



Copyright Review Board

United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000

June 2, 2023

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**Re: Second Request for Reconsideration for Refusal to Register Opihi Necklace
(SR # 1-8675607187; Correspondence ID: 1-4MNE2WL)**

Dear Mr. Kelly:

The Review Board of the United States Copyright Office (“Board”) has considered Rise Hawaii Jewelry LLC’s (“Rise”) second request for reconsideration of the Registration Program’s refusal to register a copyright claim in “Opihi Necklace” (“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

Opihi Necklace was submitted for registration as a jewelry design for a necklace pendant.¹ The design consists of an opihi shell that has been cleaned and the edges accented with an encircling gold band that attaches to a bail. An image of the design, provided by Rise and serving as the deposit copy, is below:



¹ Jewelry designs are typically classified as sculptural works, and more rarely pictorial works. *See* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 908 (3d ed. 2021) (“COMPENDIUM (THIRD)”) (“Jewelry designs are typically protected under the U.S. copyright law as sculptural works, although in rare cases they may be protected as pictorial works.”); *see also id.* § 908.2 (describing jewelry creation methods including “carving, cutting, molding, casting, or shaping the work,” which are three dimensional and sculptural in nature, as well as two dimensional pictorial matter, “such as a drawing or etching”). The Board considered both the sculptural and pictorial qualities of the Work.

II. ADMINISTRATIVE RECORD

On March 25, 2020, Rise filed an application to register a copyright claim in the Work. In a June 2, 2020 letter, a Copyright Office registration specialist refused to register the claim, finding that it did not “contain any design element that is both sufficiently original and creative.” Initial Letter Refusing Registration from U.S. Copyright Office to John Kelly at 1 (June 2, 2020).

In a letter dated August 13, 2020, Rise requested that the Office reconsider its initial refusal to register the Work. Letter from John W. Kelly to U.S. Copyright Office (Aug. 13, 2020) (“First Request”). After reviewing the Work in light of the points raised in the First Request, the Office reevaluated the claims and again concluded that the Work did not “contain a sufficient amount of original and creative authorship to support a copyright registration,” as “[t]he work as whole consists of a round shell accented with a gold band around its outer edge. This basic, garden-variety arrangement is a standard form that does not warrant registration.” Refusal of First Request for Reconsideration from U.S. Copyright Office to John Kelly at 1, 3 (Jan. 15, 2021).

In a letter dated April 14, 2021, Rise 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 John W. Kelly to U.S. Copyright Office (Apr. 14, 2021) (“Second Request”). In that letter, Rise asserted that the Work is sufficiently creative because the jewelry design “encompasses a unique selection, arrangement and use of a Hawaiian opihi shell, which the artist modified from its original form using metallic paints and other elements to alter the opihi shell and frame.” *Id.* at 2. Rise described the process of creating the Work, focusing on the selection of chemicals used in preparing the shell for use in the necklace, and the application of gold trim to the shell exterior. *Id.* at 2–5.

III. DISCUSSION

After carefully examining the Work and applying the relevant legal standards, the Board finds that the Work does not contain the creativity necessary to sustain a claim to copyright.

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 the copyright 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, “as opposed to copied from other works.” *Id.* Second, the work must possess sufficient creativity. *Id.* Only a modicum of creativity is necessary, but the Supreme Court has held that some works fail to meet even this low threshold. *Id.* at 358–59.

The Office and the courts consistently have found that familiar symbols and designs are not sufficiently creative to sustain a copyright claim. *See* 37 C.F.R. § 202.1(a) (“[F]amiliar symbols or designs” are “not subject to copyright and applications for registration of such works cannot be entertained.”); *see also Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 102–03 (2d Cir. 1951) (what “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.’”). When evaluating a jewelry design’s copyrightability, the Office may take into account

the shapes of various elements, decoration on the jewelry’s surface (*e.g.*, engravings), as well as the selection and arrangement of the various elements. *See* COMPENDIUM (THIRD) § 908.3. “Jewelry designs that contain only a trivial amount of authorship,” however, are *de minimis* and uncopyrightable. *See id.* §§ 313.4(B); 908.2 (“The Office will not register pieces that, as a whole, do not satisfy [the] requirement [of being sufficiently creative or expressive] such as mere variations on a common or standardized design or familiar symbol, designs made up of only commonplace design elements arranged in a common or obvious manner.”). 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).

The individual elements of the Work, namely the shell and circular band of gold, are not registrable. First, the opihi shell itself is a natural element. Naturally occurring materials are not protected by copyright, as they are not the product of human authorship. COMPENDIUM (THIRD) § 906.7. Moreover, the process used on the shell does not establish creative authorship for purposes of copyright protection. Rise argues that “elements that were originally derived from nature have been significantly transformed” via chemical process, metallic paints, and other elements, which “alter the opihi shell” and satisfy the requirement for original authorship. Second Request at 5–6. It describes the process of preparing the opihi shell as a multistep process involving painting the shell with a metallic conductive paint followed by a three-step liquid chemical process. *Id.* at 2–4. While an author may sometimes express their original authorship via their manner of process, COMPENDIUM (THIRD) § 905 (“In the case of three-dimensional works, original authorship may be expressed in many ways, such as carving, cutting, molding, . . . or otherwise processing material into a three-dimensional work of sculpture.”), the process here does not meet this bar. No sculptural changes resulting from the process are visible from the deposit copy, and to the extent that they may exist, they are at most, *de minimus*. After the use of Rise’s process, the shell’s appearance remains primarily the result of naturally occurring phenomena. *See id.* § 906.7 (provide the example of a polished and display mounted stone as an unprotectable work of nature). Only the recognizable expression of creative choices present in the final work can be protectable by copyright. *Id.* § 909.3(B) (“the author’s expression must be recognizable from the deposit copy(ies), rather than the author’s explanation of his or her creative process.”).²

The painting of the shells with metallic conductive paint during the initial part of the processing is also not a copyrightable element. Rise states that the purpose of applying the metallic conductive paint is “so that the metals will later stick to the paint” when forming the gold boarder, implying a functional rather than creative purpose. Second Request at 2. Functional aspects of a work are not subject to copyright protection. *See Brandir Int’l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1147–48 (2d Cir. 1987) (denying copyright protection to a purported artistic bike rack as there were “design changes made in response to functional concerns.”). Moreover, the addition of a single or relatively few colors to the shell is not a copyrightable alteration. *See* COMPENDIUM (THIRD) § 906.3 (“Merely adding or changing one or relatively few colors in a work, or combining expected or familiar pairs or sets of colors is not

² Moreover, ideas and processes are not separately eligible for copyright protection. 17 U.S.C. § 102(b); 37 C.F.R. § 202.1(b); *see also* COMPENDIUM (THIRD) § 313.3(A) (“the Copyright Act expressly excludes copyright protection for ‘any idea, procedure, process, system, method of operation, concept, principle, or discovery’”). Therefore, the three-step chemical process Rise describes is not protectable by copyright itself.

copyrightable, regardless of whether the changes are made by hand, computer, *or some other process*. This is the case even if the coloration makes a work more aesthetically pleasing or commercially valuable.”) (emphasis added).

Second, the band of gold is a common familiar design which follows the naturally occurring edge of the shell. The hand-painted band of gold is also an unprotectable common design. *See id.* § 906.1. Rise describes the border as “an irregular shape tracing the edge of the shell.” Second Request at 4. As a result, the shape of the border was dictated by the naturally occurring shape of the shell, not by Rise, meaning it is not the product of human creativity. COMPENDIUM (THIRD) § 906.7. Additionally, aberrations occurring as the border follows the contours of the shell amount to “minor linear or spatial variations” that are insufficiently creative for protection. *Id.* § 905.

Finally, the selection and arrangement of the unprotectable elements in the Work in combination does not evince sufficient creativity to support registration. While the Office may register a work that consists 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.” *Id.* § 906.1. The arrangement of the shell and gold border shape is a common arrangement in which one element is essentially serving as an encasement for the other. The arrangement is similar to a bezel setting, a common jewelry design setting, in which an ornament is encased in a metal rim or outline. *See Bezel*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/bezel> (last updated May 26, 2023) (bezel, noun 3. jewelry: “a usually metal rim of a piece of jewelry in which an ornament (such as a gem) is set”). Since the gold outline in the Opihi Necklace is effectively the same arrangement of elements found in a common bezel setting, the arrangement of elements do not present sufficient creativity to warrant registration.

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.



U.S. Copyright Office Review Board

Suzanne V. Wilson, General Counsel and
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