United States Copyright Office
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March 20, 2017

Howard Rockman
Law Offices of Howard B. Rockman, P.C.
525 W Monroe Street, Suite 2360
Chicago, IL 60661

Re: Second Request for Reconsideration for Refusal to Register Star Brilliant Cut 57 Facet Diamond, Correspondence ID: I-YX6QVV; SR# 1-1069429181

Dear Mr. Rockman:

The Review Board of the United States Copyright Office (the "Board") has examined Sadamatsu Company Limited's ("Sadamatsu") second request for reconsideration of the Registration Program's refusal to register a copyright claim in the work titled "Star Brilliant Cut 57 Facet Diamond" (the "Work"). After reviewing the application, the deposit copy, and the relevant correspondence, along with the arguments in the second request for reconsideration, the Board affirms the Registration Program's denial of registration of this copyright claim.

I. DESCRIPTION OF THE WORK

The Work is a design of a cut diamond with fifty-seven facets, or flat faces of the stone. The diamond is comprised of the flat top surface area (the "table"), twenty-five facets on the top portion of the diamond (the "crown"), thirty facets on the cone-shaped lower part of the stone (the "pavilion"), as well as the bottom tip of the stone (the "culet"). The Work's facets are a collection of triangles, quadrilaterals, and a decagon. Looking down at the Work from the table and crown shows a large five-point star with a smaller five-point star in the larger star's center.

Photographic reproductions of the Work are included as Appendix A.

II. ADMINISTRATIVE RECORD

On December 12, 2013, Sadamatsu filed an application to register a copyright claim for "jewelry design" in the Work. In a letter dated April 29, 2014, a Copyright Office registration specialist refused to register the Work, finding that it "lacks the authorship necessary to support a copyright claim." *See* Letter from Kathryn Sukites, Registration Specialist, to Howard Rockman, Law Offices of Howard B. Rockman, P.C. (April 29, 2014).

The letter stated that the Work does not possess sufficient creative authorship within the meaning of the copyright statute and settled case law to support a claim to copyright. *Id.*

In a letter dated September 26, 2014, Sadamatsu requested that the Office reconsider its initial refusal to register the Work. *See* Letter from Howard Rockman, Law Offices of Howard B. Rockman, P.C., to U.S. Copyright Office (Sept. 26, 2014) ("First Request"). After reviewing the points raised in the First Request, the Office reevaluated the claims and in a letter dated February 3, 2015, again concluded that the Work does not contain a sufficient amount of original and creative artistic or graphic authorship to support a copyright registration. *See* Letter from Gina Giuffreda, Attorney Advisor, to Howard Rockman, Law Offices of Howard B. Rockman, P.C. (Feb. 3, 2015).

In a letter dated June 1, 2015, Sadamatsu requested that, pursuant to 37 C.F.R. § 202.5(c), the Office again reconsider its refusal to register the Work. *See* Letter from Howard Rockman, Law Offices of Howard B. Rockman, P.C., to U.S. Copyright Office (June 1, 2015) ("Second Request"). In its Second Request, Sadamatsu disagreed with the Office's conclusion that the Work does not include the minimum amount of creativity required to support registration under the Copyright Act. Specifically, Sadamatsu claimed that the Work contains a new and complex arrangement and coordination of facets selected and created by skilled craftspeople. *Id.* at 1. Sadamatsu further maintained that it is not seeking registration of the double star image itself but of a sculptural work whose shape, selection, coordination, and arrangement of the facets they claim comprises an original work of authorship. *Id.* at 2, 6.

III. DECISION

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 "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 OF U.S. COPYRIGHT OFFICE PRACTICES § 906.1 (3d ed. 2014) ("COMPENDIUM (THIRD)"); *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 marketplace 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 Work

After carefully examining the Work and applying the legal standards discussed above, the Board finds that the Work fails to satisfy the requirement of creative authorship necessary to sustain claims to copyright.

Here, Sadamatsu asserts a copyright claim in a faceted gemstone with fifty-seven facets. That claim, however, runs headlong into the established position of the Copyright Office that "faceting of individual stones (*i.e.*, gem-cutting)" is "generally not copyrightable" or "considered in analyzing copyrightability" of works incorporating gemstones. COMPENDIUM (THIRD) § 908.3. In part, this reflects the principle that copyright protection does not extend to any procedure, process, or method for doing, making, or building items. *See* 17 U.S.C. § 102(b). The "faceting" of a gemstone is a mechanical process that allows the stone to reflect light in particular ways.[1] Here, it appears that Sadamatsu is attempting to assert a copyright claim in the faceting *technique* by registering a gemstone cut *using* that technique; to that extent, the claim must be rejected under section 102(b).

In addition, even setting aside the problem that a claim in "faceting" in and of itself would be barred by section 102(b), the Work here—which is the result of a particular faceting technique—does not demonstrate sufficient creativity to qualify as a copyrightable work of authorship under section 102(a).

As an initial matter Sadamatsu acknowledges that copyright protection is available, if at all, only for the Work's "creative appearance, and not for a reward for hard work." Second Request at 10. But many of Sadamatsu's arguments focus on the faceting process used to develop the Work. For instance, Sadamatsu's Second Request, as well as accompanying declarations from individuals involved in the Work's development, describe the Work's design process in great detail. First, the design team "form[ed], or polish[ed]" a

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[1] *See* Donald Clark, *Lapidary Fundamentals: Gemstone Faceting*, INTERNATIONAL GEM SOCIETY, https://www.gemsociety.org/article/lapidary-fundamentals-gemstone-faceting/.

smaller star shape on the culet of the gemstone. Second Request at 3. Next, the larger star was formed by a process that turned "the apexes of the smaller star into concave angles." *Id.* After the prototype was "polished" the star shapes were not crisp enough and the stone lacked sufficient brilliance, so the design team "repeatedly adjusted the facet points and angles of each facet to be polished" until a sharp double star and acceptable brilliance were achieved. *Id.* at 3-4. This extensive "trial-and-error process" involved "continually selecting, revising, and reworking the facet" shapes, coordination, and arrangements. *Id.* at 4. Sadamatsu details the Work's creation in an effort to highlight that "acts of sculptural authorship" and "substantial creative efforts" took place to create the Work's cut. First Request at 5; Second Request at 2.

While the Board appreciates the amount of labor that went into the Work's creation, our examination focuses on a work's appearance and not on the amount of time, effort, or expense undertaken. *See* COMPENDIUM (THIRD) § 310.7. *See also Sophia & Chloe, Inc. v. Brighton Collectables, Inc.*. No. 12-CV-2472-AJB-KSC, 2016 U.S. Dist. LEXIS 182644, at *12, (S.D. Cal. Mar. 21, 2016) (noting that plaintiff's devotion of "much time and effort to designing jewelry featuring a common shape does not transform [the common shape] into copyrightable expression"). Accordingly, Sadamatsu's description of the Work's development does not persuade the Board that the Work contains sufficient copyrightable authorship.

Turning to our examination of the Work's appearance, jewelry that *incorporates* cut gemstones may be considered copyrightable if the design is sufficiently creative. But, even then, certain jewelry designs are considered *de minimis*, rendering the design uncopyrightable. Examples include solitaire rings, simple diamond stud earrings, and commonly used gemstone cuts. *See* COMPENDIUM (THIRD) § 908.2. Here, the Work shows even less creativity—it is a cut gemstone consisting exclusively of facets in common geometric shapes.

Sadamatsu notes that it is not seeking to register either the individual facets or the double star image resulting from the faceting, but the shape, selection, coordination, and arrangement of the facets that make up the design as a whole. Second Request at 6. The First Request points out that the most common diamond design is the fifty-eight facet "round brilliant" cut, with common modifications being the modern round brilliant, passion, marquise, heart, square, emerald, triangular trillion, oval, and pear cuts. *See* First Request at 3. According to Sadamatsu, the main feature of the Work that distinguishes it from the round brilliant design is "a large [five-point] star, and a small [five-point] star appearing at the center of the large star when looking top down from the diamond through the table and crown." *Id.* at 3. Understanding that a double five-point star image on its own is uncopyrightable as a familiar design and basic geometric shape—*see* 37 C.F.R. § 202.1(a); *see also* COMPENDIUM (THIRD) §§ 906.1, 906.2—Sadmatsu emphasizes that it is not attempting to register the two star image itself, but the arrangement of facets that produce the image. Second Request at 2, 8. The double star image "is <u>not</u> the shape of the diamond,

but the image created by the reflection of light in the surface of the table of the diamond." *Id.* at 8. These arguments do not persuade the Board.

It is clear that the Work's craftsmen were skilled and went to great lengths to produce the double star image, but the authorship involved in selecting, coordinating, and arranging the facets must be objectively revealed in the deposit submitted to the Copyright Office. *See* 17 U.S.C. § 410(a) (requiring the Office to assess whether "the material deposited constitutes copyrightable subject matter"); *see Feist*, 499 U.S. at 358 ("Originality requires only that the author make the selection and arrangement independently … and *that it display* some minimal level of creativity.") (emphasis added). Given the deposited material, the Board cannot examine how light is reflected between the facets (*see* Second Request at 3), nor structural and faceting differences between the Work and the standard round brilliant cut. *See id.* at 4 (discussing differences in symmetry, facet formation in ten rather than sixteen divisions, and facet shape). What the Board sees is a collection of facets in common geometric shapes and a double five-point star image. Indeed, from what the Board is able to tell, the Work—with its 57 facets—is *not* a "significant variation[]" on the 58-faceted traditional round brilliant design, Second Request at 1; the major differences between the two cuts are attributable to the faceting process and not the overall physical appearance of the work.

Finally, while it is true that works may be copyrightable if their selection, arrangement, or modification reflects choice and authorial discretion that is not so obvious or so minor that the "creative spark is utterly lacking or trivial as to be nonexistent," (*Feist*, 499 U.S. at 359), the compilation of the Work's fifty-seven individual facets does not rise to this level. Thus, the Office finds that the level of creative authorship involved in this configuration of unprotectable elements is, at best, *de minimis*, and too trivial to enable 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 claims 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

APPENDIX A

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【書類名】　図面

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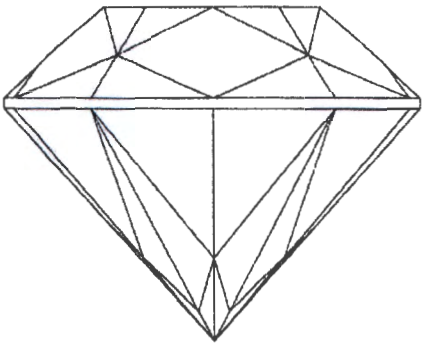

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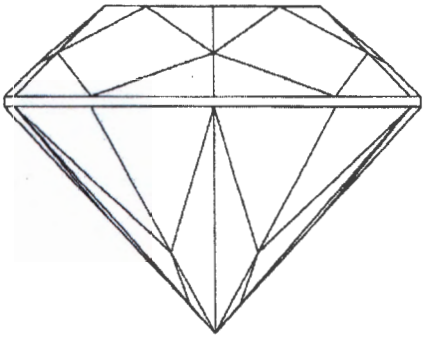

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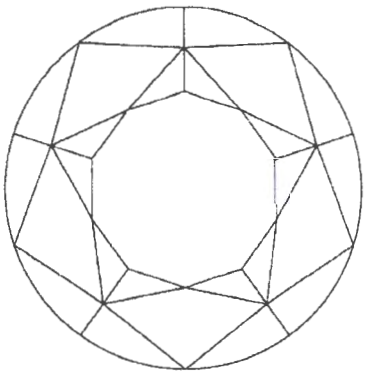

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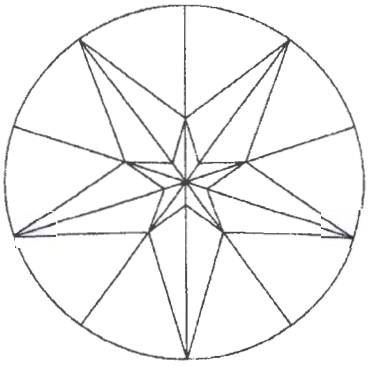

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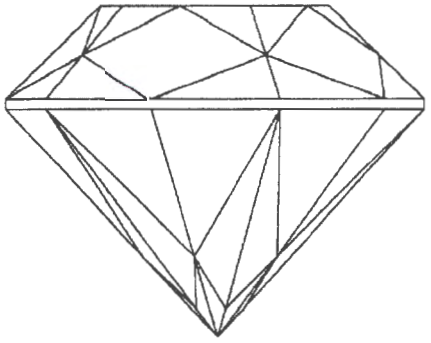

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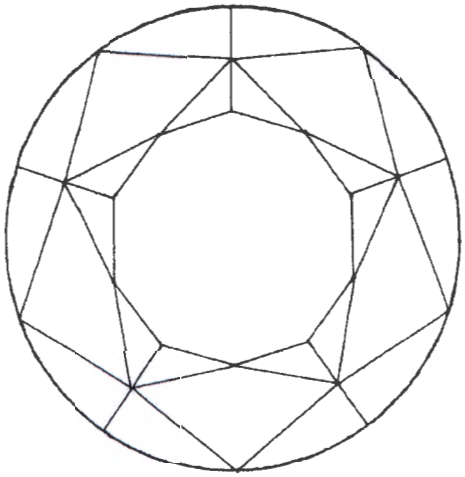

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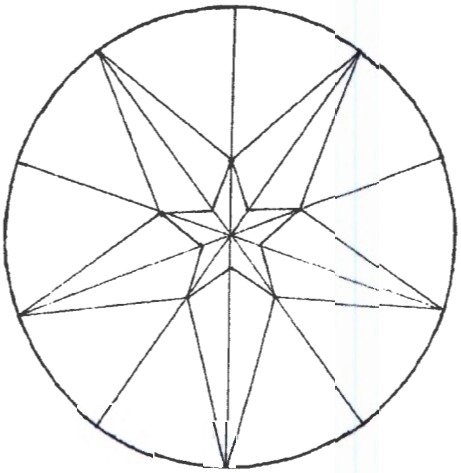
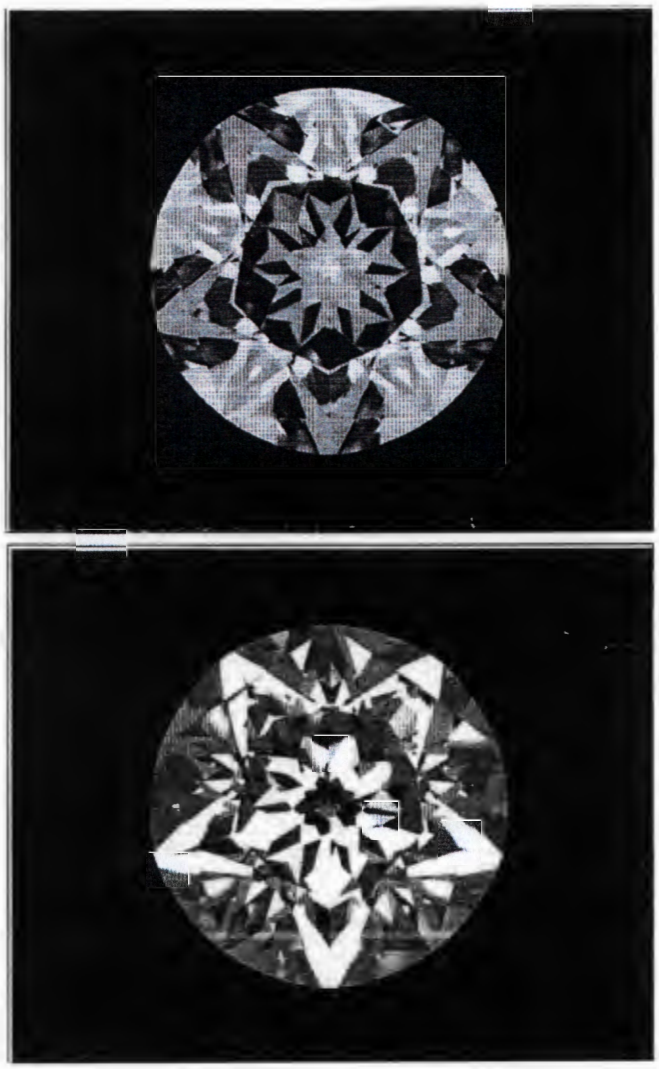
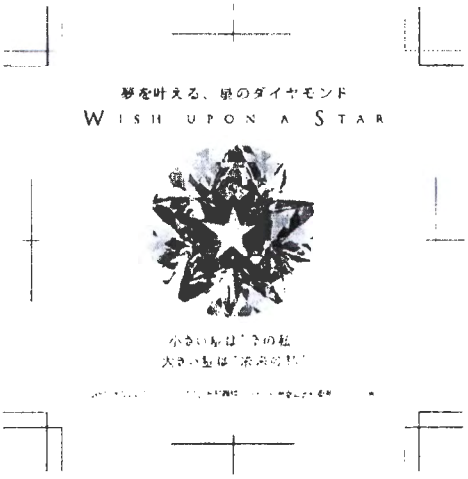


Star Brilliant Cut
57 Facets




夢を叶える、星のダイヤモンド
WISH UPON A STAR

OBTAINING U.S. COPYRIGHT REGISTRATION FOR THE ELARA SQUARE CUT-CORNERED BRILLIANT DIAMOND

Howard B. Rockman

In 2000, the U.S. Copyright Office granted what is believed to be the first copyright registration covering a gemstone design. Previously, the Copyright Office maintained that cut designs lacked artistic or sculptural authorship, and that gemstone faceting was a non-copyrightable array of common geometrical shapes in a three-dimensional object. The application to obtain copyright registration for the Elara—a square cut-cornered brilliant diamond design—was initially rejected on similar grounds. However, the position of the copyright examiner was successfully appealed to the highest level of the Copyright Office, which ultimately decided that copyright registration for the Elara cut was appropriate. This experience shows that there may be a new intellectual property vehicle available for manufacturers to protect proprietary cut designs.

A recent *Gems & Gemology* article (Overton, 2002) stated that U.S. federal courts require more original artistic expression to establish a copyright than exists in diamond cut designs. While court decisions may presently indicate that gemstone designs are not copyrightable, the U.S. Copyright Office recently issued copyright registration No. VA-1-104-147 (effective June 29, 2000) for the Elara square cut-cornered brilliant diamond cut (figure 1), produced and marketed by Kuwayama Europe of Antwerp, Belgium, and its U.S. affiliate, Elara Diamond U.S.A. According to the U.S. Register of Copyrights, the Elara diamond cut is the first gemstone design the Copyright Office has ever registered (M. Peters, pers. comm., Nov. 6, 2001). This article summarizes the background and history of the Elara copyright registration process.

THE COPYRIGHT REGISTRATION PROCESS

U.S. copyright law protects works of "authorship" such as books and movies, as well as sculptures, computer programs, photographs, and myriad additional media that continually develop as art and technology advance (see U.S. Code, Title 17; information in this article is drawn from that source). The copyright holder has the exclusive right to control reproduction of the expression embodied in his or her artistic creation after it has been fixed in a tangible medium such as the print in a book, the images on a reel of film, or the electronic pattern on a computer disc, CD, or DVD. This includes control over copying of the work, the preparation of derivative works, distribution of copies to the public, public performance, and public display. Only the copyright holder can sell or license these rights to other persons or entities. The term of a copyright begins at the moment of fixation in a "tangible medium of expression" and currently runs for the life of the author plus 70 years. In the case of "works for hire" (those created by employees for their employers or by outside authors working under a written contract), it runs for a total of 95 years.

When considering a work comprised of several elements, such as the facets of a gemstone design, the existence of copyright rests on the originality inherent in the coordination or arrangement of those specific elements that, in total, comprise the new design. While individual components may not be protected

See end of article for About the Author and Acknowledgments.
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Figure 1. The Elara diamond is the first diamond cut design to be awarded a U.S. copyright registration. Courtesy of Elara Diamond Corp.

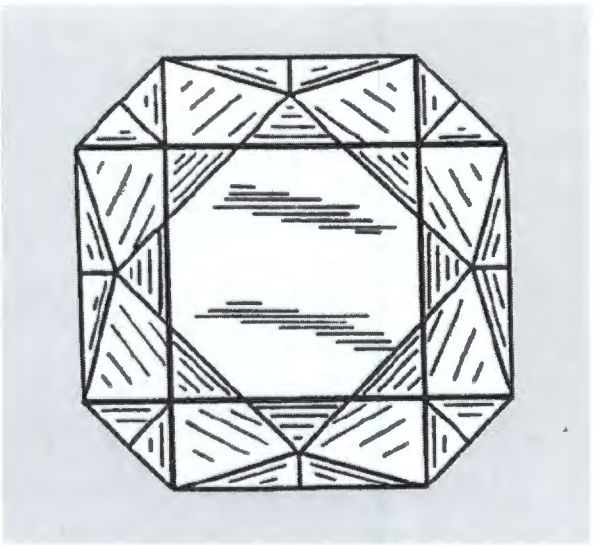

Figure 2. This facet diagram shows the top view of the design of the Elara cut as registered with the U.S. Copyright Office.

by copyright, such protection may be triggered by the particular way in which the underlying elements combine to arrive at the finished design. It is the originality of arrangement that determines whether or not it is eligible for copyright protection. In other words, while the squares, triangles, and parallelograms that make up a gemstone facet design may not be individually protectable by copyright, an original and innovative arrangement of them may be protectable.

At any time during the term of a copyright, the copyright owner may seek federal registration of his or her claim by applying to the U.S. Copyright Office, paying the designated fee, and depositing a specimen of the work with the application. A copyright examiner will review the application to ensure that it covers a work that is indeed copyrightable subject matter under the law. If all requirements are correctly set forth in the application, and the submitted specimen establishes that the work constitutes copyrightable subject matter, a Certificate of Registration is issued. If the examiner makes a negative finding on any of these issues, registration is refused. This refusal may be appealed to a first level and, if necessary, to a second, higher level within the Copyright Office.

One can hold and own (and transfer and license) a copyright without obtaining registration for it, but a copyright owner must obtain federal registration before taking action to enforce the copyright against an infringer. However, an infringement action can be brought if a copyright registration application has been filed but refused, as long as a copy of the infringement complaint is furnished to the Copyright Office. In addition, the timing of the registration application after first publication affects the type of damages that may be recovered. In most foreign countries, there is no comparable registration system; thus, no prior registration is required to enforce a copyright outside the U.S.

FIRST APPLICATION FOR REGISTRATION OF THE ELARA DIAMOND AND FIRST APPEAL

The copyright registration procedure for the Elara diamond began on June 29, 2000, when an application (with photos) was filed on behalf of Kuwayama Europe, covering a gemstone design (see figure 2) then known as the Flanders Brilliant (since changed to Elara).

The Copyright Office initially rejected the application (J. H. Ashley, pers. comm., Nov. 13, 2000) and repeated its refusal to register following a request for reconsideration (the first appeal; V. Giroux, pers. comm., May 25, 2001). It stated that the diamond design lacked the artistic or sculptural authorship necessary to support a copyright registration, and based its conclusions on several factors.

First, the examiner believed that the subject of registration was the *process* of faceting the gem, and ideas, concepts, and processes that may be embodied in a work are not subject to copyright protection (see U.S. Code title 17, section 102[b]).

Second, to meet the originality requirement for copyright registration, a work must possess more than a *de minimis* level of creativity. The examiner

held that, as discussed above, copyright law does not protect familiar geometric shapes or patterns, nor minor variations of them (see Code of Federal Regulations, title 37, section 202.1), and that it was normal procedure to refuse registration for gemstones when the faceting may be perceived to be a combination of standard or common geometrical shapes in three-dimensional form.

Third, the Copyright Office analyzed the design for copyrightability in two ways. First, the top, bottom, front, and side views were treated as separate designs. Second, the entire gemstone was considered as a whole entity. The examiner found insufficient originality in either of these analyses, stating that the overall arrangement of the facets, taken individually or as a unified whole, did not constitute a copyrightable work.

Fourth, the Copyright Office stated that while a work may be unique and distinctive, while considerable time, effort, and expense may have gone into its creation, or while it may be commercially valuable or successful, these facts do not in themselves establish original artistic authorship (V. Giroux, pers. comm., May 25, 2001).

THE SECOND APPEAL

Prior to receiving the action and comments of the copyright examiner, the creator of the design, Johan d'Haene of Antwerp, had explained to the author the precise steps he took to create the Elara cut. His ultimate aim was to incorporate into a square cut-cornered diamond shape as many of the optical qualities of the round brilliant as possible. Based on this information, the author judged that sufficient creativity and authorship existed in the design to support a second appeal in an effort to reverse the decision of the copyright examiner. On August 1, 2001, the author submitted a response and request for reconsideration of the refusal to register the copyright claim in this design.

The appeal was based on two grounds. First, it maintained that the Elara cut possessed sufficient creative authorship in the origination of its design. Second, it confirmed that registration was not being sought to cover the *process* by which the facets were applied to the rough diamond. Instead, the author argued that the steps taken in extrapolating the standard round brilliant to the Elara design constituted acts of *sculptural authorship*.

The appeal began by describing the basics of the round brilliant cut, as described in Tolkowsky (1919), for maximizing brilliance and fire. As a foundation for the creativity and authorship behind the Elara design, the author's brief set forth Mr. d'Haene's extensive experience with De Beers and the Diamond High Council (HRD) in Antwerp. During the 1980s, while a partner of a Belgian company engaged in selecting and buying diamonds for the Japanese market, he saw the need to design new diamond cuts for Japanese tastes, one of which involved the concept of "squaring the circle."

In creating this design, certain crown facet lines were extended outside of the original circle and connected to form a new, square outline with cut corners, the pattern repeating itself for each quadrant of the crown. The final cut evolved from trial and error through several different designs. The results of Mr. d'Haene's design efforts are shown in figure 2.

ARGUING THE APPEAL

In pressing the appeal, we argued that each step in the creation of the Elara cut was the result of artistic design efforts, including personal independent creative thoughts that led to certain facet arrangements. We established that design, in this particular case, went far beyond the level of creativity required to support copyright registration. We also specifically pointed out that the final design was motivated in substantial part by an attempt to create an original work that would convey a visual impression that had not been seen before. Moreover, it would present a markedly different visual image compared to other diamond designs on the market at that time. We also argued that the design retained a significant degree of the brilliance that can be produced by the round brilliant cut.

The description of the specific design steps also supported our contention that the design was not based on a familiar geometric shape, but a combination of facet shapes in a specific, complex arrangement providing the finished design with its unique character. We argued that the creative expression embodied in the design was capable of standing alone as an independent copyrightable work, and not an agglomeration of several standard forms or shapes with minor linear or spatial variations. We specifically pointed out to the Copyright Office that the design comprised originality of facet coordination and arrangement, whereby the shape and position of each facet in the total design coordinated with other facet shapes and positions to provide an eye-catching attractive design.

The requisite authorship for copyright registration was shown to be the particular steps taken in

the extrapolation of the round brilliant to the square brilliant design, as a result of the effort and thought of Mr. d'Haene. We argued that the totality of the subject diamond design, considered as a whole, produces an aesthetic effect and appearance that conveys to the viewer the beauty of design.

THE DECISION

On November 6, 2001 (M. Peters, pers. comm.), the Register of Copyrights responded to our appeal as follows:

> After careful consideration, the Copyright Office Board of Appeals has decided to register the Flanders Brilliant (ELARA) diamond. The registration is only for the three-dimensional faceted stone because of the complexity of the overall sculptural configuration. We rarely see such complexity in gemstones used in jewelry design, and we cannot recall previously making such a registration. The registration of course does not cover any aspect of the faceting process.

In its letter, the Copyright Office also noted that courts have held that copyright protection in this type of work may be limited, particularly where the copyrightable work comprises a unique combination and arrangement of otherwise un-copyrightable elements in the particular design. This means that copyright protection only extends to the design as a whole; others may freely use the individual, un-copyrightable, elements to come up with a new gemstone design having a different overall design and appearance.

CONCLUSION

It remains to be seen whether the Copyright Office's determination that certain gemstone designs embodying acts of creative authorship are copyrightable subject matter will be followed by the U.S. federal courts, which have the inherent power to overturn such decisions. And since this is the first gem design to be registered, it is also unclear where the courts will draw the line on infringement, that is, how close competitors may come to a copyrighted gem design without infringing on the copyright. Another unanswered issue is the degree to which published, and thus copyrighted, collections of faceting diagrams for hobbyists provide protection for the designs therein.

Gemstone designers hoping to apply for copyright registration for a new design should record the mental, geometric, artistic, and analytical processes leading to the final design in order to support a conclusion of creative and artistic authorship. It would probably be helpful to retain all preliminary drafts of sketches, drawings, and calculations prepared during the design process, should it be necessary to respond to a denial of registration based on a lack of creative authorship. An applicant must also be able to describe how his or her new design differs from existing gemstone designs.

The copyright registration that was obtained by Kuwayama Europe n.v. and Elara Diamond USA, provides its owners with the ability to prevent others from copying the Elara diamond design in their own gemstone products. (Although the Elara design patent is currently being challenged in a U.S. federal court case [see "Elara diamond design patent invalidated. . . ," 2003], this case has no bearing on the validity of the copyright.) Kuwayama believes that it fully understands the limitations of the copyright protection afforded by its registration. Nevertheless, the copyright registration obtained on the Elara cut is a pioneering example of how creative authorship, originality, and creativity can combine to produce a gemstone design that meets the requirements of the U.S. copyright laws to support copyright registration.

ABOUT THE AUTHOR

Mr. Rockman (hrockman@btlaw.com) is an intellectual property attorney with the Chicago law firm of Barnes & Thornburg. As counsel for Kuwayama Europe n.v. of Antwerp, Belgium, he was instrumental in obtaining the U.S. Copyright registration for the Elara gemstone design.

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