



United States Copyright Office

Library of Congress · 101 Independence Avenue SE · Washington, DC 20559-6000 · www.copyright.gov

May 21, 2018

Dyan Finguerra-DuCharme
Pryor Cashman LLP
7 Times Square
New York, NY 10036

Re: Second Request for Reconsideration for Refusal to Register POSSESSION TOI & MOI BRACELET 1; POSSESSION TOI & MOI BRACELET 2; Correspondence ID: 1-248JI9S, SR# 1-2406151726

Dear Ms. Finguerra-DuCharme:

The Review Board of the United States Copyright Office (“Board”) has considered Richemont International S.A. and Piaget’s (“Richemont’s”) second request for reconsideration of the Registration Program’s refusal to register jewelry design claims in two bracelets titled “POSSESSION TOI & MOI BRACELET 1” and “POSSESSION TOI & MOI BRACELET 2” (“Works”). After reviewing the application, deposit copy, and relevant correspondence, along with the arguments in the second request for reconsideration, the Board affirms the Registration Program’s denial of registration of the Works because they do not contain a sufficient amount of creative authorship to support a copyright claim.

I. DESCRIPTION OF THE WORKS

Possession Toi & Moi Bracelet 1 is a bracelet made of rose gold. The bracelet consists of two interlocking rings of different sizes, attached to a thin gold chain. The larger ring is smooth gold; the smaller ring is white gold set with small diamonds. A “P” charm dangles from the bracelet’s clasp.



Possession Toi & Moi Bracelet 2 is also made of rose gold. The bracelet consists of a curved gold bar, set with brilliant-cut diamonds, attached to a circular band engraved with the word “POSSESSION” with a cuff-type mechanism. These elements are attached to a thin gold chain on either side. A diamond charm dangles from the bracelet’s clasp.



II. ADMINISTRATIVE RECORD

On May 21, 2015, Richemont filed two applications to register copyright claims in the Works as jewelry designs. In an August 5, 2016 letter, a Copyright Office registration specialist refused to register both claims, finding that the Works “lack the authorship necessary to support a copyright claim.” Letter from Annette Coakley, Registration Specialist, to Dyan Finguerra-DuCharme (Aug. 5, 2016).

Richemont then requested that the Office reconsider its initial refusal to register the Works. Letter from Dyan Finguerra-DuCharme to U.S. Copyright Office (Oct. 25, 2016) (“First Request”). Richemont asserted that “the works reflect the authorship necessary to support copyright claims” because “the requisite level of creativity is ‘extremely low,’” and the Works meet it. *Id.* at 1 (quoting *Yurman Studio, Inc. v. Castaneda*, 591 F. Supp. 2d 471, 483 (S.D.N.Y. 2008)). Richemont argued that the Office “has granted registrations for jewelry pieces consisting of familiar shapes such as circles which exhibit far less creativity than that embodied in the [Works],” and that the Works “include elements of varying shapes, widths, and sizes and deliberately employ asymmetrical arrangements in order to achieve a desired artistic effect.” *Id.* at 4–5. Richemont stated that “[v]iewed in totality, the selection and arrangement of these elements exhibit, at the very least, the minimal degree of creativity required to obtain copyright protection.” *Id.* at 5.

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 a copyright registration.” Letter from U.S. Copyright Office to Dyan Finguerra-DuCharme (Mar. 14, 2017). The Office noted that “in both works the features are not combined in any way that differentiates them from their basic shape and design components,” and rather that the Works are “simple combinations of basic design elements that cannot support a claim in copyright.” *Id.* at 3.

Richemont then submitted a second request for reconsideration of the refusals pursuant to 37 C.F.R. § 202.5(c). Letter from Dyan Finguerra-DuCharme to U.S. Copyright Office (May 12, 2017) (“Second Request”). Richemont claimed that the Office “failed to apply this well-established principle” that creativity of coordination or arrangement of otherwise unprotectable elements is “determinative of the copyrightability of” jewelry pieces. *Id.* at 1–2. Richemont included photos of jewelry pieces that courts have held sufficiently creative to be protected by copyright “as examples of the low threshold for a work to meet the ‘creativity’ requirement for copyright protection.” *Id.* at 3–5. Richemont argued that “the intricately placed, balanced, and harmonized elements in the [Works] render them worthy of protection under the Copyright Act.” *Id.* at 5.

III. DISCUSSION

A. The Legal Framework

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 its symbolism, the time and effort it took to create, or the design's commercial success in the market places 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 they do not contain the originality necessary to sustain a claim in copyright.

Though the Supreme Court in *Feist* established a low threshold for copyrightability, there is indeed a threshold. There are a wide variety of protectable works, including innumerable protectable jewelry designs, many of which include combinations of common shapes and other public domain elements. But not all jewelry designs can surmount even the low burden articulated in *Feist*. The jewelry designs at issue here include very few elements, which are merely minor variations on common shapes (here, circles, chains, and bars), arranged in an unoriginal manner. See 37 C.F.R. § 202.1(a) (“[W]orks not subject to copyright [include] familiar symbols or designs.”); see also COMPENDIUM (THIRD) § 908.2 (“The U.S. Copyright Office may register jewelry designs if they are sufficiently creative or expressive. The Office will not register pieces that, as a whole, do not satisfy this requirement, such as mere variations on a common or standardized design or familiar symbol, designs made up of only commonplace design elements arranged in a common or obvious manner, or any of the mechanical or utilitarian aspects of the jewelry.”).

For instance, Possession Toi & Moi Bracelet 1 consists of two rings of different sizes, linked together, attached to a thin chain, with a small charm dangling from the clasp. That combination of elements is commonplace and expected in jewelry designs; many bracelets and necklace have a nearly identical design with similar elements. Similarly, Possession Toi & Moi Bracelet 2 consists of only a few elements: a bar with diamonds arranged in an ordinary pattern, a ring with a word embossed on it, and a basic chain. Those elements are individually uncreative, and are combined in a commonplace way. Thus, the Works do not manifest sufficient creativity for copyright protection; instead they are akin to those works that courts have regularly found to lack sufficient creativity. See, e.g., *DBC of New York, Inc. v. Merit Diamond Corp.*, 768 F. Supp. 414, 416 (S.D.N.Y. 1991) (holding the diamond rings at issue uncopyrightable because they are “on the whole, not exceptional, original, or unique”); *Todd v. Montana Silversmiths, Inc.*, 379 F. Supp. 2d 1110 (D. Colo. 2005) (holding barbed wire jewelry uncopyrightable because despite the designer’s “aesthetic choices, the final arrangement of the elements in her jewelry still corresponds to the arrangement of public domain barbed-wire”); *Homer Laughlin China Co. v. Oman*, No. 90 Civ. 3160, 1991 WL 154540 (D.D.C. 1991) (upholding refusal to register chinaware design pattern composed of simple variations of geometric designs due to insufficient creative authorship to support copyright registration); *John Muller & Co., Inc. v. N.Y. Arrows Soccer Team, Inc.*, 802 F.2d 989 (8th Cir. 1986) (upholding Copyright Office refusal to register logo consisting of four angled lines forming an arrow, with the word “Arrows” in cursive script below). The level of creativity is *de minimis* and insufficient to support copyright registration. Cf. COMPENDIUM (THIRD) § 313.4(J) (“a work consisting of a simple combination of a few familiar symbols or designs with minor linear or spatial variations” is not copyrightable).

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the copyright claim in the Works. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action in this matter.



U.S. Copyright Office Review Board

Karyn A. Temple, Acting Register of Copyrights
and Director, U.S. Copyright Office

Sarang Vijay Damle, General Counsel and
Associate Register of Copyrights

Catherine Zaller Rowland, Associate Register of
Copyrights and Director of Public Information
and Education