United States Copyright Office
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September 9, 2013

Olshan, Grundman, Frome,
Rosenzweig & Wolosky LLP
Attn: Mary L. Grieco
65 East 55th Street
New York, NY 10022

Re: Sweet 16 Bangle GB187
Couture Diamond Hoop GE135
Correspondence ID: 1-CIT1PF

Dear Ms. Grieco:

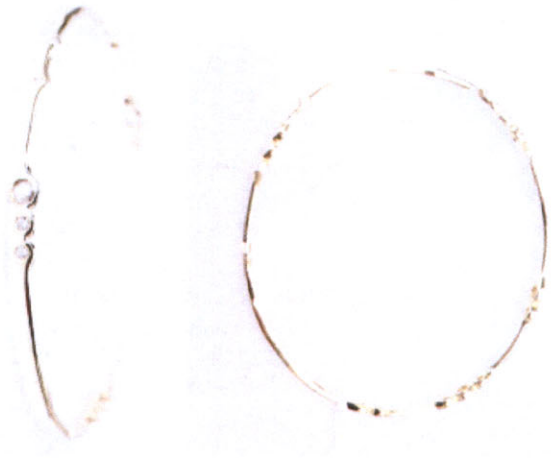
The Review Board of the United States Copyright Office (the "Board") is in receipt of your second request for reconsideration of the Registration Program's refusal to register the works entitled: *Sweet 16 Bangle GB187* and *Couture Diamond Hoop GE135*. You submitted this request on behalf of your client, Seno Jewelry, LLC, on July 16, 2012. I apologize for the lengthy delay in the issuance of this determination. After periods of inaction, staff departures, and budgetary restrictions, the Register of Copyrights has appointed a new Board and we are proceeding with second appeals of registration refusals as expeditiously as possible.

The Board has examined the application, the deposit copies, and all of the correspondence in this case. After careful consideration of the arguments in your second request for reconsideration, the Board affirms the Registration Program's denial of registration of these copyright claims. The Board's reasoning is set forth below. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action on this matter.

I. DESCRIPTION OF THE WORKS

Sweet 16 Bangle GB187 consists of a thin, circular gold band interspersed with sixteen round gemstones of differing sizes. The gold band encircles each gemstone to create an unbroken circle. The gemstones are interspersed at varying intervals, with some in

groups of three, some in groups of two, and some set alone. The below images are photographic reproductions of the work from the deposit materials:



Couture Diamond Hoop GE135 consists of a thin gold earring hoop interspersed with six round gemstones of differing sizes. The gold hoop encircles each gemstone to create an unbroken circle. The gemstones are interspersed at varying intervals. The below images are photographic reproductions of the work from the deposit materials:

II. ADMINISTRATIVE RECORD

On October 4, 2011, the United States Copyright Office (the "Office") issued a letter notifying Seno Jewelry, LLC (the "Applicant") that it had refused registration of *Sweet 16 Bangle GB187* and *Couture Diamond Hoop GE135* (the "Works"). *Letter from Registration Specialist, Thomas Brina, to Mary Grieco* (October 4, 2011). In its letter, the Office stated that it could not register the Works because they lack the authorship necessary to support a copyright claim. *Id.*

In a letter dated December 22, 2011, you requested that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusal to register the Works. *Letter from Mary Grieco to Copyright RAC Division* (December 22, 2011) ("First Request"). Upon reviewing the Works in light of the points raised in your letter, the Office concluded that the Works "do not contain a sufficient amount of original and creative artistic, graphic or sculptural authorship either in their shapes or in the treatment and arrangement of their elements" and again refused registration. *Letter from Attorney-Advisor, Stephanie Mason, to Mary Grieco* (April 24, 2012).

Finally, in a letter dated July 16, 2012, you 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 Mary Grieco to Copyright R&P Division* (July 16, 2012) ("Second Request"). In arguing that the Office improperly refused registration, you claim the Works include at least the minimum amount of creativity required to support registration under the standard for originality set forth in *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). *Second Request* at 1-2. In support of this argument, you claim that the Applicant's careful selection and arrangement of the Works' constituent elements possess a sufficient amount of creative authorship to warrant registration under the Copyright Act. *Id.* at 2.

In addition to *Feist*, your argument references several cases that demonstrate jewelry designs comprised of otherwise unprotectable elements are acceptable for copyright protection if the selection and arrangement of those elements satisfies the requisite level of creative authorship. *Id* at 2. You also reference several examples of previously registered works, all owned or created by the Applicant. *Id.* at 3.

III. DECISION

A. *The Legal Framework*

All copyrightable works must qualify as "original works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a). As used with respect to copyright, the term "original" consists of two components: independent creation and sufficient creativity. *See Feist*, 499 U.S. at 345. 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.* While only a modicum of creativity is necessary to establish the requisite level, the Supreme Court has ruled that some works (such as the telephone directory at issue in *Feist*) fail to meet this 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 nonexistent." *Id.* at 359.

The Office's regulations implement the long-standing requirements of originality and creativity set forth in the law and, subsequently, the *Feist* decision. *See* 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"); *see also* 37 C.F.R. § 202.10(a) (stating "[i]n order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form").

Case law recognizes instances in which jewelry has enjoyed copyright protection for "the artistic combination and integration" of constituent elements that, considered alone, are unoriginal. *See Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101 (2d Cir. 2001). However, as noted, the mere simplistic arrangement of non-protectable elements does not automatically establish the level of creativity necessary to warrant protection. *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"). Ultimately, the determination of copyrightability in the combination of standard design elements rests 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.D.C. 1989).

To be clear, the mere simplistic arrangement of unprotectable elements does not automatically establish the level of creativity necessary to warrant protection. For example, the Eighth Circuit upheld the Copyright Office's refusal to register a simple logo consisting of four angled lines which formed an arrow and the word "Arrows" in a cursive script below the arrow. *See John Muller & Co.*, 802 F.2d 989 (8th Cir. 1986). Likewise, the Ninth Circuit held that a glass sculpture of a jellyfish that consisted of elements including clear glass, an oblong shroud, bright colors, proportion, 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 court's language in *Satava* is particularly instructional:

> [i]t 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) (emphasis in original).

Finally, Copyright Office Registration Specialists (and the Board, as well) do not make aesthetic judgments in evaluating the copyrightability of particular works. They are not influenced by the attractiveness of a design, the espoused intentions of the author, the design's uniqueness, its visual effect or appearance, its symbolism, the time and effort it took to create, or its commercial success in the marketplace. *See* 17 U.S.C. § 102(b); *see also Bleistein v. Donaldson*, 188 U.S. 239 (1903). The fact that a work consists of a unique or distinctive shape or style for purposes of aesthetic appeal does not automatically mean that the work, as a whole, constitutes a copyrightable "work of art."

B. *Analysis of the Works*

After carefully examining the Works and applying the legal standards discussed above, the Board finds that *Sweet 16 Bangle GB187* and *Couture Diamond Hoop GE135* fail to satisfy the requirement of creative authorship.

First, the Board finds that none of the Works' constituent elements, considered individually, are sufficiently creative to warrant protection. As noted, 37 C.F.R. § 202.1(a), identifies certain elements that are not copyrightable. These elements include: "[w]ords and short phrases such as names, titles, slogans; familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering, or coloring." *Id.* Here, both Works consist of (1) a thin, circular metal band; and, (2) a series of gemstones. Consistent with the above regulations, these elements (ordinary bangle-style bracelet bands, ordinary hoop-style earring bands, and gemstones) are common, unprotectable shapes and designs. *See id.* Thus, we conclude the Works' constituent elements do not qualify for registration under the Copyright Act.

Second, the Board finds that the Works, considered as wholes, fail to meet the creativity threshold set forth in *Feist*. 499 U.S. at 359. As explained, the Board accepts the principle that jewelry designs comprised entirely of combinations of unprotectable elements may be eligible for copyright registration. However, in order to be accepted, such combinations must contain some distinguishable variation in the selection, coordination, or arrangement of their elements that is not so obvious or minor that the "creative spark is utterly lacking or so trivial as to be nonexistent." *Id.*; *see also Atari Games,* 888 F.2d at 883 (finding a work should be viewed in its entirety, with individual uncopyrightable elements judged not separately, but in their overall interrelatedness within the work as a whole).

Viewed as a whole, the Applicant's Works consist of the simple configuration of thin metal bands and gemstones into an ordinary bangle-style bracelet design and an ordinary hoop-style earring design. Specifically, we find that the authorship involved in selecting the round gemstones and setting them within a thin jewelry band is, at best, *de minimis*, and fails to meet the threshold for protection under the Copyright Act. *Feist,* 499 U.S. at 359; *see also Atari Games,* 888 F.2d at 883. Accordingly, we conclude that the Works lack the

requisite "creative spark" necessary for registration. *Feist,* 499 U.S. at 359; *Satava*, 323 F.3d at 811.

Finally, regarding your argument that the Office has registered works similar to the ones in contention, the Office has a policy of not comparing works that have been previously registered or refused registration. Each claim of copyright is examined on its own merits, with the Office applying uniform standards of copyrightability throughout the examination process. Because copyrightability involves a mixed question of law and fact, differences between any two works can lead to different results. Thus, the fact that an individual examiner might have previously registered a work that is, arguably, less original than the work at issue does not require the Board to reverse the denial of a work that we find lacks sufficient creative authorship. *See Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q.2d (BNA) 1074, 1076 (D.D.C. 1991) (where the court stated that it was not aware of "any authority which provides that the Register must compare works when determining whether a submission is copyrightable."); *accord, Coach, Inc. v. Peters*, 386 F. Supp.2d 495, 499 (S.D.N.Y. 2005) (indicating the Office "does not compare works that have gone through the registration process."). While we appreciate you bringing perceived inconsistencies in the application of Office regulations to our attention, we will not compare the Works at issue with prior registrations in our review of your requested reconsideration of refusal.

In sum, the Board finds that both the individual elements that comprise the Works, as well as the Applicant's selection, organization, and arrangement of those elements lack the sufficient level of creativity to make them eligible for registration under the Copyright Act.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the works entitled: *Sweet 16 Bangle GB187* and *Couture Diamond Hoop GE135*. This decision constitutes final agency action on this matter. 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

BY: _____
William J. Roberts, Jr.
Copyright Office Review Board