United States Copyright Office
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August 30, 2016

Martin W. Schiffmiller
Kirschstein, Israel, Schiffmiller & Pieroni, P.C.
425 Fifth Avenue, 5th Floor
New York, NY 10016-2223

Re: Second Request for Reconsideration for Refusal to Register Ring No. 43245 and Band No. 43328; Correspondence ID: 1-119L5K1

Dear Mr. Schiffmiller:

The Review Board of the United States Copyright Office (the "Board") has considered Leo Schachter Diamonds, L.L.C.'s ("Leo Schachter") second request for reconsideration of the Registration Program's refusal to register jewelry design claims in the works titled "Ring No. 43245" and "Band No. 43328" (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

Ring No. 43245 is a jewelry design for a ring consisting of a circular white gold metal band accented with two rows of inset diamonds that surround three-quarters of the ring. A large, round solitaire diamond is positioned at the top of the band, and white gold wire wraps around the top of the hand and the solitaire in a serpentine configuration.

Band No. 43328 is a jewelry design for a ring consisting of a circular white gold metal band accented with a single row of inset diamonds that surround three-quarters of the ring. A white gold wire crisscrosses the top of the band, forming a symmetrical "X."

Reproductions of the Works are set forth below, and alternate views of the Works are included as Appendix A.

Ring No. 43245

Band No. 43328

II. ADMINISTRATIVE RECORD

On August 19, 2014, Leo Schachter filed two applications to register copyright claims in the Works. In a September 16, 2014 letter, a Copyright Office registration specialist refused to register the claims, finding that they "lack the authorship necessary to support a copyright claim." Letter from Robin Jones, Registration Specialist, to Martin Schiffmiller, Kirschstein, Israel, Schiffmiller & Pieroni, P.C. (Sept. 16, 2014).

In a letter dated November 3, 2014, Leo Schachter requested that the Office reconsider its initial refusal to register the Works. Letter from Martin Schiffmiller, Kirschstein, Israel, Schiffmiller & Pieroni, P.C., to U.S. Copyright Office (Nov. 3, 2014) ("First Request"). After reviewing the Works in light of the points raised in the First Request, the Office re-evaluated the claims and again concluded that the Works "do not contain a sufficient amount of original and creative authorship to support copyright registrations." Letter from Stephanie Mason, Attorney-Advisor, to Martin Schiffmiller, Kirschstein, Israel, Schiffmiller & Pieroni, P.C. (Mar. 27, 2015).

In a letter dated June 23, 2015, Leo Schachter 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 Martin Schiffmiller, Kirschstein, Israel, Schiffmiller & Pieroni, P.C., to U.S. Copyright Office (June 23, 2015) ("Second Request"). In its Second Request, Leo Schachter claimed that the Works "embody more than a commonplace arrangement of individual unprotectable elements" and "more than a slight amount of original authorship is present." *Id.* at 4.

III. DECISION

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 "[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); *see also* COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 908.2 (3d ed. 2014) ("COMPENDIUM (THIRD)") (stating that the Office will not register jewelry "designs made up of only commonplace design elements arranged in a common or obvious manner"). 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).

Finally, 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 Works*

After carefully examining the Works and applying the legal standards discussed above, the Board finds that the Works do not contain the requisite creative authorship necessary to sustain claims to copyright.

Here, it is undisputed that the constituent elements that comprise the Works—standard metal bands with inset diamonds, simple wrapped metal wires, and a solitaire diamond—are not individually subject to copyright protection. *See* Second Request at 2.

It is true works comprised of unprotectable elements may be copyrightable if their selection, coordination, or arrangement reflects authorial discretion that is not so obvious or so minor that the "creative spark is utterly lacking or trivial as to be nonexistent." *Feist*, 499 U.S. at 359. The Board finds, however, that viewed as a whole, the selection, coordination, and arrangement of metal bands and gemstones that comprise the Works is not sufficient to render the Works original. Leo Schachter argues that the Works do not merely consist of common gold bands with standard diamond arrangements, focusing instead on the design element added by the curved metal wires. *See* Second Request at 2-3. Leo Schachter opines

that the combination of elements, including "the designer's use of tubular gold wire as a gracefully curved, wrap-around element" exceeds the low level of design creativity required to find a work copyrightable. *Id.* at 3-4. We disagree. The Works' designs constitute "mere variations on a common or standardized design or familiar symbol," (the treatment of the serpentine, "X," and infinity symbols) as well as "commonplace design elements arranged in a common or obvious manner" (a solitary diamond and single or double rows of gemstones); hence they fall short of the level of originality necessary for copyright registration. COMPENDIUM (THIRD) § 908.2. Even when combined in the Works, these typical jewelry variations lack the requisite creativity to warrant copyright protection.

Thus, we find that the level of creative authorship involved in this configuration of unprotectable elements is, at best, *de minimis*, and too trivial to enable copyright registration. *See* COMPENDIUM (THIRD) § 313.4(B).

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the copyright claims 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

Ring No. 43245

Band No. 43328