



**United States Copyright Office**

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January 24, 2017

***Via US First Class Mail***

Scott Kelley, Esq.  
Kelly & Kelley, LLP  
6320 Canoga Avenue, Suite 1650  
Woodland Hills, CA 91367

**Re: Second Request for Reconsideration for Refusal to Register Nexus;  
Correspondence ID: 1-11V5OQ3; SR# 1-2500688671**

Dear Mr. Kelley:

The Review Board of the United States Copyright Office (“Board”) has considered Spinelli Kilcollin’s (“Kilcollin’s”) second request for reconsideration of the Registration Program’s refusal to register a jewelry design claim in the work titled “NEXUS” (“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 piece of jewelry, namely five metal rings connected to each other in a chain by smaller metal connector rings. The rings have different ornamentation on them (e.g., textures, stones, metals) and can be stacked to be worn on just one finger, or stacked differently to be worn on multiple fingers. The Work is depicted in Appendix A.

**II. ADMINISTRATIVE RECORD**

On June 29, 2015, Kilcollin filed an application to register a copyright claim in the Work. In an October 29, 2015 letter, a Copyright Office registration specialist refused to register the claim, finding that the Work “lack[s] the authorship necessary to support a copyright claim.” Letter from Robin Jones, Registration Specialist, to Scott Kelley (Oct. 29, 2015).

In a letter dated January 11, 2016, Kilcollin requested that the Office reconsider its initial refusal to register the Work. Letter from Scott Kelley to U.S. Copyright Office (Jan. 11, 2016) (“First Request”). 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 “does not contain a sufficient amount of original and creative authorship to support a copyright registration.” Letter from U.S. Copyright Office to Scott Kelley (April 21, 2016).

In a letter dated June 6, 2016, Kilcollin 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 Scott Kelley to U.S. Copyright Office (June 6, 2016) (“Second Request”). In that letter, Kilcollin claimed that “too much emphasis was placed on the individual components that make up the ring without considering the author’s unique creative expression found in its entirety.” Second Request at 1. Citing *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 110 (2d Cir. 2001), Kilcollin argued that the way an author recasts and arranges jewelry elements in the source of originality, and that Kilcollin made creative choices that together meet the low bar creativity bar required for registration. Second Request at 1-2.

### 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.

## **B. Analysis of the Work**

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

The Board accepts that the Work satisfies the first prong of the originality requirement, independent creation. The Work, however, lacks sufficient creativity to satisfy the second prong. Considering the elements of the Work individually or as a whole, the Work is a simple, minor variation on common shapes or symbols consisting of a few geometric shapes arranged in an obvious manner. *See, e.g., 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).

In making its determination, the Board adheres to the standard set forth in *Feist*, where the Supreme Court held that only a modicum of creativity is necessary to support a copyright. The Review Board agrees that public domain elements and/or commonly known shapes can be combined to create copyrightable works as long as such use constitutes more than a trivial variation of such elements, *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 103 (2d Cir. 1951), and the combination meets the minimal standard of creativity.

Nevertheless, the Work is not protectable because it is made up of only a very few elements, which are merely minor variations on common shapes, arranged in an unoriginal manner. Each of the individual rings in the chain is wholly uncreative; the rings are either plain bands, or are comprised of stones distributed evenly around a metal band. Furthermore, simply linking these unexceptional individual rings into a chain does not demonstrate sufficient creativity to warrant copyright protection. While the combination's result may or may not be novel or unique, so few common shapes and symbols combined in this way cannot together generate a protectable work. Regardless of how much artistic consideration there may have been in determining what kind of metal or embellishment to use on each ring, the Copyright Office must evaluate the final work, not the possible choices and considerations. The Board therefore has determined that the elements in the Work are minor variations on common shapes, and the few elements present in the Work have been arranged in a way that is familiar to sets of stacking rings. The level of creativity therefore is *de minimis* and insufficient to be copyrightable. *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).

Similarly, it is not the possibility of choices that determines copyrightability, but whether the resulting expression contains copyrightable authorship. *See* COMPENDIUM (THIRD) § 310.8. The Board finds that the Work here, upon examination of its elements individually and as a whole, does not contain a sufficient amount of original and creative authorship to sustain a copyright claim. That an author had many choices available does not necessarily mean that the one the author selected meets even the modest creativity requirement of the copyright law.

#### 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: Catherine Rowland  
Catherine Rowland  
Copyright Office Review Board

# APPENDIX A

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