



December 15, 2023

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**Re: Second Request for Reconsideration for Refusal to Register Empower Field Horizontal (SR # 1-11319817041; Correspondence ID: 1-5KJKMTM)**

Dear Mr. Weiss:

The Review Board of the United States Copyright Office (“Board”) has considered Great-West Life & Annuity Insurance Company’s (“Great-West”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the work titled “Empower Field Horizontal” (“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 WORK**

The Work is a two-dimensional artwork comprised of a graphic followed by the words “Empower Field.” The graphic consists of three wavy horizontal black bands of different widths, stacked with negative space between them. The Work is reproduced below:



**II. ADMINISTRATIVE RECORD**

On April 21, 2022, Great-West filed an application to register a copyright claim in the Work. After examining the Work and application, a United States Copyright Office (“Office”) registration specialist refused to register the claim because the Work lacks the creative authorship necessary to support a copyright claim. Initial Letter Refusing Registration from U.S. Copyright Office to Adam Weiss at 1 (June 6, 2022).

On September 6, 2022, Great-West requested that the Office reconsider its initial refusal to register the Work. Great-West argued that the Work “exceeds” the minimum degree of creative authorship required to support registration, characterizing the Work as a “creative rendering of text and shapes” and highlighting the Work’s “stylization” of text in a “fanciful”

font and the arrangement of the text and graphic elements. Letter from Adam Weiss to U.S. Copyright Office at 1–4 (“First Request”). After reviewing the Work in light of the points raised in the First Request, the Office again concluded that the Work could not be registered. Refusal of First Request for Reconsideration from U.S. Copyright Office to Adam Weiss (Jan. 13, 2023). The Office found that the Work’s individual elements could not be registered according to pertinent regulations and case law. The wavy rectangles graphic is unregistrable because it is comprised of common shapes, and the text “Empower Field” is unregistrable because words, short phrases, and lettering cannot be registered. *Id.* Additionally, the Office found the selection, coordination, and arrangement of elements in the Work as a whole were not sufficiently original or creative to support registration, because the Work’s combination of a few common shapes with a name is an “obvious, expected,” and “simple” arrangement. *Id.*

In a letter dated April 12, 2023, Great-West requested that, pursuant to 37 C.F.R. § 202.5(c), the Board reconsider the Office’s refusal to register the Work for a second time. Letter from Adam Weiss to U.S. Copyright Office (Apr. 12, 2023) (“Second Request”). The Second Request asserts that the Office failed to adequately evaluate the work “as a whole.” It further claims that while the wavy rectangles might themselves be insufficiently creative, the selection, coordination and arrangement thereof is sufficiently creative because a viewer would perceive the wavy bands as a “unique and original representation of the letter ‘E.’” *Id.* at 2. The Second Request did not discuss the text “Empower Field” or its stylization.

### III. DISCUSSION

After carefully examining the Work and considering the arguments made in the First and Second Requests, the Board finds that the Work does not contain the creative authorship necessary to sustain a claim to copyright.

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). The term “original” consists of two elements: 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, 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,” and that “garden-variety,” “obvious,” or “practically inevitable” works lack the necessary “creative spark required by the Copyright Act.” *Id.* at 363.

The Office’s regulations implement the longstanding requirement of creativity set forth in the Copyright Act. The regulations provide that words and short phrases, and simplistic depictions thereof, are not protected by copyright. *See* 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”); *see also* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.3(D) (3d ed. 2021) (“COMPENDIUM (THIRD)”); *id.* § 906.4 (noting that “the mere use of text effects (including chalk, popup papercraft, neon, beer glass, spooky-fog, and weathered-and-worn), while potentially separable, is *de minimis*” and therefore cannot be

registered). The regulations further provide that copyright does not protect familiar shapes or designs. 37 C.F.R. § 202.1(a); *see also* COMPENDIUM (THIRD) § 313.4(J) (noting that familiar symbols and designs, and “simple combination[s] of a few familiar symbols or designs with minor linear or spatial variations,” are not protectable).

Where a work is comprised of common or standard design elements which are not sufficiently creative themselves, the requirement may be met if the work selects, coordinates or arranges those elements in a creative way. *Feist*, 499 U.S. at 358; *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 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.”).

Applying these legal standards, neither the individual elements nor the Work as whole are sufficiently creative to be copyrightable. The individual elements of the Work are made up of three wavy bands and text—neither of which is protected by copyright. The two words “Empower Field,” are not a basis for registration because copyright does not protect short phrases. *See* 37 C.F.R. § 202.1(a). Nor is the text’s rendering in a “fanciful” font, First Request at 2, copyrightable. *See* 37 C.F.R. § 202.1(a) (“mere variations of typographic ornamentation, lettering or coloring” cannot be registered); *see also Speedway Motors, Inc. v. Perlmutter*, 553 F. Supp. 3d 703 (D. Neb. 2021) (holding that the Office did not abuse its discretion when it determined that an applicant’s “stylized font” that “artistically rendered” a two-word business name was insufficiently creative because familiar shapes and typeface are generally not copyrightable). The wavy bands are not individually copyrightable either, because they are minor variations of common shapes. *See* 37 C.F.R. § 202.1(a); COMPENDIUM (THIRD) § 906.1 (noting that “[t]he Copyright Act does not protect common geometric shapes . . . including, without limitation, straight and curved lines”).

Viewing the Work as a whole, the Board also concludes that the selection, coordination and arrangement of the unprotectable elements is not sufficiently creative to support a copyright claim. The Work employs three similar shapes—wavy lines or rectangles—arranged in a parallel manner, with each line ending equidistant from the text, “EMPOWER FIELD.” The parallel arrangement of the bands, and the side-by-side arrangement of the bands and the text, is not creative enough to be eligible for copyright. *See Satava*, 323 F.3d at 811; *see also Feist*, 499 U.S. at 363; COMPENDIUM (THIRD) § 905 (“merely bringing together only a few standard forms or shapes with minor linear or spatial variations” does not meet the statutory requirement).<sup>1</sup>

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<sup>1</sup> Great-West argues that “the presence of familiar geometric shapes, symbols, designs and/or text is not enough to refuse registration,” Second Request at 1, but the Board’s conclusion is not that the presence of familiar shapes and a short phrase precludes copyright protection. The Work is not protectable because it arranges a small number of familiar shapes and text in an insufficiently creative way. *See Satava*, 323 F.3d at 811 (“a combination of unprotectable elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough” to meet the statutory standard); *see also John Muller & Co. v. N.Y. Arrows Soccer Team, Inc.*, 802 F.2d 989, 990 (8th Cir.

Great-West argues the “3 red bands”<sup>2</sup> in the Work are creatively arranged to evoke the letter “E.” See Second Request at 2 (describing the arrangement as forming a “distinctive and original rendering of the letter ‘E’”). But the Board does not consider an author’s creative intent or the intended meaning of a work. See COMPENDIUM (THIRD) § 310.5; see also *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 422–23 (“The [Copyright Act]’s text makes clear . . . that our inquiry is limited to how the article and feature are perceived, not how or why they were designed.”). While Great-West may have intended its arrangement of three parallel rectangles to evoke a capital letter, the arrangement remains one of three parallel horizontal lines, which are not sufficiently creative to sustain a copyright claim.

Great-West makes several additional arguments in support of its Second Request that do not change our conclusion here. First, Great-West argues that the Office did not evaluate the work “as a whole” in its previous evaluations. Second Request at 2 (citing *Atari Games Corp.*, 888 F.2d at 883). In *Atari*, the court held that the Copyright Office had failed to examine a video game “as a whole” when it evaluated only stationary screen displays to assess the work’s creativity, rather than assessing the work as an audiovisual series of related images and sounds. *Id.* Here, the Office has considered the static, two-dimensional Work as a whole, omitting no elements. Second, Great-West argues that the Work is copyrightable as an arrangement, impliedly comparing the Work to copyrightable arrangements in other cases. Second Request at 2 (citing *Prince Grp., Inc. v. MTS Prod.*, 967 F. Supp. 121, 125 (S.D.N.Y. 1997) and *Enter. Mgmt. Ltd., Inc. v. Warrick*, 717 F.3d 1112, 1119 (10th Cir. 2013)). In *Prince*, the court held that a fabric pattern of irregularly shaped, shaded, multicolored polka dots was creative, because those polka dots were arranged in “imperfect and conflicting diagonal lines at varying distances from each other giving the appearance of randomness, distinguish[ing] this arrangement from the regularity of the generic creativity for copyright validity.” 967 F. Supp. at 125. And in *Entertainment Management*, the court held that a work contained “protectable creative insight” in the author’s selection and arrangement of dozens of elements such that every component was “order[ed],” “vitally linked” and “necessary” to the work. 717 F.3d at 1119. While the arrangements in *Prince* and *Entertainment Management* evinced more than *de minimis* creativity, the Board concludes that Great-West’s arrangement—three lines arranged in parallel, side-by-side with text—does not. See *Feist*, 499 U.S. at 363–64.

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1986) (affirming the Office’s refusal to register a design consisting of four angled lines stacked on top of each other above the word “Arrows” because the design lacked sufficient creativity).

<sup>2</sup> As depicted above, the deposit provided by Great-West to the Office was rendered in black, not red. The Board’s analysis here is limited to the deposit provided to the Office, see COMPENDIUM (THIRD) § 1704.2, so we do not decide whether the Work would be sufficiently creative in a different coloration.

#### IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register a 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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**U.S. Copyright Office Review Board**

Suzanne V. Wilson, General Counsel and  
Associate Register of Copyrights

Maria Strong, Associate Register of Copyrights and  
Director of Policy and International Affairs

Mark T. Gray, Assistant General Counsel