United States Copyright Office
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August 12, 2013

Skadden, Arps, Slate, Meagher & Flom LLP
Attn: M. Oren Epstein
Four Times Square
New York, NY 10036-6522

Re: Ellixia
Correspondence ID: 1-A23AUI

Dear Mr. Epstein:

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 work entitled: *Ellixia*. You submitted this request on behalf of your client, Windsor Jewelers Inc., on May 8, 2012. I apologize for the 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 this copyright claim. 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 WORK

Ellixia (the "Work") is a watch with a circular body and face. The watch face has a slight slope with sixty rectangular grooves carved into it. The grooves represent the hour and minute marks of a standard watch face. The grooves vary in length and gradate in a circle around the watch face (the smallest grooves appear at the twelve hour marker and the largest grooves appear at the six hour marker). A set of hour and minute hands are fastened to the center of the off-set circle that is formed by the sloping groove design.

The below image is a photographic reproduction of the Work from the deposit materials:

II. ADMINISTRATIVE RECORD

On May 12, 2011, the United States Copyright Office (the "Office") issued a letter notifying Windsor Jewelers Inc. (the "Applicant") that it had refused registration of the above mentioned Work. *Letter from Registration Specialist, Joy Burns, to Mary Rasenberger* (May 12, 2011). In its letter, the Office indicated that it could not register the Work because it lacks the authorship necessary to support a copyright claim. *Id.*

In a letter dated July 14, 2011, the Applicant requested that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusal to register the Work. *Letter from Mary Rasenberger to Copyright RAC Division* (July 14, 2011) ("First Request"). The letter set forth your reasons as to why the Office improperly refused registration. *Id.* Upon reviewing the Work in light of the points raised in the letter, the Office concluded that the Work "does not contain a sufficient amount of original and creative artistic or sculptural authorship" and again refused registration. *Letter from Attorney-Advisor, Stephanie Mason, to Mary Rasenberger* (February 9, 2012).

Finally, in a letter dated May 8, 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 Work. *Letter from M. Oren Epstein to Copyright R&P Division* (May 8, 2012) ("Second Request"). In arguing that the Office improperly refused registration, you claim the Work includes at least the minimum amount of creativity required to meet the standard for originality set forth in *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). *Second Request* at 1-6. In support of this argument, you maintain that, when analyzed as a whole, the Applicant's arrangement of the Work's constituent elements contains a sufficient amount of creative authorship to warrant registration under the Copyright Act. *Id.* Specifically, you assert that the Applicant's claim of copyright is directed towards its arrangement of the elements that make up the Work's watch face to resemble "a rising balloon" and "rays emanating from the center" of "an image of the sun." *Second Request* at 5.

In addition to *Feist*, your argument references several cases in support of the general principle that, to be sufficiently creative to warrant copyright protection, a work need only possess a "modicum of creativity." *Id.* at 1-10. You also reference several cases that demonstrate jewelry designs comprised of otherwise unprotectable elements are acceptable for copyright protection if the selection and arrangement of their elements satisfies the requisite level of creative authorship. *Id.*

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 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 creativity.

First, the Board finds that none of the Work's 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: "familiar symbols or designs" such as circles, cylinders, lines, rectangles and other common geometric shapes. *Id.* Here, the Applicant's Work is comprised of the following elements: (1) a standard, circular watch face with a sloped groove carved into it; (2) sixty rectangular bars of varying lengths configured so that they represent common timepiece hour and minute demarcations; and (3) a basic pair of arrow-shaped hour and minute hands. Consistent with section 202.1(a), none of these common shapes and symbols are eligible for registration under the Copyright Act.

Second, the Board finds that the Work, considered as a whole, fails to meet the creativity threshold set forth in *Feist*. 499 U.S at 359. As explained above, the Board accepts the principle that jewelry designs comprised of combinations of unprotectable elements may be eligible for copyright registration. However, in order to be accepted for registration, 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." *Feist,* 499 U.S at 359; *see also Atari Games,* 888 F.2d at 883. Here, the Applicant has incorporated a sloped groove and a gradating hour and minute marker-feature into a standard watch face design. This basic variation to the common timepiece configuration is, at best, *de minimis* and lacks the requisite creative spark for copyright protection. *See Feist,* 499 U.S. at 359; *see also Satava,* 323 F.3d at 811. Thus, the Work, as a whole, is ineligible for copyright registration.

Finally, your assertion that the Applicant's arrangement of the above mentioned elements is "unlike the arrangement of any other timepiece configuration" does not add to your claim of sufficient creativity. *Id. at* 5. Nor do your assertions that the Work is "artistically arranged in an asymmetric formation to create the artistic impression that the watch face is warped and melting – with the center circle like a rising balloon" or that the Work creates "an image of the sun." *Id* at 5. As discussed above, the Board does not assess novelty, uniqueness, visual impressions, or symbolism in determining whether a work contains the requisite minimal amount of original authorship necessary for registration. Thus, even if accurate, the mere fact that the Work consists of an unconventional, symbolic arrangement of familiar shapes would not qualify the Work, as a whole, as copyrightable.

In sum, the Board finds that the Applicant's selection and arrangement of the elements that comprise the Work lack a sufficient level of creativity to make the Work registerable 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 work entitled: *Ellixia*. This decision constitutes final agency action on this matter. 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

BY: Andrea Zizzi
Andrea Zizzi
Copyright Office Review Board