



United States Copyright Office

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August 10, 2017

McNees Wallace & Nurick LLC
Attn: Brian P. Gregg
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Harrisburg, PA 17101

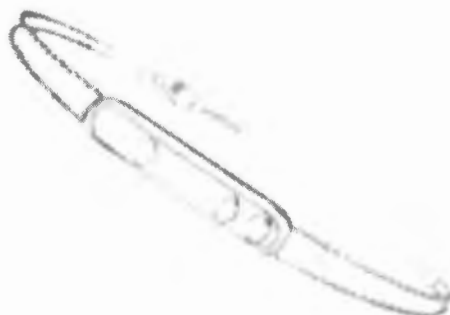
Re: Second Request for Reconsideration for Refusal to Register Move Bracelet; Original Correspondence ID: 1-1GHZLMM; SR 1-2063195164

Dear Mr. Gregg:

The Review Board of the United States Copyright Office (“Board”) has considered Messika Group SA’s (“Messika”) second request for reconsideration of the Registration Program’s refusal to register a jewelry design claim in a three-dimensional work titled “Move Bracelet” (“Work”). 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 WORK

The Work is a gold bracelet consisting of four gold chains connected to a central element that is a stadium shape (i.e., rectangular with rounded short ends). The central element is not solid, and the open center holds three round diamonds in a track; the diamonds move as the bracelet shifts on the wearer’s wrist. Two of the gold chains connect to a hoop that is one of three hoops in a single chain that reaches the clasp. A reproduction of the Work is set forth below.



II. ADMINISTRATIVE RECORD

On December 15, 2015, Messika filed an application to register a copyright claim in the Work. In a March 1, 2016 letter, a Copyright Office registration specialist refused to register the claim, finding that it “lacks the authorship necessary to support a copyright claim.” Letter from Larisa Pastuchiv, Registration Specialist, to Brian P. Gregg (March 1, 2016).

In a letter dated May 27, 2016, Messika requested that the Office reconsider its initial refusal to register the Work. Letter from Brian P. Gregg to U.S. Copyright Office (May 27, 2016) (“First Request”). Specifically, Messika argued that evaluating the Work as a whole “reveals numerous elements which are arranged in a creative way so as to satisfy the requisite threshold for creativity.” *Id.* at 2. After reviewing the Work in light of the points raised in the First Request, the Office re-evaluated the claims and again concluded that the Work reflected “an expected and basic configuration that is common to jewelry and demonstrates insufficient creativity.” Letter from Stephanie Mason, Attorney-Advisor, to Brian P. Gregg, at 3 (Nov. 10, 2016).

In a letter dated January 19, 2017, Messika requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Work. Letter from Brian P. Gregg to U.S. Copyright Office (Jan. 19, 2017) (“Second Request”). In that letter, Messika incorporated and resubmitted the text from its First Request. *Id.* at 2–4. Messika also added the argument that the Work does not fall within the “narrow area,” described in Nimmer’s treatise and mentioned in the Office’s response to the First Request, covering independent creations that are “too trivial or insignificant” to support copyright protection. *Id.* at 1.

III. DISCUSSION

A. *The Legal Framework – Originality*

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 that “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 satisfy this test. *See Feist*, 499 U.S. at 358 (finding that 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.

B. Analysis of the Work

After carefully examining the Work and applying the legal standards discussed above, the Board finds that the Work does not contain the requisite authorship necessary to sustain a claim to copyright.

Messika asserts a copyright claim in a jewelry design. Messika argues that the Work includes numerous elements that individually “express[] creative authorship” and that, taken together, “the Work reveals numerous elements which are arranged in a creative way so as to satisfy the requisite threshold for creativity.” Second Request at 3. Messika draws particular attention to the central element and the band. Specifically, Messika claims that the central element demonstrates creativity in several ways: by being comprised of “an unusual central elongated shape that is not a simple geometric shape,” by placing three diamonds within the central element’s internal channel, and by the cut, shape, and number of inlaid diamonds. Second Request at 3. The band, Messika states, is unusual in that it has four points of connection, rather than just two at opposite sides of the central element, and that each side of the band is slightly different.

Messika correctly notes that the standard for copyright protection articulated in *Feist* is a low bar—requiring a mere “modicum” or “scintilla” of creativity. Second Request at 1 (quoting *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904, 908 (3d Cir. 1975); *Luck’s Music Library, Inc. v. Ashcroft*, 321 F. Supp. 2d 107, 118 (D.D.C. 2004)). But *Feist* also makes clear that some works do not satisfy the modicum or scintilla of creativity—“the creative spark is utterly lacking or so trivial as to be virtually nonexistent.” *Feist*, 499 U.S. at 359. Jewelry designs often qualify for copyright protection, but to do so a jewelry design must be sufficiently creative or expressive. See COMPENDIUM (THIRD) § 908.2. Combining numerous unprotectable elements will not necessarily result in a copyrightable jewelry design. See *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 109–10 (2d Cir. 2001).

Messika’s Work is not sufficiently creative. Neither the central element, nor the band, nor any other element of the Work demonstrates the necessary authorship, whether evaluated individually or in the aggregate.

Messika focuses on two elements of the design: the central element and the band. Messika claims that the central element does not implicate copyright’s bar on common geometric shapes, see COMPENDIUM (THIRD) § 906.1, because it is neither a rectangle nor a circle and therefore “not a single geometric shape.” Second Request at 2. However, the central element is, in fact, a common geometric shape. It is an oblong shape similar to an athletic track; indeed, the shape is known as “stadium.”¹ Inlaying the diamonds inside the central stadium element does not transform it from a common geometric shape or constitute a sufficiently creative variation on


¹ See *Stadium*, MATHWORLD (last visited July 13, 2017), <http://mathworld.wolfram.com/Stadium.html>. Another name for this geometric shape is “discorectangle.” Joachim Dzubiella et al., *Topological Defects in Nematic Droplets of Hard Spherocylinders*, 62 PHYSICAL REV. E 5081, 5082–83 (2000).

that shape. Moreover, while the placing of diamonds in a track to create a dynamic design may be expressive, here the creativity demonstrated is insufficient to support copyright. The fact that a design is dynamic is not enough, by itself, to confer copyright protection. *Cf. OddzOn Products, Inc. v. Oman*, 924 F.2d 346 (D.C. Cir. 1991) (upholding the Copyright Office’s discretion to refuse to register a ball that had a dynamic spherical shape that changed when held or set down). The Work’s band similarly represents common and familiar shapes. And minor variations of common and familiar shapes, such as hoops on one side of the band, do not make the common and familiar shapes copyrightable. *See* 37 C.F.R. § 202.1.

Additionally, the Board does not agree with Messika’s claim that “[t]he creative arrangement of shapes, asymmetrical band and placement of moving diamonds . . . embody at least the modicum or scintilla of creativity necessary,” Second Request at 2. As the Ninth Circuit stated in *Satava*, “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.” 323 F.3d 805 at 811. Here, the Work is comprised of common shapes placed in a common arrangement: the central element holds the gems, and the band connects to the central element. These contributions are, at most, *de minimis* and, therefore, do not demonstrate the requisite creativity. *See Feist*, 499 U.S. at 363.

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 Work. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action in this matter.

BY: 
Chris Weston
Copyright Office Review Board