



United States Copyright Office

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Re: Second Request for Reconsideration for Refusal to Register ASU Sun Card (Original Version) and ASU Sun Card (2017 Version); Correspondence IDs: 1-3FPM6OW, 1-3LO91KD; SR #s 1-6668521181, 1-6668696848

Dear Mr. Garrison:

The Review Board of the United States Copyright Office (“Board”) has considered Arizona Board of Regents’ (“ABOR’s”) second request for reconsideration of the Registration Program’s refusal to register copyright claims in the works titled “ASU Sun Card (Original Version)” (“ASU Original”) and “ASU Sun Card (2017 Version)” (“ASU 2017”) (collectively, the “Works”). After reviewing the applications, deposit copies, and relevant correspondence, along with the arguments in each of the second requests for reconsideration, the Board affirms the Registration Program’s denial of registration.

I. DESCRIPTION OF THE WORKS

The Works are two-dimensional graphical artworks that depict student ID cards. Each consists of the ASU logo (letters “ASU” with a sun cut into the lettering), words and numbers, a sun shape with extending rays, and a blank square. The primary differences between the Works are that ASU 2017 has flatter colors, different fonts, more extending rays on the sun design, and no background shading when compared to ASU Original. The Works are as follows:

ASU Original



ASU 2017



II. ADMINISTRATIVE RECORD

On June 19, 2018, ABOR filed applications to register the Works. In separate letters, Copyright Office Registration Specialists refused to register the claims, finding that each of the Works lacks the necessary authorship to support a copyright claim. Initial Letter Refusing Registration from U.S. Copyright Office to Sean Garrison, Bacal & Garrison Law Group 1 (June 20, 2018); Initial Letter Refusing Registration from U.S. Copyright Office to Sean Garrison, Bacal & Garrison Law Group 1 (Dec. 19, 2018).

ABOR subsequently requested that the Office reconsider its initial refusals to register the Works. Letter from Sean Garrison, Bacal & Garrison Law Group, to U.S. Copyright Office 1 (Sept. 11, 2018) (“ASU Original First Request”); Letter from Sean Garrison, Bacal & Garrison Law Group, to U.S. Copyright Office 1 (Mar. 18, 2019) (“ASU 2017 First Request”). ABOR contended that the Works’ respective design elements and the selection, coordination, and arrangement of those elements satisfied the minimum level of creative authorship required for copyright protection. ASU Original First Request at 2; ASU 2017 First Request at 2–3. ABOR also asserted that the Copyright Office Registration Specialists focused on each design’s elements, rather than the design as a whole. ASU Original First Request at 2; ASU 2017 First Request at 3.

After reviewing the Works in light of the points raised in the first requests for reconsideration, the Office re-evaluated the claims and concluded again that the Works were not sufficiently creative to sustain a copyright claim. Refusal of First Request for Reconsideration from U.S. Copyright Office to Sean Garrison, Bacal & Garrison Law Group 3 (Mar. 6, 2019) (“ASU Original First Reconsideration Refusal”); Refusal of First Request for Reconsideration from U.S. Copyright Office to Sean Garrison, Bacal & Garrison Law Group 2 (July 1, 2019) (“ASU 2017 First Reconsideration Refusal”). The Office analyzed each of the Works’ component elements as well as both Works as a whole, and found “the combination of the component elements to be insufficiently creative to support a claim in copyright.” ASU Original First Reconsideration Refusal at 3; ASU 2017 First Reconsideration Refusal at 3.

ABOR requested second reconsiderations of the Office's refusals to register the Works. Letter from Sean Garrison, Bacal & Garrison Law Group, to U.S. Copyright Office 1 (June 4, 2019) ("ASU Original Second Request"); Letter from Sean Garrison, Bacal & Garrison Law Group, to U.S. Copyright Office 1 (Sept. 27, 2019) ("ASU 2017 Second Request"). ABOR again argues both that the Works' respective design elements and the selection, coordination, and arrangement of these elements satisfied the minimum level of creative authorship requirement required for copyright protection, and that the Office unnecessarily focused on the Works component elements and not the Works as a whole.

III. DISCUSSION

A. *The Legal Framework*

1) *Originality*

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 and described in the *Feist* decision. *See, e.g.*, 37 C.F.R. § 202.1(a) (prohibiting registration of "[w]ords and short phrases such as names, titles, 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. *See id.*; *see also Atari Games Corp. v. Oman*, 888 F.2d 878 (D.C. Cir. 1989).

A mere simplistic arrangement of non-protectable elements does not demonstrate the level of creativity necessary to warrant protection. For example, the United States District Court for the Southern District of New York upheld the Copyright Office's refusal to register simple

designs consisting of two linked letter “C” shapes “facing each other in a mirrored relationship” and two unlinked letter “C” shapes “in a mirrored relationship and positioned perpendicular to the linked elements.” *Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 496 (S.D.N.Y. 2005).

Likewise, the Ninth Circuit has held that a glass sculpture of a jellyfish consisting of clear glass, an oblong shroud, bright colors, vertical orientation, and the stereotypical jellyfish form did not merit copyright protection. *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003). The language in *Satava* is particularly instructive:

It 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).

Similarly, while the Office may register a work that consists merely of geometric shapes, for such a work to be registrable, the “author’s use of those shapes [must] result[] in a work that, as a whole, is sufficiently creative.” U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 906.1 (3d ed. 2017) (“COMPENDIUM (THIRD)”); *see also Atari Games Corp.*, 888 F.2d at 883 (“[S]imple shapes, when selected or combined in a distinctive manner indicating some ingenuity, have been accorded copyright protection both by the Register and in court.”). Thus, the Office would register, for example, a wrapping paper design that consists of circles, triangles, and stars arranged in an unusual pattern with each element portrayed in a different color, but would not register a picture consisting merely of a purple background and evenly-spaced white circles. COMPENDIUM (THIRD) § 906.1.

2) Derivative Works

The Copyright Office will register a claim in a derivative work where the deposit material contains new authorship with a sufficient amount of original expression. 17 U.S.C. § 103(a) (“The subject matter of copyright . . . includes . . . derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.”); *see also* COMPENDIUM (THIRD) § 313.6(B) (citing H.R. REP. NO. 94-1476, at 57 (1976), 1976 U.S.C.C.A.N. 5659, 5670–71). The registration for a derivative work, however, “does not cover any previously published material, previously registered material, or public domain material that appears in the derivative work. Nor does it cover any material that is not owned by the copyright claimant.” *Id.*; *see also* 17 U.S.C. § 103(b) (Copyright in a derivative work is “independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.”).

In the case of derivative works, the “new authorship that the author contributed to the derivative work may be registered, provided that it contains a sufficient amount of original

expression, meaning that the derivative work must be independently created and it must possess more than a modicum of creativity.” COMPENDIUM (THIRD) § 311.2 (citing *Waldman Publ’g Corp. v. Landoll, Inc.*, 43 F.3d 775, 782 (2d Cir. 1994)). The amount of creativity required for a derivative work is the same as that required for a copyright in any other work: “[a]ll that is needed to satisfy both the Constitution and the statute is that the ‘author’ contributed something more than a ‘merely trivial’ variation, something recognizably ‘his own.’” *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102-03 (2d Cir. 1951) (citing *Chamberlin v. Uris Sales Corp.*, 150 F.2d 512, 513 (2d Cir. 1945)). Thus, “the key inquiry is whether there is sufficient nontrivial expressive variation in the derivative work to make it distinguishable from the [preexisting] work in some meaningful way.” *Schrock v. Learning Curve Int’l, Inc.*, 586 F.3d 513, 521 (7th Cir. 2009).

Although the amount of originality required is low, courts have recognized that derivative works “[l]acking even a modest degree of originality . . . are not copyrightable.” *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 911 (2d Cir. 1980); *see also L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir. 1976). Indeed, “[s]pecial caution is appropriate when analyzing originality in derivative works, ‘since too low a threshold will give the first derivative work creator a considerable power to interfere with the creation of subsequent derivative works from the same underlying work.’” *We Shall Overcome Found. v. The Richmond Org., Inc.*, No. 16-cv-2725, 2017 WL 3981311, at *13 (S.D.N.Y. Sept. 8, 2017). Very minor variations do not satisfy this requirement, such as merely changing the size of the preexisting work or recasting a work from one medium to another. *See L. Batlin & Son*, 536 F.2d at 491. Further, a claim to register a derivative work that adds only non-copyrightable elements to a prior product is not entitled to copyright registration. *Boyds Collection, Ltd. v. Bearington Collection, Inc.*, 360 F. Supp. 2d 655, 661 (M.D. Pa. 2005). Ultimately, whatever the addition is, it must be independently protectable for the derivative work to be registered.

B. Analysis of the Works

After carefully examining the Works and applying the legal standards discussed above, the Board finds that the Works do not contain the requisite authorship necessary to sustain a claim to copyright.

Neither the Works’ individual elements nor the combination of those elements into a whole are sufficiently creative to warrant copyright protection. First, none of the Works’ individual components are entitled to copyright protection. The short lines of text on each card, including “Sun Card,” “Arizona State University,” “Student,” “Sun Devil,” “Name Name,” and “Im A Sundevil” are not protected by copyright. 37 C.F.R. § 202.1(a) (noting that “[w]ords and short phrases such as names [and] titles” are not subject to copyright). The fonts for these works are also not eligible for copyright protection. *Id.* The Works’ familiar symbols or designs, including a white square, or mere variations of familiar symbols or designs, such as the use of a portion of an abstract sun, are also not copyrightable. *Id.*; COMPENDIUM (THIRD) § 906.2 (familiar symbols and designs or mere variations thereof are not copyrightable). ABOR spends much of its argument on the sun design specifically, asserting that the sun design is not common and familiar because of artistic choices regarding each design’s color, size, and shape, including

the rays' width, length, and number, and whether the sun or its rays would appear in full or partially cut off. ASU Original Second Request at 3; ASU 2017 Second Request at 2–3. The design, however, is a simple take on a basic sun design that is a common symbol lacking sufficient creativity.

Second, even as viewed as a whole, neither of the Works' selection, coordination, and arrangement of the shapes, colors, and words are sufficiently original. The Works are identification cards, which use design elements common to identification cards generally.¹ This includes the name and image of the person who is using the card, the name and logo of the issuing agency, and possibly an identifying number and issuance or expiration date. See ASU Original First Request at app. A; ASU 2017 First Request at app. A. Thus, the selection of a box for a picture, the name and logo of the school, and a presumptive student name and identification number are not particularly creative. Additionally, it is common for identification cards to place the issuing organization's logo, owner's name, and owner's image on opposite sides of the card.² The selection, arrangement, and coordination thus do not warrant copyright protection.³

Finally, ABOR states that “it filed its application to register the ASU Sun Card graphical artwork in furtherance of its effort to stop the unauthorized counterfeiting of its student ID cards on an online website offering a variety of fake ID[s]” ASU Original Second Request at 2; ASU 2017 Second Request at 1–2. While the Office is sympathetic to ABOR's concerns regarding counterfeiting, actual copying of another's work does not affect the Office's copyrightability analysis.⁴ See *Stern v. Does*, 978 F. Supp. 2d 1031, 1040 (C.D. Cal. 2011)

¹ For example, a quick survey of other identification cards that include many of the same or quite similar design elements. See, e.g., *ID Card Services*, <https://emu.uoregon.edu/card/>, (last visited Mar. 30, 2020) (showing University of Oregon's ID card); *MITIDCard*, <https://idcard.mit.edu/> (last visited Mar. 30, 2020) (showing MIT's college ID); *Welcome to Texas A&M University's Official MyAggieCard Application*, <https://myaggiecard.tamu.edu/> (last visited Mar. 30, 2020). The website referenced by ABOR as selling ID cards also displays several ID cards with similar design elements. See ASU Original Second Request at 2 (citing *Shop Fake Student Cards + Secondary IDs*, ID VIKING, <https://idviking.com/shop-fake-student-cards-secondart-ids> (last visited Mar. 30, 2020)); ASU 2017 Second Request at 2 (same).

² William Gonzalez, *ID Card Design 101* 9, RUTGERS, <https://cdn.ymaws.com/naccu.org/resource/collection/7C00E2DA-261A-4BFB-B240-A23790C712BC/03-ID%20card%20Design%20101.pdf> (last visited Mar. 30, 2020) (discussing “common design elements of a campus ID card”).

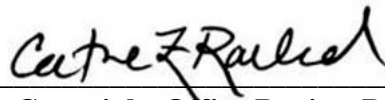
³ ABOR also emphasized that “merely because a work contains basic or familiar shapes or symbols does not disqualify that work from copyright eligibility.” ASU Original Second Request at 7; ASU 2017 Second Request at 7. While this is true, the resulting design must itself be sufficiently creative, which is not the case for the Works. Additionally, while ABOR offers examples of different graphic works that include either common geometric shapes or common symbols or designs that the Copyright Office has previously registered, the Office does not compare works that have been registered with those that are the subject of a request for reconsideration. COMPENDIUM (THIRD) § 309.3 (“A decision to register a particular work has no precedential value and is not binding upon the Office when it examines any other application.”); see also *Coach*, 386 F. Supp. at 499 (indicating the Office “does not compare works that have gone through the registration process”); *Homer Laughlin China Co. v. Oman*, No. 90 Civ. 3160, 1991 WL 154540, at *2 (D.D.C. July 30, 1991) (stating that court was not aware of “any authority which provides that the Register must compare works when determining whether a submission is copyrightable”).

⁴ The Board also notes that ABOR could not register both Works even if ASU Original was sufficiently creative. ASU 2017 is based on ASU Original, but there are not sufficient differences between the Works to support copyrightable derivative work authorship in ASU 2017. ASU 2017 does not contain new authorship that is not

(copying of plaintiff's one sentence listserv post is "not evidence of the post's creativity"); *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1073 (9th Cir. 2000) (noting that in an infringement action, courts must first address copyrightability, and "[o]nly if [the works are protected by copyright] do we turn to the issue of infringement," indicating that copyrightability and infringement are separate considerations).

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusals to register the copyright claim in the Works. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action in this matter.



U.S. Copyright Office Review Board

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Associate Register of Copyrights

Catherine Zaller Rowland, Associate Register of
Copyrights and Director, Public Information and
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Kimberley Isbell, Deputy Director of Policy and
International Affairs

contained in ASU Original; the only differences between the two Works are minor flattening or changing of colors, font, and elimination of shading. None of these changes alone or in combination gives rise to the quantum of creativity necessary for registration. In addition, both ASU 2017 and ASU Original appear to contain the ASU sunburst logo, which is preexisting material for the purpose of copyright registration.