



United States Copyright Office

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October 20, 2016

Milord Keshishian
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Los Angeles, CA 90067

Re: Second Request for Reconsideration for Refusal to Register Arms of Love – LAR08-08C3-1, Arms of Love – LAR08-08C3-3, Arms of Love – LAR08-08C3-4, and Arms of Love – LAR08-08C3-5; Correspondence ID 1-10810ER

Dear Mr. Keshishian:

The Review Board of the United States Copyright Office (“Board”) has considered L.A. Gem & Jewelry Design, Inc.’s (“L.A. Gem & Jewelry”) second request for reconsideration of the Registration Program’s refusal to register jewelry design claims in the works titled “Arms of Love – LAR08-08C3-1,” “Arms of Love – LAR08-083C-3,” “Arms of Love – LAR08-083C-4,” and “Arms of Love – LAR08-083C-5” (collectively, “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

Arms of Love – LAR08-08C3-1 is jewelry pendant design consisting of a silver band in a curlicue configuration accented with a small gold heart positioned on the bottom curve of the inner loop. A round diamond is positioned under the upper curve of the curlicue. The two ends of the silver band are tapered.

Arms of Love – LAR08-08C3-3 is a jewelry pendant design consisting of four silver loops in a cross configuration. The loops are twisted in a way to look like a ribbon. A small gold heart is positioned at the bottom of the top loop, directly above the junction of the four loops, with a round diamond positioned at the top of the same loop.

Arms of Love – LAR08-08C3-4 is a jewelry pendant design consisting of an inverted, hollow teardrop-shaped form, created out of a silver band. The ends of the silver band are tapered and the right end extends past the left. A small gold heart is positioned at the bottom of the teardrop, at the junction of the tapered ends, and a round diamond is on the inside of the apex of the shape’s curve.

Arms of Love – LAR08-08C3-5 is a jewelry pendant design consisting of a hollow, heart-shaped form, also created from a silver band. Where the two ends of the band meet to create the bottom of the heart, they cross and are tapered. A small gold heart is positioned at the inside bottom of the design, and a round diamond is placed inside the top of the heart.

Reproductions of the Works are included as Appendix A.

II. ADMINISTRATIVE RECORD

On May 29, 2014, L.A. Gem & Jewelry filed four applications to register copyright claims in the Works. In an August 18, 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 Larisa Pastuchiv, Registration Specialist, to Milord Keshishian, Milord & Associates (May 29, 2014).

In a letter dated November 17, 2014, L.A. Gem & Jewelry requested that the Office reconsider its initial refusal to register the Works. Letter from Milord Keshishian, Milord & Associates, to U.S. Copyright Office (Nov. 17, 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 registration.” Letter from Stephanie Mason, Attorney-Advisor, to Milord Keshishian, Milord & Associates (Mar. 4, 2015).

In a letter dated June 3, 2015, L.A. Gem & Jewelry 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 Milord Keshishian, Milord & Associates, to U.S. Copyright Office (June 3, 2015) (“Second Request”). In that letter, L.A. Gem & Jewelry claimed that the Works are copyrightable “because they meet the minimal threshold of originality needed to support copyright protection, whether for an original, derivative, or compilation work.” *Id.* at 1. L.A. Gem & Jewelry also asserts that the unauthorized copying of the Works by other designers is evidence of the Works’ originality, *id.* at 6, and that the Works are unlike any previously existing jewelry designs. *Id.* at 8.

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 United States District Court for the Southern District of New York upheld the Copyright Office’s refusal to register simple designs consisting of two linked letter “C” shapes “facing each other in a mirrored relationship” and two unlinked letter “C” shapes “in a mirrored relationship and positioned perpendicular to the linked elements.” *Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 496 (S.D.N.Y. 2005). 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).

Similarly, 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.

Finally, Copyright Office registration specialists (and the Board) do not make aesthetic judgments in evaluating the copyrightability of particular works. *See* COMPENDIUM (THIRD) § 310.2. The attractiveness of a design, the espoused intentions of the author, the design’s visual effect or appearance, its symbolism, the time and effort it took to create, or the design’s commercial success in the marketplace are not factors in determining whether a design is copyrightable. *See, e.g., Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

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.

L.A. Gem & Jewelry argues that the Works are copyrightable both as to the individual elements in each design, as well as compilations of these elements. *See* Second Request at 2, 8. The Board disagrees with these arguments.

Each Work is comprised of three elements: a sterling silver band, a gold-toned heart, and a small gemstone. None of these individual elements is copyrightable in itself. The gold-toned hearts are simply minor variations on the common heart shape, and thus cannot be protected by copyright. *See* COMPENDIUM (THIRD) § 313.4(J) (stating that familiar symbols and designs, such as a heart, are uncopyrightable). Similarly, the gemstone accents are simply single decorative stones, without any copyrightable elements. *See* COMPENDIUM (THIRD) § 313.4(B) (giving “solitaire rings, simple diamond stud earrings, simple hoop earrings, and other jewelry designs that contain only a trivial amount of authorship” as examples of uncopyrightable, *de minimis* authorship).

As for the sterling silver bands, which are variations on the familiar symbols of the curlicue, cross, teardrop, and heart, L.A. Gem & Jewelry asserts that by designing these symbols with techniques such as “variances in slope,” “ebbs and flows,” and “variance in slope and thickness,” Second Request, at 6-7, they have created copyrightable works. What L.A. Gem & Jewelry has created with the silver band elements of the Works, however, is

better described as “mere variations on a familiar symbol or design,” which do not clear the bar of copyrightability. COMPENDIUM (THIRD) § 906.2.

As to whether the Works are copyrightable when viewed as compilations, it is true that unprotectable elements may satisfy the requirement for copyrightable authorship as a compilation if they are selected, coordinated, and/or arranged in a sufficiently creative manner. Specifically, when a jewelry design includes only a few elements, copyrightability may be found in the “decoration, arrangement, use of color, shapes, or textures.” COMPENDIUM (THIRD) § 908.3. The Board finds that the Works do not meet this threshold. In this case, each Work consists of three elements—a variation on a familiar symbol, an accent diamond, and an accent heart—arranged in a predictable and simplistic manner. *See id.* § 312.2. Thus, viewing the Works as compilations does not render them sufficiently creative to qualify for protection.

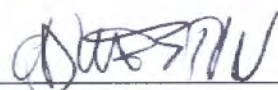
L.A. Gem & Jewelry also argues that the Works’ “abstract depiction of an embrace[] constitutes a fresh take on conventional jewelry design incorporating a gemstone and a heart,” which is unlike any other preexisting works of art. Second Request at 5. The Board does not find this argument persuasive for two reasons. First, the symbolic meaning or impression of a work—such as whether it evokes an embrace in the mind of the viewer—is irrelevant to its copyrightability. COMPENDIUM (THIRD) § 310.3. Additionally, a work may exhibit a “fresh take” on a design but still fall short of the originality requirement. *See* COMPENDIUM (THIRD) § 310.1.

Finally, the Board finds that the fact that others have copied the Works, Second Request at 6, has no bearing on their copyrightability. In applying the originality standard the Office does not assess a design’s success in the marketplace in determining whether a work contains the requisite minimal amount of original authorship necessary for registration. *See* COMPENDIUM (THIRD) § 310.10. Thus, even if accurate, the fact that the Works have been copied by competitors only indicates that others believe it to be a profitable design, not that it possesses copyrightable authorship. *See Paul Morelli Design, Inc. v. Tiffany & Co.*, 200 F. Supp. 2d 482, 488-89 (E.D. Pa. 2002).

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 Work. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action in this matter.

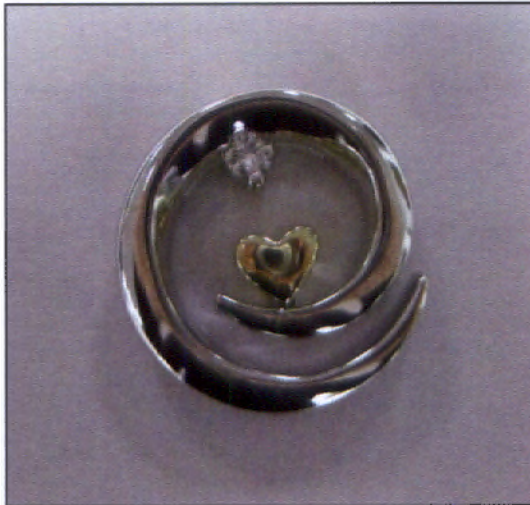
BY:



Chris Weston
Copyright Office Review Board

APPENDIX A

Arms of Love – LAR08-08C3-1

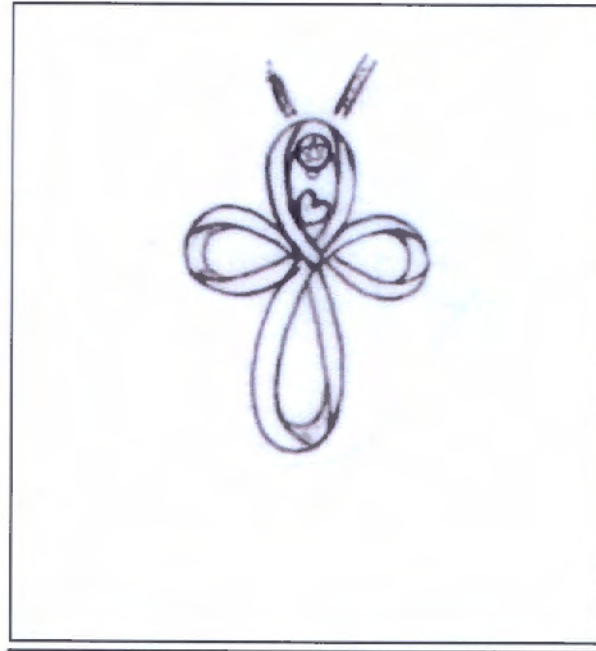




Arms of Love – LAR08-08C3-3







Arms of Love – LAR08-08C3-4





Arms of Love – LAR08-08C3-5

