LIBRARY
OF
CONGRESS

COPYRIGHT
OFFICE

101 Independence
Avenue, S.E.

Washington, D.C.
20559-6000

September 28, 2000

Daniel W. McDonald, Esq.
Merchant & Gould
9100 Norwest Center
90 South Seventh Street
Minneapolis, Minnesota 55402-4131

Re: BUNNY EARS
Copyright Office Control Number 60-6001-4329(M)

Dear Mr. McDonald:

The Copyright Office Board of Appeals has reviewed your request to reconsider the Examining Division's denial of a claim to register a "Bunny Ears" headband on behalf of Hanover Accessories, Inc. This claim, received on October 16, 1996, was originally included in a submission of six animal ear headbands. Only the "Bunny Ears" headband is part of this appeal. After reviewing the materials submitted in support of this claim, the Board has determined that the work cannot be registered because it does not contain the required amount of original artistic authorship.

ADMINISTRATIVE RECORD

On October 16, 1996, the Copyright Office received your client's applications for registration of six animal ear headbands, including an application for "Bunny Ears" signed by John Sumners of your office. By letter dated March 6, 1997, Examiner Geoffrey R. Henderson advised Mr. Sumners that the six claims could not be registered because they were useful articles without separately identifiable pictorial, graphic or sculptural features that meet the minimum amount of original authorship required to support a claim to copyright.

In a letter dated May 2, 1997, Mr. Sumners appealed the refusal to register these headbands. Mr. Sumners submitted an affidavit from Susan K. Chabak, who stated that she was the designer of the headbands and that she had first created an original sketch for the headbands and then created the sculptures. Mr. Sumners asserted that the works were original, owing their origin to the designer's intellectual effort and not to any preexisting material. He noted that "virtually any distinguishable variation created by an author in an otherwise unoriginal work of art will constitute sufficient originality to support a copyright," (citing *Nimmer on Copyright* at Section 2.08[B][2]).) Finally, Mr. Sumners noted that the Office had registered a previously submitted headband, entitled "Reindeer Ears," submitted by this remitter.

Section Attorney David Levy, by letter dated August 22, 1997, advised Mr. Sumners that the Visual Arts Section was unable to register copyright claims in the headbands under consideration. Mr. Levy accepted that the works might be original with Ms. Chabak. but concluded that the works were not sufficiently creative. In particular, Mr. Levy observed that "the bunny ears are oval shaped, with slight indentations caused by the material or fabric that is used." Because "ovals are familiar symbols and designs which are in the public domain," and "simple variations of standard designs and their simple arrangement do not furnish a basis upon which to support a copyright claim," he concluded that this headband was not registrable.

On January 13, 1999, you submitted "Petitioner's Appeal from Denial of Registration of Copyright," accompanied by declarations from Mr. Sumners, Ms. Chabak, and Dr. Heidi Curtin, a veterinarian who described the differences between the genuine rabbit ears and the rabbit ears in "Bunny Ears." The petition appealed only the refusal to register 'Bunny Ears," and did not address the refusals to register the other five headbands.

DISCUSSION

I. UNDER *FEIST*, THE TOUCHSTONE OF PROTECTION IS ORIGINALITY

The creative authorship in "Bunny Ears" is insufficient to make it an "original work of authorship," within the meaning of the *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 347 (1991), other relevant case law, and the copyright statute, regulations, and practices. *Feist* requires originality as the touchstone of copyright protection. Originality consists of two components: the work must be independently created and must possess a certain minimum amount of creativity. *Id.* at 359, citing *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903). Accordingly, the Copyright Office examines works pursuant to this standard.

As you know, in *Feist* the Court rejected the industrious effort, or "sweat-of-the-

brow" standard some courts had applied to compilations and declared that, across the board, all works of authorship must exhibit originality to be copyrightable. The Court found the compilation at issue in *Feist* insufficient to meet the required standard. Your letter acknowledges that originality is exhibited in two ways: by independent creation, which is the contribution of something recognizable as the author's own, and by the contribution of more than a minimal amount of creative authorship. Moreover, you also acknowledge that *Feist* held that this two-part standard is constitutionally mandated by the copyright clause of the U.S. Constitution. 499 U.S. at 347.

A. Originality as Independent Creation

As you acknowledge, Hanover's claim does not extend to "the general idea of animal/bunny ears on headbands," but only to "the ears themselves and the way the ears are placed on the headbands." (1999 Appeal Letter, p. 7). Of course, even if the idea of a Bunny Ears headband had originated with Hanover, it can claim a copyright only in that expression which it independently created, and not in the idea of a Bunny Ears headband. See 17 U.S.C. §102(b).

The Board does not question whether this particular Bunny Ears headband was independently created. Thus, that aspect of the originality requirement poses no impediment to registration in this case.

B. Originality as a Sufficient Amount of Creativity

Originality also requires that a work meet a minimal threshold of creativity. In *Feist,* the Court stated that in addition to requiring independent creation by the author, originality requires "some minimal degree of creativity." Although the requisite level of creativity is low, and a slight amount will suffice, there remains a narrow category of works in which the creative spark is insufficient to support a copyright. *Id.* at 359, citing *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

The Board has concluded that the Bunny Ears headband lacks sufficient creative expression. As shown in the photographs deposited, the work consists of two half-ovals folded toward the center. As such, it is a stock rendition of a bunny ears headband entirely too typical to support a copyright. A work of similarly uncopyrightable content was at issue in *OddzOn Products, Inc., v. Oman,* 924 F.2d 346 (D.C. Cir.1991). There the court ruled that a sphere made up of hundreds of wiggly filaments was ineligible for copyright protection not because it approximated a sphere, but because there was insufficient additional creative work beyond the object's basic shape to warrant a copyright. *Id.* at 348. Here the basis of refusal to register this Bunny Ears headband is the work's deficiency in creativity. The shape and coloration of the ears

is typical of soft sculptural depictions of rabbit ears, and adds not even a minimal level of creativity to such garden variety depictions. As the Court noted in *Feist*, notwithstanding the extremely low standard, "there remains a narrow category of works in which the creative spark is so utterly lacking or so trivial as to be virtually nonexistent". 499 U.S. at 359. Thus, some works fail to clear this admittedly low hurdle, even though they are the result of industrious effort. *Id.* at 364. As was the case for the works in *Feist* and *OddzOn*, this Bunny Ears headband falls short of the requisite creative mark.

Copyright Office regulations governing artistic works are consistent with *Feist*'s teachings in providing that "In order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form." 37 C.F.R. 202.10(a). The curvature of lines or the shape of this Bunny Ears headband must meet this minimum creativity threshold. Further explicating this requirement, the *Compendium of Copyright Office Practices (Compendium II)* (1984) states the minimum standards for registration of sculptural works. Section 503.02(b) states:

> The requisite minimal amount of original sculptural authorship necessary for registration in Class VA does not depend upon the aesthetic merit, commercial appeal, or symbolic value of a work. Copyrightability is based upon the creative expression of the author, that is, the manner or way in which the material is formed or fashioned. Thus, registration cannot be based upon standard designs which lack originality, such as common architecture moldings, or the volute used to decorate the capitals of Ionic and Corinthian columns. Similarly, it is not possible to copyright common geometric figures or shapes in three-dimensional form, such as the cone, cube, or sphere. The mere fact that a work of sculpture embodies uncopyrightable elements, such as standard forms of ornamentation or embellishment, will not prevent registration. However, the creative expression capable of supporting copyright must consist of something more than the mere bringing together of two or three standard forms or shapes with minor linear or spatial variations.

But in the case of "Bunny Ears," the delineation is an unadorned ellipse, or, as more plainly described by Mr. Levy, an oval. As an oval is a common geometric figure, and because only garden variety additions are exhibited in this oval, it cannot be registered.

You assert that the shape is not that of an oval because "one end of each of the ear portions on Hanover's bunny ears forms a point, and the other end is truncated to be attached to the headband portion of the product." We discuss the truncated end below, in Part II. With respect to the statement that one end of the ear forms a point, the Board has reviewed the photographs of the headband and is unable to agree with that characterization. Whether or not that

is the case, however, the fact remains that the shape of the ears is a minor variation from that common geometric figure and is commonplace among soft sculptural depictions of rabbit ears, *e.g.*, in stuffed animals. As such, it suffers the same fate as the five-pointed star in *Bailie v. Fisher*, 258 F.2d 425, 426 (D.C. Cir.1958). There the Copyright Office denied registration to a cardboard star with a large transparent circle in the middle for insertion of a phonorecord. The star was supported vertically by two flaps that folded back to display the phonorecord, which was imprinted with the performer's likeness. The Court upheld the Copyright Office's refusal of the cardboard star/phonorecord display, acknowledging the "established wide range of selection within which the Register may determine what he has no power to accept." *Id.* at 426. *See Past Pluto Productions Corp., v. Dana*, 627 F.Supp. 1435, 1441 (S.D.N.Y.1986) ("no originality in spiked crown feature composed of elemental symmetry prompted most probably by the promise of convenience in manufacture").

This work is basically two half-ovals joined together on a headband, and as such is comparable to the series of chevron stripes at issue in *John Muller & Co., Inc. v. New York Arrows Soccer Team, Inc.* , 802 F.2d 989 (8th Cir. 1986). In that case, the Register determined that a logo consisting of four angled lines forming an arrow, with the word "arrows" below, did not possess the necessary "creative authorship in its delineation or form." The *John Muller* court affirmed the Register's discretion to decide where to draw the line between enough and not enough creativity.

You have also asserted that even if some aspects of the authorship in Bunny Ears are familiar symbols or designs, the work consists of a combination of shapes and materials, and that combination constitutes a distinctive selection and arrangement that is subject to copyright protection. You have identified the following aspects of the work in support of your claim of copyrightable authorship: "the impractical size of the ear portions of Hanover's Bunny Ears, the stuffed aspect of the ear portions, the particular combination of colors, and the profile of the Bunny Ears." The Board cannot accept your assertion that any of these aspects, individually or in combination, evidence sufficient creativity to meet the admittedly modest threshold for copyrightability.

We address your arguments with respect to the combination of elements below. With respect to the individual elements you have identified, the Board does not consider the size of the ears to be the product of creative authorship. It may be that the ears are larger than actual rabbit ears, but the Board's decision is not based on a conclusion that Bunny Ears is a faithful depiction of actual rabbit ears.[1] Rather, it appears to the Board that the size of Bunny Ears is

---

[1] For that reason, most of the arguments set forth in Part II.B. of your letter, which asserts that the Bunny Ears are significantly different from actual rabbit ears, are irrelevant to the

consistent with the size of the ears typically found on soft sculptures of rabbits. The Board can detect no creativity in that aspect of the headband. Similarly, the fact that (and manner in which) the ear is stuffed does not distinguish it from virtually all soft sculptural depictions of rabbit ears. The particular colors of the ears - white fur on the outside and pink on the inside - is also commonplace.

C. Standard of Authorship for Combinations of Elements

As noted above, you have asserted that the combination of size, shape and color in this case is sufficiently creative to support a copyright even if the individual elements of Bunny Ears do not make the grade. The Board disagrees. The combined elements you have identified are simply a selection of standard size, shape and color found in soft sculptures of rabbits or rabbit ears. In short, the Board cannot discern even a "distinguishable variation in the arrangement and manner of presentation" of public domain elements" in the Bunny Ears. *Cf. Atari Games Corp. v. Oman,* 979 F.2d 242, 246 (D.C. Cir. 1992).

You also state that "Bunny Ears" is made up of a combination of irregularly shaped pieces of material, and assert that the combination is registrable. But even though some combination of shapes may be copyrightable, others do not make the grade. See *Feist* at 359 (noting that for some works, the creative spark is lacking or so trivial as to be virtually nonexistent). In *Jon Woods v. Curran,* 8 U.S.P.Q. 2d 1870, 1872 (S.D.N.Y. 1988), the court considered the design of a grid super-imposed on striped cloth, holding that familiar symbols, even if distinctively arranged or printed, are not proper subjects for copyright protection. The decision approvingly referred to the Copyright Office's practice example of "a simple combination of two or three standard symbols such as a circle, a star, and a triangle with minor linear variations" as a combination possessing insufficient creativity. (Compendium I of Copyright Office Practices, at 2.8.3.I.a.(1973). Similarly, the Board has concluded that these simply folded half-ovals bordered in white and lined in pink constitute such a combination - a standard variation of familiar shapes - one that is too simple to reach the threshold quantum of copyrightability.

II. STANDARD OF AUTHORSHIP FOR USEFUL ARTICLES

You admit that "Bunny Ears" headbands are artistic works for useful articles," and claim protection "for the ears themselves and the way the ears are placed on the headbands." 1999 Appeal letter, p. 7. As you know, an artistic work that is a useful article can be registered insofar as its form is concerned but not with respect to its mechanical or utilitarian aspects. Design elements of pictorial, graphic, or sculptural works can be considered only to the extent that they

---

Board's determination

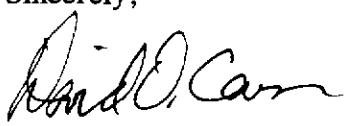
can be identified separately from the utilitarian aspects of the article. 17 U.S.C. 101. In suggesting that these ears are not ovals, you point out that the bottom end of each ear "is truncated to be attached to the headband portion of the product." Appeal Letter, p. 4. In addition to being noncreative (an oval cut in half), this design element is a functional or utilitarian aspect of the design. As such, the truncated component of the design, where the ear is joined to the headband, does not fall within the statutory definition of pictorial, graphic, or sculptural work. 17 U.S.C. 101. To the extent that this aspect of the shape is dictated by its function, it is not subject to copyright protection. See *Durham Industries, Inc. v. Tomy Corp.*, 630 F.2d 905, 914-15 (2d Cir. 1980).

As was the case with the polystyrene mannequins at issue in *Carol Barnhart Inc., v. Economy Cover Corp.*, 773 F.2d 411, 417 (2d Cir. 1985), where the court found no aesthetic features separable from the mannequins' clothes-draping function, cutting off an oval to attach it to a headband is not separable from that function, even if it were an aesthetic feature. *Id.*, *Esquire, Inc. v. Ringer,* 591 F.2d 796 (D.C. Cir. 1978), *cert. denied,* 440 U.S. 908 (1979)(creativity, *inter alia*, required in overall shape of utilitarian objects). To be sure, the Board does not disqualify the entire shape of the ear in Bunny Ears as utilitarian, but only disqualifies the squared off aspect of the lower part of the ear, which you admit is functional. The headband, inclusive of the bunny ears, however, is not registrable because the quantum of creativity in this simple ellipse design, even considering its folded corners, is insufficient.

CONCLUSION

For the reasons stated above, the Copyright Office Board of Appeals concludes that Bunny Ears cannot be registered for copyright protection. This decision constitutes final agency action.

Sincerely,



David O. Carson
General Counsel
for the Appeals Board
U.S. Copyright Office

r:\dc\appeal.bunny ears.wpd
September 28, 2001