



**United States Copyright Office**

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Jacob Berman, Esq.  
SmartSign LLC  
One Pierrepont Plaza  
300 Cadman Plaza West, Suite 1303  
Brooklyn, NY 11201

**Re: Second Request for Reconsideration for Refusal to Register SmartSign S-2257 No Trespassing; Correspondence ID: 1-1SHR6G9; SR#: 1-3043925161**

Dear Mr. Berman:

The Review Board of the United States Copyright Office (“Board”) has considered SmartSign LLC’s (“SmartSign’s”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the work titled “SmartSign S-2257 No Trespassing” (the “Work”). After reviewing the applications, deposit copies, and relevant correspondence, along with the arguments in the second requests for reconsideration, the Board affirms the Registration Program’s denials of registration.

**I. DESCRIPTION OF THE WORK**

The Work is a two-dimensional artwork comprised of a red rectangle with curved edges and a white square in the center. The top and bottom of the Work has white block lettering stating “NO TRESPASSING” and “TRESPASSERS WILL BE PROSECUTED.” In the white square, additional black block lettering at the bottom states “THIS PROPERTY IS PROTECTED BY VIDEO SURVEILLANCE.” At the top of the white square is a depiction of a black video camera, consisting of a supporting arm, rectangular box with a white front, and cylindrical lens casing with a white, circular lens.

The Work is depicted below.



## II. ADMINISTRATIVE RECORD

On January 15, 2016, SmartSign filed an application to register a two-dimensional artwork claim in the Work. SmartSign did not indicate in its application that it was seeking protection of any text in the Work or protection of the Work as a compilation. In a March 15, 2016 letter, a Copyright Office registration specialist refused to register the claim, finding that it “lacks the authorship necessary to support a copyright claim.” Letter from Beth Garner, Registration Specialist, to Scott Davies, xpressmyself.com 1 (Mar. 15, 2016).

On April 21, 2016, the Office received a letter from SmartSign requesting reconsideration of the Office’s initial refusal to register the Work. Letter from Scott Davies, SmartSign, to U.S. Copyright Office (Apr. 21, 2016) (“First Request”). SmartSign argued that the Work contained “at least some minimal degree of creativity.” *Id.* at 1 (citing *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991)). SmartSign further argued that the Work “contains at least the following elements of sufficient creativity to merit protection: (1) the original artwork of the camera and (2) the selection, coordination, and arrangement [sic].” *Id.* 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 “does not contain a sufficient amount of original and creative authorship to support a copyright registration.” Letter from Stephanie Mason, Attorney-Advisor, to Scott Davies, xpressmyself.com 1 (Aug. 12, 2016). The Office noted that “courts have consistently have found that standard designs, figures, and geometric shapes are not sufficiently creative to sustain a copyright claim” and that “copyright does not protect the general layout and format of text or pictorial matter or the ideas expressed by either of those items.” *Id.* at 2–3.

In a letter dated October 24, 2016, SmartSign 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 Jacob Berman, SmartSign LLP, to U.S. Copyright Office (Oct. 24, 2016) (“Second Request”). SmartSign again argued that the Office should register the Work because the camera graphic is

sufficiently creative to support copyright registration and the Work is sufficiently creative due to the selection, coordination, and arrangement of its constituent elements. *Id.* at 1–2. Regarding the camera graphic, Smart Sign argued that it was not “common” or “simple” and that the Office does register works that use geometric shapes “when the author’s use of the shapes results in a sufficiently creative work.” *Id.* (citing U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 906.1 (3d ed. 2014) (“COMPENDIUM (THIRD)”). Regarding the selection and arrangement of the Work’s elements, SmartSign first argued that there was creativity when it selected: “(a) a warning notice (‘No trespassing’ text); (b) a method for monitoring violations of the warning (the camera graphic and ‘This property is protected by video surveillance’ text); and (c) an explanation of the consequence for violating the warning notice (‘Trespassers will be prosecuted’ text).” *Id.* at 2. SmartSign also argued that it “exercised creative and artistic decision-making in its arrangement of the material presented in the [Work,]” including by: “positioning the text ‘No trespassing’ at the top of the [Work] and ‘Trespassers will be prosecuted’ at the bottom, in white font on a red background;” “organiz[ing] the camera graphic and ‘This property is protected by video surveillance’ text . . . in the center of the [Work] in black font over a white background;” “hav[ing] the camera graphic appear directly above the ‘This property is protected by video surveillance’ text;” and “position[ing] all elements of the [Work] with centered text.” *Id.* at 3.

### III. DISCUSSION

#### A. *The Legal Framework – 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*, at 345. 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. *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. *See 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." COMPENDIUM (THIRD) § 906.1; *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.

### ***B. Analysis of the Work***

SmartSign offers two arguments in favor of registering the Work as a two-dimensional artwork: (1) the Work is registrable due to the selection, coordination, and arrangement of the Work's constituent elements; and (2) the camera graphic is sufficiently creative on its own. Second Request at 1–2. Neither argument is persuasive.

First, it is unclear whether SmartSign's arguments regarding selection, coordination, and arrangement are limited to the Work as a whole or evidence a new argument regarding the Work as a compilation. Regarding the Work as a whole (regardless of compilation), the Board finds that it is not sufficiently creative to support registration. The Work's font, spacing, and certain color combinations are standard for signs and are not the product of creative choice. For

example, the American National Standards Institute (“ANSI”) published instructions for making different types of signs, which have resulted in common sign designs, including in this Work. *See, e.g.*, ANSI Z35.1-1968: Specifications for Accident Prevention Signs ¶¶ 5.3, 6.8, 7.2 (noting that the common phrase of “No Trespassing” is preferred, that “[b]lock-style lettering should be used because it is more easily read,” and that the colors red, black, and white should be used to designate danger). In *Marobie-Fl, Inc. v. National Association of Fire Equipment Distributors*, No. 96 C 2966, 2000 WL 1053957 (N.D. Ill. 2000), a court found individual images were not subject to copyright protection, because they were “standard fire, safety, and warning images or signs” that consisted of familiar symbols, words, or phrases. *Id.* at \*5. That court also noted that some of those images were not original, because their composition was dictated by governmental regulations and standards (including the ANSI standards) that predated their creation. *Id.* Further, in *Ferman v. Jenlis, Inc.*, No. 4:16-cv-00074, 2016 WL 7912016 (S.D. Iowa 2016), a court found that there was no copyright protection for certain “No Trespassing” signs, because those signs were “not related to a particular form of expression or authorship,” but rather related to the alleged concept of “no trespassing” signs. *Id.* at \*6. The Office also notes that neither words and short phrases, nor typography are protected by copyright. 37 C.F.R. § 202.1(a), (e); *see also Ferman*, 2016 WL 7912016, at \*6 (“Because ‘no trespassing’ signs include the words ‘no trespassing’ practically by definition, the phrase is not protected.”); *Hutchins v. Zoll Med. Corp.*, 492 F.3d 1377, 1385 (Fed. Cir. 2007) (“Copyright does not protect individual words and ‘fragmentary’ phrases when removed from their form of presentation and compilation.”); *Magic Mktg. v. Mailing Servs.*, 634 F. Supp. 769, 771 (W.D. Pa. 1986) (noting that “fragmentary words and phrases” are not protected by copyright); *Eltra Corp. v. Ringer*, 579 F.2d 294, 298 (4th Cir. 1978) (typeface is not copyrightable); COMPENDIUM (THIRD) § 313.3(D), 313.4(C) (both typeface and words and short phrases are not copyrightable). When, viewed overall as a whole, the Board finds that the Work is not protectable by U.S. copyright law and thus cannot be registered.

Additionally, to the extent SmartSign is arguing that the Work qualifies as a compilation, the Board notes that SmartSign did not seek to register a claim in compilation in its initial application. *See* COMPENDIUM (THIRD) § 618.6 (“To register a claim to copyright in a compilation the applicant should identify the new material that the author contributed to the work and should specify the preexisting material or data that was selected, coordinated, and/or arranged (*e.g.*, ‘compilation of data’ or ‘compilation of sound recordings’). . . . When completing an online application, the applicant should provide this information on the Authors screen in the field marked Other.”). Moreover, even if the compilation rubric applied,<sup>1</sup> the Board would not have been able to find sufficient creative compilation authorship to support registration. The combination of elements is not creative: it encompasses, at most, a non-

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<sup>1</sup> The Board seriously doubts that a compilation claim can ever successfully be made in circumstances like this one. *See* Dennis S. Karjala, COPYRIGHT AND CREATIVITY, 15 UCLA ENT. L. REV. 169, 194–95 (2008) (noting that, if taken too far, “there is likely no work of authorship that is not a compilation under the statutory definition,” since “[a] novel, for example, is a selection and arrangement of words (or letters), a musical work is a selection and arrangement of notes, and a painting is a selection and arrangement of forms and colors”). In any event, here the analysis of the claim in the “compilation” of visual elements is practically equivalent to the analysis of the claim in the visual artwork—both, in effect, require the Board to assess the combination of pictorial and graphic elements as a whole. *See* COMPENDIUM (THIRD) § 905 (explaining that, for visual art works, “original authorship may be present in the selection, coordination, and/or arrangement of images, words, or other elements, provided that there is a sufficient amount of creative expression in the work as a whole”).

protectable combination of standard font, spacing, and short phrases, which are likely dictated by industry guidelines or practices.

Second, SmartSign's camera graphic is not sufficiently original to support registration by itself. The camera graphic is not creative enough to warrant registration even if it is not "common" in the same way that gender, mathematical, and currency symbols are common. SmartSign depicted a surveillance camera in the simplest geometric shapes possible, including a bent line as a support arm, a rectangular box, and a cylindrical lens. SmartSign asserts that because *some* arrangement of geometric shapes can be copyrightable, inclusion of the camera graphic dictates that the Work should be registered. Second Request at 2. But, for the Office to register a work composed of common shapes, "the author's use of those shapes [must] result[] in a work that, as a whole, is sufficiently creative." COMPENDIUM (THIRD) § 906.1. Thought of another way, "[w]orks that contain no expression or only a *de minimis* amount of original expression are not copyrightable and cannot be registered with the U.S. Copyright Office." *Id.* § 313.4(B); *see also Coach* at 496; *John Muller & Co. v. New York Arrows Soccer Team, Inc.*, 802 F.2d 989, 990 (8th Cir. 1986) (upholding the Copyright Office's refusal to register a simple logo consisting of four angled lines which formed an arrow and the word "Arrows" in a cursive script beneath the arrow); *Tompkins Graphics, Inc. v. Zipatone, Inc.*, No. 82-5438, 1983 U.S. Dist. LEXIS 14631, at \*4 (E.D. Pa. Aug. 15, 1983) ("Variations of square[s], rectangles, circles and ellipses" were not protectable, as "[s]uch basic geometric shapes have long been in the public domain and therefore cannot be regulated by copyright.>").

#### 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.

BY:   
Catherine Rowland  
Copyright Office Review Board