United States Copyright Office
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April 25, 2016

Tannenbaum Helpern Syracuse & Hirschtritt LLP
Attn: Donald Prutzman
900 Third Ave. Suite 1200
New York, NY 10022

Re: Second Request for Reconsideration for Refusal to Register Eva Fehren X Ring and Eva Fehren X Ring—Black Gold, Correspondence ID: 1-IW1A44

Dear Mr. Prutzman:

The Review Board of the United States Copyright Office (the "Board") has examined Gorga Fehren Fine Jewelry LLC's ("Fehren Fine Jewelry's") second request for reconsideration of the Registration Program's refusals to register copyright claims in three-dimensional works titled "Eva Fehren X Ring" and "Eva Fehren X Ring—Black Gold" (the "Works"). After reviewing the applications, the deposit copies, and the relevant correspondence in the cases, along with the arguments in the second request for reconsideration, the Board affirms the Registration Program's denial of registration of these copyright claims.

I. DESCRIPTION OF THE WORKS

"Eva Fehren X Ring" and "Eva Fehren X Ring—Black Gold" are jewelry ring designs. Both ring designs consist of two standard circular metal bands that have each been partially inset with a channel of small diamonds. In both ring designs, the circular bands intersect so that they form a symmetrical "X" or cross shape.

Photographic reproductions of the Works are included as Appendix A.

II. ADMINISTRATIVE RECORD

On March 27, 2013, Fehren Fine Jewelry filed applications to register copyright claims in the Works. In a letter dated June 25, 2013, a Copyright Office registration specialist refused to register the Works, finding that they "lack the authorship necessary to support a copyright claim." *See* Letter from Robin Jones, Registration Specialist, to Donald Prutzman, Tannenbaum Helpern Syracuse & Hirschtritt LLP (June 25, 2013). The letter stated that the Works do not possess sufficient creative authorship within the meaning of the copyright statute and settled case law to support a claim to copyright. *Id.*

In a letter dated September 23, 2013, Fehren Fine Jewelry requested that the Office reconsider its initial refusal to register the Works. *See* Letter from Donald Prutzman, Tannenbaum Helpern Syracuse & Hirschtritt LLP, to U.S. Copyright Office (Sept. 23, 2013) ("First Request"). After reviewing the points raised in the First Request, the Office reevaluated the claims and in a letter dated January 13, 2014, again concluded that the Works do not contain a sufficient amount of

original and creative artistic or graphic authorship to support a copyright registration. *See* Letter from Stephanie Mason, Attorney-Advisor, to Donald Prutzman, Tannenbaum Helpern Syracuse & Hirschtritt LLP (Jan. 13, 2014).

In a letter dated April 10, 2014, Fehren Fine Jewelry requested that, pursuant to 37 C.F.R. § 202.5(c), the Office again reconsider its refusal to register the Works. *See* Letter from Donald Prutzman, Tannenbaum Helpern Syracuse & Hirschtritt LLP, to U.S. Copyright Office (Apr. 10, 2014) ("Second Request"). In its Second Request, Fehren Fine Jewelry disagreed with the Office's conclusion that the Works do not include the minimum amount of creativity required to support registration under the Copyright Act. Specifically, Fehren Fine Jewelry claimed that the selection and arrangement of the Works' constituent elements possesses a sufficient amount of creative authorship to warrant copyright protection. *Id.* at 2.

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 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 held 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 nonexistent." *Id.* at 359.

The Office's regulations implement the longstanding requirements of originality and creativity in the law as affirmed by, 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"); 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"). 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. Indeed, 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, e.g., Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101 (2d Cir. 2001). 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"). 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.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). Likewise, the Ninth Circuit has held that a glass sculpture of a jellyfish that consisted of elements including clear glass, an oblong shroud, bright colors, 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) (emphasis in original).

Finally, Copyright Office registration specialists (and the Board) do not make aesthetic judgments in evaluating the copyrightability of particular works. *See* COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 310.2 (3d ed. 2014) ("COMPENDIUM (THIRD)"). They are not influenced by 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 its commercial success in the marketplace. *See* 17 U.S.C. § 102(b); *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 the Works fail to satisfy the requirement of creative authorship necessary to sustain claims to copyright.

Here, it is undisputed that the constituent elements that comprise the Works—two standard metal bands and a channel of gemstones—are not individually subject to copyright protection. It is true that public domain elements may satisfy the requirement for copyrightable authorship as a compilation if they are selected, coordinated, and/or arranged in a sufficiently creative manner. *See* COMPENDIUM (THIRD) § 312.2. Thus, although the individual components of a given work may not be copyrightable, the Copyright Office follows the principle that works should be judged in their entirety and not based solely on the protectability of individual elements within the work. *Atari Games Corp. v. Oman*, 979 F.2d 242, 244-245 (D.C. Cir. 1992). Works comprised of public domain elements may be copyrightable if their selection, arrangement, or modification reflects choice and 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 that, viewed as a whole, the selection, combination, and arrangement of metal bands and gemstones that comprise the Works is not sufficient to render the Works original. The Works consist of little more than two circular intersecting metal bands decorated with channels

of diamonds and arranged so that they form a standard symmetrical "X." Mere variations of a standard "X" or cross design, as well as the decorative placement of channels of gemstones on a band, are not only typical of jewelry ring designs but, as a whole, 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 Work. Pursuant to C.F.R. § 202.5(g), this decision constitutes final agency action in this matter.

BY: _____

Chris Weston
Copyright Office Review Board Member

APPENDIX A