United States Copyright Office
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Re: BUTTERFLY HAIRCLIP
Control No. 61-203-571.(R)

Dear Mr. Cohen:

I am writing on behalf of the Copyright Office Board of Appeals in response to your letter dated December 13, 2002, requesting reconsideration of a refusal to register a work entitled "BUTTERFLY HAIRCLIP" on behalf of your client, C.S.P. Diffusion Z.I. de la Laye. The Board has carefully examined the application, the deposit and all correspondence in this case concerning this application and affirms the denial of registration of this work.

I. ADMINISTRATIVE RECORD

A. Initial submission and Office refusal to register

The initial application for registration of the BUTTERFLY HAIRCLIP, received on September 4, 2001, sought registration for a jewelry design. In a letter dated December 12, 2002, Visual Arts Examiner Wilbur King refused registration of this work because he concluded that the work was a useful article which did not contain any separable authorship necessary to sustain a claim of copyright. Letter from King to Cohen of 12/12/02. Mr. King noted that a claim for copyright protection in a useful article must evidence sufficient separable authorship in order to sustain a copyright. Mr. King also explained the concepts of physical and conceptual separability as discussed in legislative history and the Compendium of Copyright Office Practices, Compendium II, Chapter 5 (1984). *Id* at 1. In applying the applicable law to the work, Mr King stated that "[b]ecause all of the elements of the work you deposited are either related to the utilitarian aspects or function, or are subsumed within the overall shape, contour, or configuration of the article, there is no physically or conceptually 'separable' authorship as such." *Id.* at 2.

B. First request for reconsideration

In a letter to the Examining Division of April 11, 2002, you requested reconsideration of the Copyright Office's refusal to register the BUTTERFLY HAIRCLIP. First, you argued that the BUTTERFLY HAIRCLIP was not a "useful article" within the meaning of 17 U.S.C.

§ 101 and the interpretation of that provision by the courts. Letter from Cohen to the Examining Division of 4/11/02, at 3-6. Alternatively, you argued that even if the BUTTERFLY HAIRCLIP is found to be a useful article, the conceptually separable elements of the work support a claim to copyright despite the utilitarian function. *Id.* at 6-9. In specific, you relied on Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co., 74 F.3d 488 (4th Cir 1996), Yurman Design, Inc. v. PAJ Inc., 262 F.3d 101 (2d Cir 2001), Masquerade Novelty Inc. v. Unique Industries, Inc., 912 F.2d 663 (3d Cir. 1990), Hart v. Dan Chase Taxidermy Supply Co., 86 F.3d 320 (2d Cir. 1996), Brandir International Inc. v. Cascade Pacific Lumber Co., 834 F.2d 1142 (2d Cir. 1987), Carol Barnhart Inc. v. Economy Cover Corp., 773 F.2d 411 (2d Cir. 1985) and Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989 (2d Cir. 1980) as support for your view that the BUTTERFLY HAIRCLIP contains conceptually separable authorship which should be registered by the Copyright Office. *Id.*

In your request for reconsideration, you also argued, and provided support for your argument in the form of a declaration from Christian Potut, that the creation of the work required aesthetic choices in representing the appearance of a butterfly. You conclude by stating that these "artistic considerations constitute much more than the 'slight amount' of creativity necessary for copyright registration." *Id.* at 9.

C. Examining Division response to first request for reconsideration

In a letter dated July 24, 2002, Examining Division Attorney Advisor Virginia Giroux responded to your first request for reconsideration and explained that the Examining Division fully reviewed the points raised in your letter together with the actual samples submitted and the supporting declaration by Christian Potut. As a result of that review, Ms. Giroux stated that the Examining Division accepted your assessment that the work was "primarily ornamental and decorative, and as such, does not fall within the category of useful articles." Letter from Giroux to Cohen of 7/24/02, at 1.

Despite the finding that the work was not a useful article, the BUTTERFLY HAIRCLIP was again refused registration, because Ms. Giroux found the work did not contain a sufficient amount of original artistic or sculptural authorship upon which to support a claim of copyright. *Id.* at 1. Ms. Giroux explained that to be regarded as copyrightable, a work must not only be original, but must also "possess more than a *de minimis* quantum of creativity." *Id.* at 1, *citing,* Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 363 (1991). Ms. Giroux also noted that originality, as interpreted by the courts, means that the authorship must constitute more than a merely trivial variation of public domain elements. *Id.*, *citing,* Alfred Bell & Co v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951). Ms. Giroux further stated that the individual parts do not reflect the creativity necessary to support a registration and that the "arrangement and combination of the curvilinear or arc-shapes and 'S' shapes coupled with the triangular cut-outs do not rise to the level of copyrightable authorship necessary to sustain a copyright registration." *Id.* at 1-2,

citing Compendium II, § 503.02(b). While agreeing that the quantum of creative authorship necessary to sustain a copyright is low, Ms. Giroux expressed the Examining Division's view that the sculptural elements embodied in this work, as well as their arrangement and combination, fail to meet this low threshold for copyrightable authorship and that the design reflects *de minimis* authorship arranged in a rather simple configuration. *Id.* at 2. Even under the principle expressed in Atari Games Corp. v. Oman, 888 F.2d 878 (D.C. Cir. 1989), requiring a work's authorship to be assessed in its entirety, the BUTTERFLY HAIRCLIP falls short. *Id.* at 2.

Ms. Giroux also responded to your arguments comparing the instant work to the belt buckles in Kieselstein-Cord v. Accessories By Pearl, Inc., 632 F.2d 989 (2d Cir. 1980). Since the belt buckles in that case were registered upon initial examination, there was no articulation of the grounds for the registration. Nevertheless, Ms. Giroux noted that the BUTTERFLY HAIRCLIP can be distinguished from that registration because the jewelry registered by the Copyright Office in Kieselstein-Cord contained conceptually separable sculptural elements that were fanciful and distinguishable from the functional design of the belt buckles. The creative authorship in the jewelry as a whole rose above the creative authorship found in the BUTTERFLY HAIRCLIP. *Id.* at 3.

In response to your argument that the aesthetic choices made by the author satisfy the "slight amount" of creative authorship necessary for copyright registration, Ms. Giroux noted that all works require choices. She explained that it is not the mental activity involved that determines the sufficiency of authorship, but rather "whether the particular resulting expression contains copyrightable authorship. *Id.* at 3. In the Examining Division's view, the BUTTERFLY HAIRCLIP does not evidence a sufficient amount of authorship to support registration.

D. Second request for reconsideration

In a letter dated December 13, 2002, you sent a second request for reconsideration to the Copyright Office's Board of Appeals together with a supplemental declaration from Christian Potut and five exhibits. You support the Examining Division's determination that the work is not a useful article, and you urge that the work should be classified within the context of "works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned." Letter from Cohen to Board of Appeals of 12/13/02, at 2. You reiterate the case law cited in support of this view in your first appeal. *Id.* at 3-4.

You also argue that the BUTTERFLY HAIRCLIP "clearly exceeds the low level of creativity as a work of original sculptural authorship." *Id.* at 4. Again, you reiterate your previous arguments and note that the Feist decision, the Alfred Bell decision and Compendium II all support the view that the standard for sufficient creative authorship is minimal. *Id.* at 4-5. You state that because a jeweled bee pin and a stuffed toy lion are cited in Compendium II as examples of sufficient creative authorship, in contrast to works shaped as simple

geometric shapes, e.g., a five-point star, the BUTTERFLY HAIRCLIP clearly falls on the side of sufficient creativity. You also argue that part of the reason that Ms. Giroux concluded that the minimal standard of originality was not met is that she "improperly" characterized the features of the work as common geometric shapes and that Ms. Giroux reduced the creative expression to only two features. *Id.* at 5. It is your position that the "S" shape described by Ms. Giroux is not common, but rather is an asymmetrical form of the "S" with creative triangular cutouts to "mimic the arcuate edges of the winged portions." *Id.* at 6. By reference to your exhibits 1- 4, you also argue that there are numerous creative elements that are apparent when the work is examined. In addition to the "S" shape, you note that "winged portions A-D form a butterfly shape and that when combined with the edge surfaces E-H, present a stylized butterfly-like shape. *Id.* at 7. You also note additional ornamental recesses (M-P), ornamental openings (I-L), arcuate edge surfaces (E-H) and winged portions (A-D) that you state were not considered by Ms. Giroux and were not adequately considered in their overall combination as required by Atari Games. *Id.* at 7-8.

You point to the new Exhibit 5 as an example of a prior work without any of the BUTTERFLY HAIRCLIP's creative features and argue that the additional elements found in the BUTTERFLY HAIRCLIP represent original features used to create a distinctive design. *Id.* at 7-8. You also state that the BUTTERFLY HAIRCLIP "embodies more creativity than a jeweled bee pin merely consisting of three parallel rows of stones." *Id.* at 8. Relying on language in the Feist decision that "even the slightest amount [of creativity] will suffice" to support copyright registration, you maintain that this work exceeds that requisite standard. *Id.* at 8-9.

II. DECISION

A. Description of work

The BUTTERFLY HAIRCLIP is a spring-hinged, black, plastic clip with two sets of seven opposing, inter-laced, curved teeth. On the top of the clip, there are two opposing 'winged' portions that extend outwardly in a curvilinear fashion to form a stylized butterfly shape. At the center of these opposing winged portions are two curved rectangular areas which, when squeezed together, engage the spring to open the curvilinear teeth.

B BUTTERFLY HAIRCLIP is not a useful article

The Copyright Office Board of Appeals recognizes that there was disagreement between the grounds on which the Examiner based his refusal and the basis for refusal in the first request for reconsideration. The Board need not reach a resolution of the issue of whether or not the work is a useful article or instead a "work of artistic craftsmanship" as the latter term is distinguished in section 101 of the statute from mechanical or utilitarian aspects of a pictorial, graphic or sculptural work. Our ultimate determination of registrability does not rest on that question. The analysis would be virtually identical even if the BUTTERFLY

HAIRCLIP were considered a useful article, because only the separable artistic features of the useful article would be considered for determining whether these features achieved the requisite level of creative authorship. Since only those non-functional features of the BUTTERFLY HAIRCLIP are being claimed to supply the requisite level of creative authorship, the fundamental question for the Board is essentially the same – do the non-functional features establish more than a *de minimis* quantum of creative authorship to sustain a copyright registration? Because the Board of Appeals finds the answer to this question to be negative, it is unnecessary to resolve the question of whether the BUTTERFLY HAIRCLIP is a work of artistic craftsmanship or a useful article.

C. BUTTERFLY HAIRCLIP does not contain sufficient separable authorship

The Board recognizes the applicability of Feist when examining and judging the authorship of a sculptural work or any other work. Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991). The Board further recognizes that the threshold for copyrightability of a work is low. Nevertheless, a threshold does exist, as indicated by the facts and holding of the Feist decision itself. 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, and that there can be no copyright in works in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359.

Even prior to Feist, Copyright Office registration practices following settled precedent recognized that some works of authorship contain only a *de minimis* amount of authorship and, thus, are not copyrightable. We acknowledge that pre-Feist case law recognized no demanding standard for copyrightability. *See, e.g.*, Alfred Bell & Co., Ltd. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951) (" 'Original' in reference to a copyrighted work means that the particular work 'owes it origin' to the 'author.' No large measure of novelty is necessary.") 191 F.2d at 102. This does not mean, however, that no standard at all existed. Although Catalda itself stated that "no large measure of novelty is necessary" in a work of authorship in order to enjoy copyright protection, the same Second Circuit opinion also held that the distinguishable variation in a work of authorship for which copyright protection is sought, must be "more than a 'merely trivial' variation." 191 F.2d at 102-103. Forty years later, Feist again confirmed that the "standard of originality is low, but it does exist." 499 U.S. at 362.

You also cite the Yurman decision in support of your argument that the standard is "extremely low." Yurman Design, Inc. v. PAJ, Inc., 262 F.3d 101 (2d Cir. 2001). As stated, the Board agrees that the standard of originality is low. The works at issue in Yurman, however, were registered by the Copyright Office and given the statutory presumption of validity by the court. Unlike the works involved in the Yurman case that were registered, the Board finds that the BUTTERFLY HAIRCLIP falls below the threshold necessary to sustain a registration of copyright.

The Copyright Office registration practices have long recognized that works with only a *de minimis* amount of authorship are not copyrightable. *See* Compendium of Copyright Office Practices, Compendium II, (1984), section 202.02[a]. The particular examples in the Compendium II that you cite in support of registration are distinguishable from the present work. The jeweled bee pin example described a sculptural depiction of a bee that would be copyrightable, whereas jewelry consisting simply of three parallel rows of stones would not be registrable. Compendium II at section 504.02(2). The BUTTERFLY HAIRCLIP is closer to the simple pattern in the jewelry example than it is to the sculptural bee. If this hairclip had included a sculptural butterfly, it would likely have contained sufficient authorship. Instead, the BUTTERFLY HAIRCLIP contains is only a *de minimis* "suggestion" of a butterfly, without the presence of copyrightable expression. The stuffed toy lion example in Compendium II is similarly distinguishable. Compendium II at section 504.02(3). The toy lion example involved sufficient expression of a sculptural lion, not the mere suggestion existing in *de minimis* authorship of a lion. While the BUTTERFLY HAIRCLIP may suggest the shape of a butterfly, the expression of this suggestion is found to be lacking the requisite level of creative authorship.

The Board of Appeals agrees with the Examining Division's finding that the BUTTERFLY HAIRCLIP contains insufficient creative authorship to support a copyright registration. Despite your efforts to describe the ornamental features of this hairclip as a variety of distinct artistic features, the simple fact remains that those ornamental features are *de minimis* variations of common geometric shapes arranged in a symmetrical manner. The individual features and their selection and arrangement are "garden-variety" ornamentation of a basic hairclip with *de minimis* creativity. *See*, Feist at 362. Although the curves may be aesthetically pleasing, the four winged portions (A, B, C, and D of Exhibit 3) are identical to each other. The arrangement of these winged portions are symmetrical. Neither the individual winged portions or the entire side of the clip, including the triangular spaces, reveals sufficient creative authorship to sustain a registration for a claim of copyright.

III. CONCLUSION

For the reasons stated in this letter, the Copyright Office Board of Appeals affirms the Examining Division's refusal to register the BUTTERFLY HAIRCLIP. This decision constitutes final agency action in this matter.

Sincerely,

Marilyn J. Kretsinger

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