United States Copyright Office
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May 20, 2014

Maurice B. Pilosof
1925 Century Park East
Suite 2300
Los Angeles, CA 90067

Re: H-2, 3, 4, 5 & 8
Correspondence ID: 1-G9LYL8

Dear Ms. Pilosof:

The Review Board of the United States Copyright Office (the "Board") is in receipt of your second request for reconsideration of the Registration Program's refusal to register the works entitled: *H-2, H-3, H-4, H-5,* and *H-8*. You submitted this request on behalf of your client, Thalia Bloch, on November 21, 2013.

The Board has examined the application, the deposit copies, and all of the correspondence in this case. After careful consideration of the arguments in your second request for reconsideration, the Board affirms the Registration Program's denial of registration of these copyright claims. The Board's reasoning is set forth below. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action on this matter.

I. DESCRIPTION OF THE WORKS

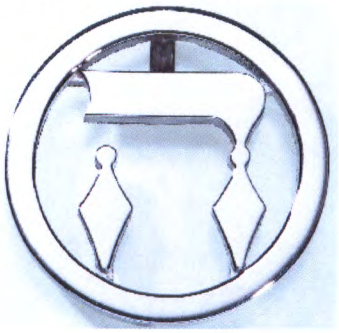
H-2, H-3, H-4, H-5, and *H-8* (the "Works") are a collection of pendants designed to be worn on a necklace chain.

H-2, H-3, H-4, and *H-5*, all consist of stylized renderings of the Hebrew letter "Hei" set inside a thin circular band. In *H-2* and *H-3*, both the "Hei" and the circular band are pavé with round-cut diamonds (the "Hei" in *H-2* also contains two decorative, pink crystals). In *H-5*, only the circular band is pavé with diamonds. *H-4* does not include diamonds. The following images are photographic reproductions of the works from the deposit materials:

H-2

H-3

H-4



H-5

H-8 consists of a circular metal disc with two shapes arranged to resemble a stylized version of the Hebrew letter "Hei" cut from its center. The below image is a photographic reproduction of the work from the deposit materials:

H-8

II. ADMINISTRATIVE RECORD

On January 10, 2012, the United States Copyright Office (the "Office") issued a letter notifying Thalia Bloch (the "Applicant") that it had refused registration of the above mentioned Works. *Letter from Registration Program to Maurice B. Pilosof* (Jan. 10, 2012). In its letter, the Office indicated that it could not register the Works because they lack the authorship necessary to support a copyright claim. *Id.*

In a letter dated April 10, 2012, the Applicant requested that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusal to register the Works. *Letter from Maurice B. Pilosof to Copyright RAC Division* (Apr. 10, 2012) ("First Request"). Upon reviewing the Works in light of the points raised in the letter, the Office concluded that the Works "do not contain a sufficient amount of original and creative artistic, graphic, or sculptural authorship" and again refused registration. *Letter from Stephanie Mason, Attorney-Advisor, to Maurice B. Pilosof* (Aug. 23, 2013).[1]

[1] In its August 23, 2013, denial of your First Request, the Office indicated that it had held its decision on your request for consideration "pending the outcome of the Second Request for Reconsideration for the work titled H-1." *Letter from Stephanie Mason, Attorney-Advisor, to Maurice B. Pilosof* (Aug. 23, 2013). It

Finally, in a letter dated November 21, 2013, you 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 Maurice B. Pilosof to Copyright R&P Division* (Nov. 21, 2013) ("Second Request"). In arguing that the Office improperly refused registration, you claim the Works include at least the minimum amount of creativity required to support registration under the standard for originality set forth in *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991). *Second Request* at 1-4. In support of this argument, you claim that the Applicant carefully selected and combined the individual elements that comprise the Works to give them a grade of creative authorship that is not present when the elements are evaluated independently. *Id.* Specifically, you assert that the Applicant's claim of copyright is directed to the unique fonts used to create the stylized "Heis," the "thickness of the circles" around the "Heis," the "amount, size, and color of the diamonds used," and the way the "Heis" "cut into the circle in certain forms of the designs." *Id.* at 5. You also request that the Board take into account the Applicant's creative efforts such as arranging the Works' elements to represent "unity within the Jewish culture," "allude a certain sense of femininity," and "symbolize blending of life with diamonds" in assessing their copyrightability. *Id.* at 2.

In addition to *Feist*, your argument references several cases in support of the general principle that, to be sufficiently creative to warrant copyright protection, a work need only possess a "modicum of creativity." *Id.* at 3-4. You also reference several cases that demonstrate works comprised of otherwise unprotectable elements are acceptable for copyright protection if the selection and arrangement of their elements satisfies the requisite level of creative authorship. *Id.*

III. DECISION

A. *The Legal Framework*

All copyrightable works must qualify as "original works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a). As used with respect to copyright, the term "original" consists of two components: independent creation and sufficient creativity. *See Feist*, 499 U.S. at 345. 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.* While only a modicum of creativity is necessary to establish the requisite level, the Supreme Court has ruled that some works (such as the telephone directory at issue in *Feist*) fail to meet this 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 long-standing requirements of originality and creativity set forth in the law and, subsequently, 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

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further indicated that the Board had issued a letter dated August 14, 2013, that "affirm[ed] the Registration Program's denial of registration for H-1." *Id.* Upon internal inspection, it has come to our attention that the August 14, 2013, letter denying registration of H-1 was inadvertently mailed to an incorrect address. We apologize for any confusion this may have caused. A revised letter denying your second request for reconsideration of the work titled H-1 is being mailed separately and should arrive soon.

symbols or designs; [and] mere variations of typographic ornamentation, lettering, or coloring"); *see also* 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").

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 Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101 (2d Cir. 2001). However, as noted, the mere simplistic arrangement of non-protectable elements does not automatically establish the level of creativity necessary to warrant protection. *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).

To be clear, the mere simplistic arrangement of unprotectable elements does not automatically establish the level of creativity necessary to warrant protection. For example, the Eighth Circuit upheld the Copyright Office's refusal to register a simple logo consisting of four angled lines which formed an arrow and the word "Arrows" in a cursive script below the arrow. *See John Muller & Co., Inc. v. NY Arrows Soccer Team, Inc.*, 802 F.2d 989 (8th Cir. 1986). Likewise, the Ninth Circuit held that a glass sculpture of a jellyfish that consisted of elements including clear glass, an oblong shroud, bright colors, proportion, 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 court's language in *Satava* is particularly instructional:

> [i]t 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, as well) do not make aesthetic judgments in evaluating the copyrightability of particular works. They are not influenced by the attractiveness of a design, the espoused intentions of the author, the design's uniqueness, its 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); *see also 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 *H-2, H-3, H-4, H-5,* and *H-8* and applying the legal standards discussed above, the Board finds that each work fails to satisfy the requirement of creative authorship.

First, the Board finds that none of the Works' constituent elements, considered individually, are sufficiently creative to warrant protection. As noted, 37 C.F.R. § 202.1(a), identifies certain elements that are not copyrightable. These elements include: "[w]ords and short phrases such as names, titles, slogans; familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering, or coloring." *Id.*

H-2, H-3, H-4, and *H-5* are comprised of varying combinations of the following elements: (1) the Hebrew letter "Hei"; (2) a thin circular band; and, (3) gemstones of various size and color. Gemstones and thin circular bands are familiar shapes, ineligible for copyright protection. *See* 37 C.F.R. § 202.1(a) (stating "familiar symbols or designs" are prohibited from registration under the Copyright Act). The "Hei" character is a letter and is likewise ineligible for copyright protection. *Id.*; *see also Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 498-99 (S.D.N.Y. 2005) (indicating mere variations in typographic ornamentation or lettering cannot support a copyright claim). Finally, coloration alone is insufficient to support a copyright claim. *See Boisson v. Banian, Ltd.*, 273 F.3d 262, 271 (2d Cir. 2001) (indicating mere coloration cannot support a copyright claim). Thus, none of the elements that comprise *H-2, H-3, H-4,* and *H-5*, individually, qualify for registration under the Copyright Act.

H-8 is comprised of a thin metal disc with two shapes arranged to resemble a stylized version of the Hebrew letter "Hei" cut from its center. For the reasons indicated above, neither the thin metal disc nor the stylized letter are eligible for protection. *See* 37 C.F.R. § 202.1(a) (prohibiting registration of familiar shapes); *Coach, Inc. v. Peters*, at 498-99 (prohibiting the registration of variations in lettering). Thus, as with the other works, none of the elements that comprise *H-8* are eligible for registration under the Copyright Act.

Second, the Board finds that the Works, each considered in their entirety as a whole, fail to meet the creativity threshold set forth in *Feist*. 499 U.S. at 359. As explained, the Board accepts the principle that jewelry designs comprised of combinations of unprotectable elements may be eligible for copyright registration. However, in order to be accepted, such combinations must contain some distinguishable variation in the selection, coordination, or arrangement of their elements that is not so obvious or minor that the "creative spark is utterly lacking or so trivial as to be nonexistent." *Id.*; *see also Atari Games,* 888 F.2d at 883 (finding a work should be viewed in its entirety, with individual noncopyrightable elements judged not separately, but in their overall interrelatedness within the work as a whole).

H-2, H-3, H-4, and *H-5* consist of little more than the Hebrew letter "Hei" set inside a standard, circular jewelry band. Three of the works include sections of pavé diamonds and one work includes two ornamental pink crystals. This ordinary jewelry pendant arrangement of a letter set within a simple circular band and decorated with gemstones of various size and color is *de minimis* and fails to meet the threshold for copyrightable authorship. *Feist,* 499 U.S. at 359; *see also Atari Games,* 888 F.2d at 883. Accordingly, we conclude that *H-2, H-3, H-4,* and *H-5* lack the requisite "creative spark" necessary for registration. *Feist,* 499 U.S. at 359; *Satava*, 323 F.3d at 811.

As noted, *H-8* is a thin metal disc with shapes arranged to resemble a "Hei" symbol cut from its center. As with the above works, this basic combination of an ordinary shape and an unprotectable letter is *de minimis* and lacks the requisite "creative spark" necessary for registration. *Feist,* 499 U.S. at 359; *Satava*, 323 F.3d at 811.

Finally, your assertions that the selection and arrangement of the Works' elements represent "unity within the Jewish culture," allude to "a certain sense of femininity," and "symbolize blending of life with diamonds" do not add to your claims of sufficient creativity. *Id.* at 2. As discussed above, the Board does not assess a design's symbolism, uniqueness, visual effect or appearance, or the espoused intentions of the author in determining whether a work contains the requisite minimal amount of original authorship necessary for registration. *See* 17 U.S.C. § 102(b); *see also Bleistein*, 188 U.S. 239. Thus, even if accurate, the mere fact that the Works consist of unique, symbolic arrangements of familiar shapes into jewelry pendant designs would not qualify the Works for copyright protection.

In sum, the Board finds that both the individual elements that comprise the Works, as well as the Applicant's selection, organization, and arrangement of those elements lack the sufficient level of creativity to make the Works eligible for registration under the Copyright Act.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the works entitled: *H-2, H-3, H-4, H-5, and H-8.* This decision constitutes final agency action on this matter. 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

BY: _____

Stephen Ruwe
Copyright Office Review Board