



United States Copyright Office

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

January 13, 2017

Hunton & Williams LLP
Attn: Douglas Kenyon
P.O. Box 109
Raleigh, NC 27602
United States

Re: Second Request for Reconsideration for Refusal to Register Ten Table Thorn Link ID Bracelet; Correspondence ID: 1-185VNWS

Dear Mr. Kenyon:

The Review Board of the United States Copyright Office (“Board”) has considered Sylva & Cie’s second request for reconsideration of the Registration Program’s refusal to register a jewelry design claim in a three-dimensional work titled “Ten Table Thorn Link Bracelet” (“Work”). 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.

I. DESCRIPTION OF THE WORK

The Work is a bracelet consisting of a polygon plate with eight sides, a decorative border, and diamonds arranged in a “caviar” setting. The plate connects to two link chains, one made of silver and the other gold. The clasp is an engraved floral clasp. A reproduction of the Work is set forth below.



II. ADMINISTRATIVE RECORD

On June 3, 2015, Sylva & Cie filed an application to register a copyright claim in the Work. In an August 25, 2015 letter, a Copyright Office registration specialist refused to register the claim, finding that it “lacks the authorship necessary to support a copyright claim.” Letter from Kathryn Sukites, Registration Specialist, to Douglas Kenyon, Hunton & Williams LLP (Aug. 25, 2015).

In a letter dated November 25, 2015, Sylva & Cie requested that the Office reconsider its initial refusal to register the Work. Letter from Douglas Kenyon, Hunton & Williams LLP, to U.S. Copyright Office (Nov. 25, 2015) (“First Request”). After reviewing the Work in light of the points raised in the First Request, the Office re-evaluated the claims and again concluded that the Work “does not contain a sufficient amount of original and creative authorship to support a copyright registration.” Letter from Stephanie Mason, Attorney-Advisor, to Douglas Kenyon, Hunton & Williams LLP (Mar. 18, 2016).

In a letter dated June 20, 2016, Sylva & Cie requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Work. Letter from Douglas Kenyon, Hunton & Williams LLP, to U.S. Copyright Office (June 20, 2016) (“Second Request”). In that letter, Sylva & Cie disclaimed the “individualized shapes and symbols that Sylva & Cie did not claim copyright for in the first instance,” *id.* at 2, and claimed that “[a]lthough comprised of common shapes, the Bracelet’s unique arrangement is well above the Supreme Court’s ‘extremely low’ originality threshold.” *Id.* at 1.

III. DISCUSSION

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 that “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 satisfy this test. *See Feist*, 499 U.S. at 358 (finding that 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 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 Work

After carefully examining the Work and applying the legal standards discussed above, the Board finds that the Work does not contain the requisite authorship necessary to sustain a claim to copyright.

Sylva & Cie did not seek copyright in the individual components of the Work and sought copyright only in the Work as an arrangement. It argued that, together, the Work's common shapes satisfy the low bar for copyrightability. It is undisputed that uncopyrightable components may be protectable if selected or combined "in a distinctive manner indicating some ingenuity." *Atari Games Corp.*, 888 F.2d at 883; see also *Diamond Direct, LLC v. Star Diamond Grp., Inc.*, 116 F. Supp. 2d 525, 528 (S.D.N.Y. 2000). And Sylva & Cie correctly noted that courts frequently emphasize the importance of selection and arrangement in assessing the copyrightability of jewelry design. See, e.g., *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101 (2d Cir. 2001).

However, here the Board finds that the selection, combination, and arrangement of the Work's basic elements—a jeweled pendant, a metal rope of silver and gold, a floral clasp—is insufficient to render the Work original. These are concededly unprotectable shapes and designs, and, as the Ninth Circuit stated in *Satava*, "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." 323 F.3d 805 at 811. Here, the arrangement of jewels in straight lines and the use of an eight-sided pendant are commonplace, while the inclusion of a floral clasp and the use of two kinds of metal in the band are, at most, *de minimis* contributions. Sylva & Cie presented no evidence that the Work is sufficiently original, relying primarily on *Jane Envy LLC v. Infinite Classic Inc.*, Nos. SA:14-CV-065-DAE, SA:14-CV-081-DAE, SA:14-CV-083-DAE, 2016 WL 797612 (W.D. Tex. 2016), in which the court noted that though a necklace was composed of uncopyrightable components, together those components "sufficiently display the stamp of the author's originality." *Id.* at *7. But Sylva & Cie offered no theory or explanation of how the *Jane Envy* arrangement was similar, or relevant, to the Work at issue here. Indeed, a number of the jewelry

items at issue in the *Jane Envy* case were found to lack sufficient creativity to warrant copyright protection. *Id.* at *8.

Accordingly, the Board finds that the Work's selection, combination, and arrangement do not demonstrate the creative authorship necessary for a successful copyright claim.

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 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