both you and Ms. Giroux-Rollow have already noted, the requisite quantum of creativity necessary is very low. However, the Supreme Court has stated that there can be no copyright in works in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Feist*, 499 U.S. at 359; *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.") A work that reflects a simple arrangement fails to meet the low standard of minimum creativity required for copyrightability. *Feist,* 499 U.S. at 362-63. Indeed, the work before the Court in *Feist* purported to be a copyrightable combination of elements, but failed to meet the necessary quantum of creative authorship, and was instead found to be a "garden variety" arrangement of noncopyrightable elements. The Court further 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, 499 U.S. at 363.

We do not dispute the fact that decorations such as this can fall within the category of works of authorship that are the general subject matter of copyright. However, not all decorative designs are copyrightable. Additionally, as *Feist* confirms, all works regardless of category must contain a sufficient amount of original and creative authorship to be copyrightable. *Feist,* 499 U.S. at 346 (originality as a constitutional requirement).

In its long-standing registration practices, the Office has consistently recognized and applied the modest, but nevertheless extant, requisite level of creativity necessary to sustain a claim to copyright. The *Compendium of Copyright Office Practices II*, § 202.02(a)(1984) (*Compendium II*) states that: "[w]orks that lack even a certain minimum amount of original authorship are not copyrightable." *Compendium II* further clarifies that for works of pictorial, graphic, and sculptural authorship within which jewelry designs fall, "a certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." *Id.* at § 503.02(a). In applying this standard, courts have consistently found that standard designs, figures, and geometric shapes are not sufficiently creative to meet the required quantum threshold. *Nimmer*, at § 2.01[B], 2-14; *Bailie v. Fisher,* 258 F.2d 425 (D.C.Cir. 1958); *Homer Laughlin China Co., v. Oman,* 22 U.S.P.Q. 2d 1074 (D.D.C. 1991); *OddzOn Products, Inc. v. Oman,* 924 F.2d 346 (D.C. Cir. 1991). *Compendium II,* § 503.02(a) notes that "registration cannot be based on the simplicity of standard ornamentation.... Similarly, it is not possible to copyright common geometric figures or shapes...." Further, "familiar symbols or designs, and mere variations of typographic ornamentation, lettering, or coloring, are not copyrightable." *Id.* at § 202.02(j). No registration is possible where the work consists solely of elements which, individually or collectively, are incapable of supporting a copyright claim. Uncopyrightable elements include common geometric figures or symbols such as a hexagon, an arrow, or a five-point star. *Id.* at § 503.02(a); *see also Bailie v. Fisher,* 258 F.2d at 426 ("Register [of Copyrights] may properly refuse to accept for deposit and registration 'objects not entitled to protection under the law'"); *DBC of New York, Inc. v. Merit Diamond Corp.,* 768 F. Supp. at 416 (upholding a refusal to register a jewelry design of graduated marquise and trillion cut diamonds on a knife-edged shank on the basis of the commonplace symbols and familiar designs); 37 CFR 202.1(a) (familiar symbols or designs "are not subject to copyright and applications for registration of such work cannot be entertained").

The landmark *Feist* decision made it clear that while the standard of originality is low, it does exist. *Feist*, 499 U.S. at 362. In agreement with *Feist*, the Ninth Circuit restated the principle governing the necessary quantum of originality. *See North Coast Industries v. Jason Maxwell, Inc.*,

972 F.2d 1031, 1033 (9th Cir. 1992)(citing *Alfred Bell* ("No large measure of novelty is required... [A]ll that 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.'"); *see also Compendium II,* at § 503.02(a)("[r]egistration cannot be based on a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations.") Similarly, "the 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." *Id.* at § 503.02(b).

C. The works in their entirety

You have asserted that the applicant's work must be taken as a whole. Memorandum at 4. Simple variations of standard designs and their minor arrangement do not support a claim to copyright. Some combinations of common or standard forms contain sufficient creativity in their selection, coordination and arrangement of those forms. *See Feist,* 499 U.S. at 358 (the Copyright Act "implies that some 'ways [of combining uncopyrightable material] will trigger copyright, but others will not," with the determination resting on the presence of creativity in selection, coordination, and arrangement of material); *Atari Games Corp. v. Oman,* 979 F. 2d at 245-56 (a work viewed as a whole may be subject to copyright due to its selection and arrangement of otherwise unprotectible elements); *Diamond Direct LLC v. Star Diamond Group, Inc.,* 116 F. Supp. 2d at 528 ("while component parts are not entitled to copyright protection simply by virtue of their combination into large whole, copyright may protect the particular *way* in which the underlying elements are combined – if the particular method of combination is itself original.") (Emphasis in original).

However, merely combining unprotectible elements does not alone establish creativity where the combination or arrangement is itself simplistic or formulaic or minor in its configuration. For example, in *Jon Woods Fashions, Inc. v. Curran,* 8 U.S.P.Q. 2d 1870 (S.D.N.Y. 1988) the district court upheld the Register's decision that a fabric design consisting of striped cloth over which a grid of 3/16" squares was superimposed, even though distinctively arranged or printed, did not contain the minimal amount of original artistic material necessary to merit copyright protection. Similarly, the Eighth Circuit upheld the Register's refusal to register a simple logo, consisting of four angled lines which formed an arrow and the words "Arrows" in cursive script below the arrow. *John Muller & Co. v. New York Arrows Soccer Team,* 802 F.2d at 989.

In your Memorandum, you recount a number of choices the applicant has made in creating this design. Memorandum at 1-2. However, not all combinations and arrangements of commonplace, simple, or unprotected-in-themselves elements will rise to the level of copyrightable authorship. In *Satava v. Lowry*, the Ninth Circuit held unprotectible sculptural arrangements which combined elements not copyrightable in themselves. 323 F.3d 805 (9th Cir. 2003). The court explained that not "any combination of unprotectible elements automatically qualifies for copyright protection. Our case law suggests, and we hold today, that a combination of unprotectible 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." 323 F.3d at 811.

D. Analysis of the work

The applicant's work consists of eight identical links with each link based roughly on a figure-eight design. The links are connected together in a circular pattern. The Review Board concludes that the copyrightability of this design, if it exists at all, must be determined by the design of a single link. The decision to multiply the link eight times and arrange the links in a circular pattern is simply too trivial.

Looking solely at one link, it is apparent that the link design is relatively simple. In order to emphasize the flowing shape of the link, raised bumps have been placed in the middle of the metal. Two slightly different sized stones are placed in the center of the bottom and top portions. The top and bottom portions of the figure-eight design are of different dimensions. The Board concludes that this combination of these basically simple elements do not add up to an overall composition that rises to the necessary minimum level of creativity.

III. CONCLUSION

The Board has reviewed this design in its entirety and as to its individual elements and 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 Examining Division's refusal to register this design. This decision constitutes final agency action.

Sincerely,

/s/

Maria Pallante
Associate Register,
Policy & International Affairs
for the Review Board
United States Copyright Office