COPYRIGHT
OFFICE

February 5, 1997

RE: Baby Gold Jewelry, Inc., BG14K-N1035 and 23 Others
Control No. 60-407-0034 (L)

Dear Mr. Weingram:

This is in response to your letter dated May 14, 1996, addressed to Melissa Dadant, Special Assistant to the Chief of the Examining Division, appealing on behalf of your client, Baby Gold Jewelry, Inc., the Copyright Office's refusal to register BG14K-N1035 and 23 Others. Your letter was forwarded to the Copyright Office Board of Appeals.

The Copyright Office Board of Appeals has examined the claims and considered all correspondences from your firm regarding these claims. After careful review, the Office is affirming the Examining Division's refusal to register these claims, because the jewlry designs consist of common shapes or symbols which do not contain copyrightable subject matter, and which are also not combined in a way that adds to the copyrightability of the works. In addition, we note that four of these works, BG14K-RO903, RO925, RO909, and RO905, appear to have been published without copyright notice prior to March 1, 1989, the effective date of the Berne Convention Implementation Act.

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Administrative Record

The Copyright Office received the applications for registration of these works of jewelry design on September 26, 1994. In a letter dated January 19, 1995, Visual Arts Examiner James L. Shapleigh notified you that the Copyright Office could not register the 24 jewelry designs, because they did not exhibit sufficient original artistic or sculptural authorship to support a copyright claim.[1] The letter stated that familiar shapes, symbols and designs are

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[1] This set of registration applications at first included 36 designs. The Office rejected 12 of the designs (BG14K-RO930, RO904, RO962, NO903, EO651, NO763, EO675, EO690, RO914, RO926, RO981, and RO980) because they appeared to be published without copyright notice prior to the effective date of the Berne Convention. Stating that corrective registration was possible within five years of publication, we inquired whether the 12 works were published with adequate notice. You indicated in your First Appeal of May 19, 1995, that you were investigating the publication without notice issue, and actually appealed only the rejection of the other 24 works. In your Second Appeal (continued...)

not registrable, and that simple variations or combinations of basic geometric designs do not support a copyright registration.

On May 19, 1995, you appealed the Office's refusal to register BG14K-N1035 and 23 OTHERS. You claimed that there existed "identifiable, artistic, copyrightable material in the jewelry designs." You listed and individually described each submitted work, arguing that the works showed original and creative authorship independent of known shapes, designs and functional influence, and were "delicately designed for young children." The Copyright Office issued a second refusal to register BG14K-N1035 and 23 OTHERS on January 16, 1996. The letter by Special Assistant to the Chief, Examining Division, Melissa Dadant reiterated that the jewelry designs did not contain original authorship to support a registration; although a work need not be strikingly unique or novel, the author must contribute more than a mere trivial variation of public domain elements.

On May 14, 1996, you wrote to Ms. Dadant with a second request for reconsideration. You enclosed an affidavit of your own expert testimony asserting the originality and copyrightability of the jewelry. You attached pages from a modern art reference book published by Harcourt Brace Jovanovich concerning art that you held comparable to the works in question, and wrote:

> [A]pplicant's Work is a Work of genius and artistic excellence in the same manner as the Works of Joseph Beuys, Al Held, Dorothea Rockburne and other artists exhibiting **Minimalist** expression... Clearly these Works have as much right to copyright protection as any of the Works of Al Held or Dorothea Rockburne....

Citing Held's South Southwest (a work of cubes and circles), and Rockburne's Velar Combination Series (a work with pencil traces creating crosses, triangle, bisections and other basic geometric forms), you asserted that "common geometric shapes or familar shapes, symbols and designs can contain sufficient sculptural authorship to support a copyright

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[1](...continued)
of May 14, 1996, no mention was made of the other 12 works or the notice issue. The Office has thus closed the file with respect to those works. The titles which are the subject of this final appeal are: BG14K-N1035, RO965, N1065, N1060, RO905, N1063, EO213, EO209, EO202, N1077, EO695, ERO669CZ, RNC3, RNC1, RO903, RNC4, RO985, RO999, RO925, RO909, RO985CP, RO992, ENC1, and ENC8.

registration." You further asserted that the determination of what is a "minimal" amount of original copyrightable expression is not in the purview of the Copyright Office.

Categories of Copyrightable Works

In your correspondence, you cited a statement from Copyright Office Circular 1 to the effect that the "categories" of copyrightable works described in section 102(a) of the Copyright Act should be viewed broadly. As noted in the January 16, 1996, letter by Special Assistant to the Chief of the Examining Division Melissa Dadant, however, this statement in Circular 1 is merely intended to guide applicants in selecting the most appropriate registration application form. In this instance, the works in question clearly fall within the category of pictorial, graphic or sculptural works, but the jewelry designs here do not contain sufficient original authorship to support a registration.

Familiar Shapes and Designs

Works of jewelry are copyrightable where they represent the "original, tangible expression of an idea rather than merely pleasing form dictated solely by functional considerations." Trifari, Krussman & Fischel, Inc. v. Charel Co., 134 F. Supp. 551, 553 (S.D.N.Y. 1955). Such works are registrable as pictorial, graphic and sculptural works under section 102(a)(5) of the copyright law. The Office agrees with Trifari that copyrighted matter "need not be strikingly unique or novel." 134 F. Supp. at 553. However, that case held that an author must "contribute more than a merely trivial variation" of public domain elements, "something recognizably his own." Id. Accord, Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951).

In your letter, you asserted that the jewelry designs here under consideration contain identifiable and original copyrightable authorship, independent of known shapes, designs and functional influence. However, the Office's second letter of refusal listed several ways in which these designs were common or familiar, or represented uncopyrightable ideas. Nor were the familiar shapes and symbols here combined or arranged in a way that adds copyrightable authorship. The Board of Appeals affirms the Examinging Division's assessment.

For example, familiar shapes such as hearts are not copyrightable, and mounting or dangling a stone or gem inside a heart does not constitute copyrightable authorship. Simply combining familiar shapes, such as inscribing a heart in the center of a cross, does not create a copyrightable design. Placing words or phrases, such as "Special

Godchild" or "Daddy's Girl," on a jewelry item constitutes an uncopyrightable design where the simple combination of words and short phrases with a familiar symbol does not rise to the level of copyrightablity. As noted in the Office's January 16, 1996 letter, pronged or striated settings for stones, such as exhibited in RNC1 or RO985CP, represent simple or common shapes and functional aspects of the design and, even when combined with a stone, are not protectable by copyright.

Copyright Office regulations state that familiar symbols and designs are not copyrightable. 37 C.F.R. §202.1. This principle is supported by many judicial decisions. In John Muller & Co. v. New York Arrows Soccer Team, Inc., 802 F.2d 989 (8th Cir. 1986), the appeals court held not copyrightable a logo consisting of four angled lines forming an arrow with the word "Arrows" in cursive script. In Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc., 634 F. Supp. 769 (W.D.Pa. 1986), the court held that envelopes printed with solid black stripes and a few words such as "priority message" or "gift check" did not exhibit the minimal level of creativity necessary for copyright registration. In Bailie v. Fisher, 258 F.2d 425 (D.C. Cir. 1958), the court held that a cardboard star with a circular center for photographs, and two folded flaps allowing the star to stand for display, was not a work of art within the meaning of 17 U.S.C. §5(g) (1909). See also Forstmann Woolen Co. v. J.W. Mays, Inc., 89 F. Supp. 964 (E.D.N.Y. 1950) (nothing artistic about way in which plaintiff's name or legend "100 % Virgin Wool" appeared on label, and no originality displayed in form or representation of fleurs de lis); and Jon Woods Fashions, Inc. v. Curran, 8 U.S.P.Q. 2d (BNA) 1870 (S.D.N.Y. 1988) (upholding Register's decision that fabric design of striped cloth with grid of squares was not copyrightable).

Creativity Comparable to Minimalist Art

You asserted in your correspondence and affidavit that these works exhibit as much copyrightable authorship as works of artists of the Minimalist or Dada periods. However, aesthetic value or representations of particular art theories do not determine copyrightability. Relative artistic merit is not material or relevant in determining copyrightablity. Trifari, Krussman & Fischel, Inc. v. Charel Co., 134 F. Supp. at 552. Whether a work is copyrightable rests solely on the nature and quantity of the fixed expression reflected in the work.

Discretion of Copyright Office

Finally, you argued in your correspondence that determining what is a minimal amount of copyrightable expression is not in the purview of the Copyright Office. Section 410(a) of the current Copyright Act vests the Register with the power to examine and

determine whether material deposited constitutes registrable matter. 17 U.S.C. §410(a) (1994). Section 410(b) states that "[i]n any case in which the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited does not constitute copyrightable subject matter or that the claim is invalid for any other reason, the Register shall refuse registration..." Id. §410(b). Considerable weight is given to an agency's interpretation of its regulations, and the Register's discretion in this regard is clearly recognized by the courts. The Copyright Act "establishes a wide range of selection within which discretion must be exercised by the Register in determining what he has no power to accept." Esquire v. Ringer, 591 F.2d 796, 805-06 (D.C. Cir. 1978), cert. denied, 440 U.S. 908 (1979) (quoting Bouve v. Twentieth Century-Fox Film Corp., 122 F.2d 51, 53 (D.C. Cir. 1941)). Accord, Custom Chrome, Inc. v. Ringer, 35 U.S.P.Q. 2d (D.D.C. 1995); Jon Woods Fashions Inc. v. Donald Curran, 8 U.S.P.Q. 2d (BNA) 1870 (1988); John Muller & Co, Inc. v. New York Arrows Soccer Team, Inc., 802 F.2d 989 (8th Cir. 1986); 1 Nimmer on Copyright §2.08 [B][1].

For the reasons stated above, no registrations can be made for these works.

This letter constitutes final agency action.

Sincerely,

Nanette Petruzzelli

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for the Appeals Board
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