



Copyright Review Board

United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000

April 11, 2022

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8945 Long Point Road, Suite 120
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Re: Second Request for Reconsideration for Refusal to Register 2019 NI Logo Variants (Correspondence ID: 1-4NN6VPM; SR # 1-8968610561)

Dear Mr. Cain:

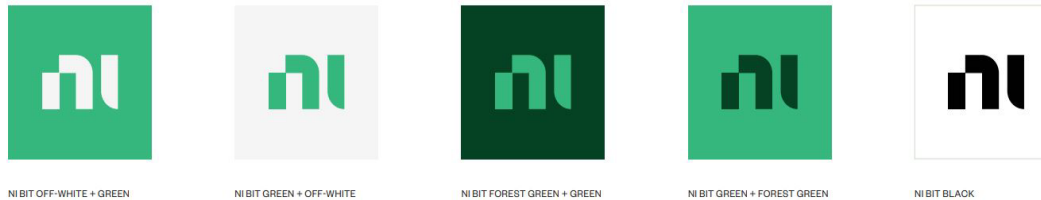
The Review Board of the United States Copyright Office (“Board”) has considered National Instruments Corporation’s (“National Instruments”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork and text claim in the work titled “2019 NI Logo Variants” (“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 WORK¹

The Work is a set of logos consisting of the stylized letters “n” and “i.” The letters are positioned side-by-side, with the variants each using different colors (*i.e.*, green, black, or white) and some variants having either a square or rectangular background in different colors (*i.e.*, green, black, or white). The Work is as follows:²

¹ National Instruments submitted two additional logos with its deposit titled “NI BITS GREEN” and “NI ARCS.” “NI BITS GREEN” consists of two green and two white squares that are the same size, with the green squares placed in the top left and bottom right corners and the white squares placed in the top right and bottom left corners. “NI ARCS” consists of three black, arched lines, with each line increasing in size from right to left. In National Instruments’ First Request for Reconsideration and Second Request for Reconsideration, National Instruments only mentioned, and reproduced images of, the ten logos discussed herein. As National Instruments limited its Requests for Reconsideration to the ten logos, the Board limits its analysis to these works.

² National Instruments applied for registration using the Standard Application, which “may not be used to register a group of related works, unless it is expressly permitted under the Office’s regulations.” U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 1403 (3d ed. 2021) (“COMPENDIUM (THIRD)”). Because there are no relevant regulations for this application, the Board views the Work as all ten logo variants combined.



II. ADMINISTRATIVE RECORD

On June 26, 2020, National Instruments filed an application to register a copyright claim in the Work. In a July 24, 2020 letter, a Copyright Office registration specialist refused to register the claim, finding that it “lacks the authorship necessary to support a copyright claim.” Initial Letter Refusing Registration from U.S. Copyright Office to John Cain at 1 (July 24, 2020).

In a letter dated August 25, 2020, National Instruments requested that the Office reconsider its initial refusal to register the Work. Letter from John C. Cain to U.S. Copyright Office (Aug. 25, 2020) (“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’s “individual elements . . . do not exhibit a sufficient amount of original and creative authorship to support a copyright registration.” Refusal of First Request for Reconsideration from U.S. Copyright Office to John Cain at 3 (Feb. 3, 2021). The Office further concluded that the “arrangement of these few elements [(i.e., letters, colors, and shapes)] into an expected logo configuration in no way demonstrates the necessary creativity required to support a claim in copyright.” *Id.*

In a letter dated April 23, 2021, National Instruments 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 John C. Cain to U.S. Copyright Office (Apr. 23, 2021) (“Second Request”). In that letter, National Instruments argued that the Work was not a “commonplace symbol,” as it cannot be found “on any keyboard” and that the Board failed to acknowledge creative elements within the work, such as the stylized letters “n” and “i” having “a distinctive notch in the top left corner” and “a distinctive curved bottom,” respectively. *Id.* at 3. Additionally, National Instruments asserted that the “design choices were made regarding the underlying design of the NI Logo and the colors, size, and spacing of the individual NI Logos and backgrounds of the overall work.” *Id.* Finally, it asserted that “[t]he elements of the underlying NI Logo and the overall design comprising ten variations of the logo, while relatively simple, are arranged in a sufficiently original way to possess ‘some modicum of creativity.’” *Id.* at 6.

III. DISCUSSION

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. *See, e.g.*, 37 C.F.R. § 202.1(a) (prohibiting registration of “[w]ords and short phrases such as names, titles, and slogans; familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering or coloring”); *id.* § 202.10(a) (stating “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 be sufficient to meet this test. *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”). 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, 883 (D.C. Cir. 1989); *Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 498–99 (S.D.N.Y. 2005).

A mere simplistic arrangement of non-protectable elements does not demonstrate the level of creativity necessary to warrant protection. *See Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) (“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”); *see also* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 906.1 (3d ed. 2021) (“COMPENDIUM (THIRD)”) (stating that the author’s use of a work that consist merely of geometric shapes must “result[] in a work that, as a whole, is sufficiently creative”).

Applying these legal standards, the Board finds that the Work does not contain the requisite authorship necessary to sustain a claim to copyright. Specifically, neither the individual elements of the Work nor the Work as whole demonstrate sufficient creativity to be protectable under the Copyright Act.

The individual elements of the Work consist of multiple instances of the stylized letters “n” and “i”; the use of five different colors to depict the letters and/or the backdrops against which the letters are displayed, which are combined in a finite number of arrangements; and the

limited use of simplified geometrical shapes. Each of these elements fails to demonstrate the sufficient creativity required for copyright protection. First, the Work’s stylization of the letters “n” and “i” are uncopyrightable. *See* 37 C.F.R. § 202.1(a); COMPENDIUM (THIRD) § 313.4(J); *see also Yu Zhang v. Heineken N.V.*, 2010 WL 11596643 (C.D. Cal. Sept. 29, 2010) (declining to find copyright protection in a stylized rendering of Kanji characters in the Chinese language because “variations of lettering or typographic ornamentation are not subject to copyright” and copyright protection would “effectively give [plaintiff] a monopoly on renditions of these five Chinese characters”).

While National Instruments argues that the Work is not “in any standard font or typeface,” First Request at 4, and cannot be found “on any keyboard,” Second Request at 3, it also admits that the Work “uses a stylized version of the lower case letters ‘n’ and ‘i.’” Second Request at 3. Letters are the building blocks of expression and cannot be protected by copyright law “regardless of how novel and creative the shape and form of the typeface characters may be.” COMPENDIUM (THIRD) § 906.4; *see also Eltra Corp. v. Ringer*, 579 F.2d 294, 298 (4th Cir. 1978) (noting Congress has consistently refused copyright protection to typeface); *Tufenkian Imp./Export Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 132 (2d Cir. 2003) (explaining that letters are “raw materials” within the public domain, including “the generic shape of the letter ‘L’ and all of the elaborately more specific ‘L’s’ from the hundreds of years of font designs that have fallen into the public domain”). In “some very limited cases” decorative elements added to a graphical work otherwise comprised largely of lettering may be sufficiently creative to warrant registration. *See* COMPENDIUM (THIRD) § 906.4 (discussing the example of “original pictorial art that forms the entire body or shape of the typeface characters”); *see also* COMPENDIUM (THIRD) § 313.3(D). Here, however, the claimed decorative elements of the Work — namely the “distinctive notch in the top left corner” of the “n” and the “distinctive curved bottom” of the “i” — are not sufficiently creative to overcome the general prohibition on registration of mere lettering. *See* Second Request at 3. Instead, the notch and curved bottom of the letters are examples of mere variations of typographic ornamentation that are not subject to copyright protection. Further, the use of green, black, or white coloring alone is not eligible for copyright protection. *See* 37 C.F.R. § 202.1(a); COMPENDIUM (THIRD) § 906.3 (“Mere coloration or mere variations in coloring alone are not eligible for copyright protection.”). Finally, the use of squares or rectangles surrounding the “n” and “i” is not protectable by copyright. *See* 37 C.F.R. § 202.1(a); COMPENDIUM (THIRD) § 906.1 (listing “squares, cubes, [and] rectangles” as common geometric shapes that are not protectable).

Nor does the combination of these unprotectable elements in the Work rise to the level of creativity necessary for copyright registration. Where a design combines uncopyrightable elements, it is protected only when the “elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.” *Satava*, 323 F.3d at 811. Here, the letters are “arranged in two lines of five logos per line,” Second Request at 3, which constitutes a “mere simplistic arrangement” that evidences insufficient creativity. *See id.*; *see also Coach*, 386 F. Supp. 2d at 499 (holding that two unlinked letters facing each other in a mirror image did not contain the requisite level of creativity); *Speedway Motors, Inc. v. Perlmutter*, No. 4:20-CV-3089, 2021 U.S. Dist. LEXIS 150107, at *14–15 (D. Neb. Aug. 10, 2021) (affirming the Office’s decision to deny registration to a logo consisting of two colors, a circle, and typeface); *Alberto-Culver Co. v. Andrea Dumon, Inc.*, 466 F.2d 705, 711 (7th Cir. 1972) (“mere distinctiveness in typographic ornamentation will

not ordinarily qualify otherwise noncopyrightable material for copyright protection”). The combination and arrangement in the Work are too standard to constitute an original work of authorship. The addition of a square or rectangle surrounding the letters in each bottom square of the grid as well as the top right square of the grid does not alter the fact that the combination and arrangement of these elements are “commonplace” and do not possess sufficient creativity required for copyright protection. *Feist*, 499 U.S. at 363; *see also Satava*, 323 F.3d at 811. Instead, the Work presents a simplistic combination and arrangement that evidences *de minimis* creativity. *See John Muller & Co. Inc. v. N.Y. Arrows Soccer Team*, 802 F.2d 989, 990 (8th Cir. 1986) (affirming the Office’s refusal to register a combination of a word and simple graphic); *see also* COMPENDIUM (THIRD) § 914.1 (Office generally refuses to register works consisting of “mere scripting,” and “use of different fonts or colors, frames, or borders”). While “[t]he standard of originality is low, . . . it does exist,” and the Board concludes that the Work lacks the modicum of creativity required for copyright protection. *Feist*, 499 U.S. at 362.

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.



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