February 2, 2001

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Steven B. Lehat, Esq.
26 Iron Bark Way
Irvine, CA 92612

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Re: Butterfly Wings and Angel Wings
Control Numbers: 60-700-1548(S)

Dear Mr. Lehat:

101 Independence Avenue, S.E.

I am writing on behalf of the Copyright Office Board of Appeals in response to your letter dated May 15, 2000, appealing a refusal to register two works entitled "Butterfly Wings" and "Angel Wings" on behalf of your client, William Zelowitz. The Board has carefully examined the applications, the deposits, and all correspondence in this case concerning these applications and affirms the denial of registration because neither of the works represent sufficient artistic or sculptural authorship to support a claim to copyright.

Washington, D.C.
20559-6000

Administrative Record

The initial application for registration was received on July 2, 1999 and rejected because the works lacked sufficient artistic or sculptural authorship to support a copyright. The letter of rejection stated that in order to be copyrightable, artwork or sculpture must contain at least a minimal amount of original artistic material. In addition, the letter went on to say that copyright does not protect familiar symbols and designs, minor variations of basic geometric shapes, lettering and typography, or mere variations in coloring.

You filed a request for reconsideration on December 13, 1999, arguing that the copyrightability of sculptured wings was supported by case law, and that "the author's enclosed declaration presented the creativity necessary for his works to be copyrighted." Your letter further asserted that "the author's very personal creative vision regarding both works and the gap that separates them from their real world counterparts further accentuates the degree of serendipity at play here."

In response to the initial request for reconsideration, Ms. Virginia Giroux expanded on the reasoning for the initial rejection. (Letter from Virginia Giroux to Steven B. Lehat, dated March 3, 2000). Ms. Giroux pointed out that the material such as feathers, boas, and fabric does not determine copyrightability. She further stated that in the case of sculptural works, the originality must lie in the shape of the sculpture and must have originated with the author. Finally, in response to the cases cited in your initial letter, Ms. Giroux distinguished the works in those cases as being more complex, and not comparable to the works at issue here.

A second request for reconsideration was filed on May 15, 2000, desiring a "reasoned analysis" of the denials and a particular explanation of the refusal to accept the principles articulated by allegedly analogous case law. You relied heavily upon the case of Great Importations, Inc. v. Caffco Int'l, Inc., 1997 U.S. Dist. LEXIS 14808, in which the court found that originality sufficient of copyright could be found in the wings of a sculptural work, and also the feather formation. Comparing Great Importations to this case, you stated that the authors in both made the very same choices. You also cited Kamar Int'l, Inc. v. Russ Berrie & Co., which stated that even "realistic depictions of animals" could be copyrightable.657 F.2d 1059 (9th Cir. 1981). You argued that this sculptural depiction of angel and butterfly wings must be logically included into this broader category of works that were copyrightable. Finally, you relied on Superior Form Builders v. Dan Chase Taxidermy Supply Co., 74 F.3d 488 (4th Cir. 1996) in which the court found that the mannequins specifically designed to bear actual skin, ie. taxidermic expressions, were copyrightable. You claimed that if the simple artistic choices made in creating the mannequins warranted sufficient artistic expression and originality for copyright registration, then this author's abstract renditions of angel and butterfly wings should naturally deserve the same allowance. Along the same line of argument, you cited Animal Fair, Inc. v. Amfesco Indus., Inc., 620 F.Supp. 175 (D. Minn. 1985) granting copyright protection to sculptural depictions of "bear claws."

Discussion

The Board has concluded that the Visual Arts Section correctly found that the "ANGEL WINGS" and "BUTTERFLY WINGS" contain insufficient copyrightable authorship to justify registration. Accordingly, registration for both sculptures will be denied.

The work entitled "ANGEL WINGS" consists of a piece of wire bent and manipulated in such a manner that it creates a pair of angel wings. The wings are covered with feathers to make them look more wing-like.

The sculptural authorship embodied in ANGEL WINGS does not reflect sufficient creativity necessary to sustain a copyright registration. While there was clearly effort and thought involved in creating this work, as evidenced by the author's statement in the record, this industrious effort or "sweat of the brow" does not provide the basis for original authorship. Feist Publications v. Rural Tel. Serv. Co.,.499 U.S. 340 (1991). In addition, although there was some

selection and arrangement of the materials used to create this work, not every selection and arrangement rises to the level of creative authorship. *Id.* The selection and arrangement of feathers in this sculpture is so common, plain, and simple that it depicts a standard shape of a wing – i.e., a common shape that is not subject to copyright protection.

While this standard design and simple arrangement may be aesthetically pleasing, they do not furnish a basis upon which to support a copyright claim. John Muller & Co. v. N.Y. Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986). Similarly, the functional considerations incorporated into the work – the need for strength and durability – do not supply the requisite creativity for copyrightable authorship. Only when the particular manner of creative expression necessary for copyrightable authorship is present will a registration issue. 37 CFR 202.1(b).

The cases cited that upheld registration of animal forms are distinguishable from this work in the degree of selection, arrangement and creativity involved. Great Importations, Inc. v. Caffco Int'l, Inc., 1997 U.S. Dist. LEXIS 14808; Kamar Int'l, Inc. v. Russ Berrie & Co., 657 F.2d 1059 (9th Cir. 1981); Superior Form Builders v. Dan Chase Taxidermy Supply Co., 74 F.3d 488 (4th Cir. 1996); Animal Fair, Inc. v. Amfesco Indus., Inc., 620 F.Supp. 175 (D. Minn. 1985). The authorship found in these cases evidenced additional creative choices in the final forms. This depiction of wings does not rise to the level of creativity present in these cases.

Even prior to Feist, Copyright Office registration practices recognized that works with only a *de minimis* amount of authorship are not copyrightable. See Compendium of Copyright Office Practices, Compendium II, § 202.02(a)(1984). With respect to pictorial, graphic and sculptural works, the class within which the wing design would fall, the Compendium states that a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." Compendium II, § 503.02(a)(1984). The Compendium recognizes that it is not aesthetic merit, but the presence of creative expression that is determinative of copyrightability, *id.*, and that "registration cannot be based upon the simplicity of standard ornamentation such as chevron stripes, the attractiveness of a conventional fleur-de-lys design, or the religious significance of a plain, ordinary cross. Similarly, it is not possible to copyright common geometric figures or shapes such as the hexagon or the ellipse, a standard symbol such as an arrow or a five-pointed star. ... The same is true of a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations." *Id.*

For the reasons stated above, no registration can be made for the work, "ANGEL WINGS."

Similarly, the Board finds that the work, "BUTTERFLY WINGS," also does not meet the requisite level of creative authorship. This work consists of four panels in the shape of wings of similar shape, albeit with minor differences and proportions. The wings are made with a dotted toile fabric that is outlined with a marabou boa. The wings are connected in the center by a welded hub that is also covered with a boa.

While this sculpture presents a closer question, the Board again finds that the requisite level of authorship is lacking. The Board does not recognize any original authorship in the shape or ornamentation of the "BUTTERFLY WINGS." The work consists of standard shapes in a common four-winged butterfly pattern. On the surface of the wing design, the speckled pattern appears random and common and does not reveal any creative authorship. Uncopyrightable familiar shapes and the pattern on the surface of the wings does not exhibit even the modicum or *de minimis* quantum of creativity that is required to support a copyright. See Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340, 362, 363 (1991). In addition, the combination of shapes and materials incorporated into the work does not alter the de minimis nature of the creative authorship. With respect to pictorial, graphic and sculptural works, the class within which "BUTTERFLY WINGS" would fall, the Compendium of Copyright Office Practices, Compendium II, states that a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." Compendium II, §503.02(a)(1984).

Although the ornamentation applied to the surface of this work may be unique, uniqueness is not a copyrightable quality. The Board can find no elements in the work that embody more than a "merely trivial" variation of familiar shapes sufficient to meet the admittedly low threshold of original authorship. See Chamberlin v. Uris Sales Corp., 150 F.2d 512, 513 (2d Cir. 1945). See also L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 490 (2d Cir.) (en banc), cert. denied, 429 U.S. 857 (1976), citing Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951). The requisite creative authorship is lacking in the "BUTTERFLY WINGS" work.

For the reasons stated above, no registration can be made for this work. This letter constitutes final agency action.

Sincerely,

David O. Carson
General Counsel
for the Appeals Board
United States Copyright Office