



United States Copyright Office

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September 27, 2016

Katherine L. McDaniel
Fulwider Patton LLP
Howard Hughes Center
6060 Center Drive, Tenth Floor
Los Angeles, CA 90045

**Re: Second Request for Reconsideration for Refusal to Register What is in Your Soul—Round Locket, What is in Your Heart Linx Lockets—Round Watch, and What is in Your Heart Linx Lockets—Round Locket with Bail;
Correspondence ID: 1-WIFQCV**

Dear Ms. McDaniel:

The Review Board of the United States Copyright Office (“Board”) has considered Linx Bracelets, Inc.’s (“Linx Bracelets”) second request for reconsideration of the Registration Program’s refusal to register jewelry design claims in the works titled “What is in Your Soul—Round Locket” (“Round Locket”), “What is in Your Heart Linx Lockets—Locket Watch” (“Locket Watch”), and “What is in Your Heart Linx Lockets—Round Locket with Bail” (“Round Locket with Bail”) (all three collectively, the “Works”). After reviewing the applications, deposit copies, 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 jewelry designs, each a type of locket designed to hold charms. The Round Locket is a round locket consisting of two pieces which are held together by a screw. Each piece is constructed of a metal band with a clear glass center. Charms can be inserted between the two pieces. A chain is attached through the channel created where the two pieces meet. The Round Locket with Bail is essentially the same as the Round Locket, except that it is held shut by a hinge that snaps closed, and instead of a chain the locket includes a bail which allows it to hang on a chain, ribbon, bracelet, or key chain. The Locket Watch includes a watch face composed of numbers and hands, on top of which is built a clear glass divider. Charms may be placed inside this divider; the charms are secured by enclosing the divider in a clear glass dome. The watch may be worn on the wrist with the aid of two bands.

Photographic reproductions of the Works are included as Appendix A.

II. ADMINISTRATIVE RECORD

On April 25, 2014, Linx Bracelets filed applications to register copyright claims in the three Works. In a June 20, 2014 letter, a Copyright Office registration specialist refused to register the claims, finding that the Works “lack the authorship necessary to support copyright claims.” Letter from Paula Gillaspie, Registration Specialist, to Angelina Chew, Palmer, Lombardi & Donohue LLP (June 20, 2014).

In three separate letters each dated August 20, 2014, Linx Bracelets requested that the Office reconsider its initial refusal to register the Works. Letter from Katherine L. McDaniel, Fulwider Patton LLP, to U.S. Copyright Office (Aug. 20, 2014) (“First Request—Locket Watch”); Letter from Katherine L. McDaniel, Fulwider Patton LLP, to U.S. Copyright Office (Aug. 20, 2014) (“First Request—Round Locket with Bail”); Letter from Katherine L. McDaniel, Fulwider Patton LLP, to U.S. Copyright Office (Aug. 20, 2014) (“First Request—Soul Round Locket”). After reviewing the Works in light of the points raised in the First Requests, the Office reevaluated the claims and again concluded that the Works “do not contain a sufficient amount of original and creative authorship to support a copyright registration.” Letter from Stephanie Mason, Attorney-Advisor, to Katherine L. McDaniel, Fulwider Patton LLP 1 (Dec. 9, 2014).¹

In a letter dated February 19, 2015, Linx Bracelets requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Works. Letter from Katherine L. McDaniel, Fulwider Patton LLP, to U.S. Copyright Office (Feb. 19, 2015) (“Second Request”). In that letter, Linx Bracelets continued to assert that the “Office has failed to properly appreciate the original and creative nature of these three (3) Works.” *Id.* at 2.

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

¹ The letter also refused claims in three other works not at issue here. *See* Letter from Stephanie Mason, Attorney-Advisor, to Katherine L. McDaniel, Fulwider Patton LLP 1 (Dec. 9, 2014).

“[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 Ninth Circuit rejected a claim of copyright in a piece of jewelry where the manner in which the parties selected and arranged the work’s component parts was more inevitable than creative and original. *See Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971). 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 appearance, 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 Works

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

1. First of all, no individual element of the Works is copyrightable. When analyzing copyrightability in jewelry, the Office will not consider certain aspects, including “[p]urely functional elements, such as a clasp or fastener.” COMPENDIUM (THIRD) § 908.3. Furthermore, simple shapes are only copyrightable “when selected or combined in a distinctive manner indicating some ingenuity.” *Atari Games Corp.*, 888 F.2d at 883. Here, most of the elements of the Round Locket are purely functional, including the screw and the chain. This leaves only the two circular glass pieces and the metal bands. These pieces alone constitute only a simple shape.

Similarly, the hinge that snaps shut and the bail in the Round Locket with Bail, as well as the hinge, the clear plastic divider, and the bands in the Locket Watch, are also merely functional. Removing these elements from the copyrightability assessment leaves, in the case of the Locket Watch, merely a conventional watch face and a round glass cover; and in the Round Locket with Bail, two round glass covers. None of these elements of the three Works is, by itself, eligible for copyright protection.

2. Although Linx Bracelets correctly notes that “a work may be copyrightable even though it is entirely a compilation of unprotectable elements,” First Request—Locket Watch, at 6, quoting *Prince Group, Inc. v. MTS Products*, 967 F. Supp. 121, 125 (S.D.N.Y. 1997), the Works at issue here do not qualify as copyrightable compilations. Although “[o]riginality requires only that the author make the selection or arrangement independently (*i.e.*, without copyright that selection or arrangement from another work), and that it display some minimal level of creativity,” *Feist* nonetheless instructs that “not every selection,

coordination, or arrangement will pass muster.” *Feist*, 499 U.S. at 358. The Office “generally will not register a compilation containing only two or three elements, because the selection is necessarily *de minimis*.” COMPENDIUM (THIRD) § 312.2 (citing H.R. REP. NO. 94-1476, at 122 (1976)).

Here, the selection and arrangement of elements in the Works do not display the requisite minimal level of creativity for copyright protection. For example, the non-functional elements of the Round Locket comprise a metal band with clear glass centers. Such a selection is *de minimis*, and insufficiently creative to merit copyright protection. The same applies to the Round Locket with Bail and Locket Watch. Each Work consists of commonplace elements combined in a non-original manner. None of the three Works is copyrightable as a compilation.

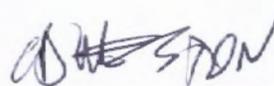
3. Linx Bracelets points out that some features of the Round Locket, though not all of them, are also present in a Linx Bracelets work previously granted a certificate of registration, “What is in Your Heart?”(R) Jewelry Designs, Registration Number VA 1-908-855. Second Request at 3. But “[a] decision to register a particular work has no precedential value and is not binding upon the Office when it examines any other application.” COMPENDIUM (THIRD) § 309.3. Thus, even though the Office registered “What is in Your Heart?”(R) Jewelry Designs, this fact has no bearing on our analysis with respect to the Works at issue in this second request for reconsideration.

Additionally, upon reexamining the earlier “What is in Your Heart”(R) Jewelry Designs work, and in light of the principles of copyrightability discussed above, the Board questions the validity of this registration and thus is referring it to the Copyright Office’s Registration Program for potential cancellation pursuant to 37 C.F.R. § 201.7. The Registration Program will be in contact with Linx Bracelets regarding the results of that referral.

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.

BY:



Chris Weston
Copyright Office Review Board

APPENDIX A

“What is in Your Soul?” Linx Lockets Jewelry Design – Round Locket



“What is in Your Heart?” Linx Lockets – Locket Watch



“What is in Your Soul?” Linx Locket – Round Locket with Bail

