



**United States Copyright Office**

Library of Congress · 101 Independence Avenue SE · Washington, DC 20559-6000 · [www.copyright.gov](http://www.copyright.gov)

November 28, 2017

Jill M. Pietrini  
Sheppard Mullin Richter & Hampton LLP  
1901 Avenue of the Stars, Suite 1600  
Los Angeles, CA 90067-6055  
[jpietrini@sheppardmullin.com](mailto:jpietrini@sheppardmullin.com)

**Re: Second Request for Reconsideration for Refusal to Register HQ Artwork (unpublished), Correspondence ID 1-26ELCAI, SR 1-3214790458; HQ Artwork (published), Correspondence ID 1-26ER319, SR 1-3214790342**

Dear Ms. Pietrini:

The Review Board of the United States Copyright Office (“Board”) has considered Lion’s Gate Entertainment, Inc.’s (“Lionsgate”) second requests for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claims in the works titled “HQ Artwork (unpublished)” and “HQ Artwork (published)” (“Works”). 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 WORKS<sup>1</sup>**

Because both Works are derivative works, they can each be described, to some extent, by reference to what they do *not* include: the previously-registered image of an eye and the words “Comic Con” reproduced below:



---

<sup>1</sup> Though two separate second requests for reconsideration were submitted for these Works, they have been consolidated for administrative purposes.

**Registration number VA 1-908-071**

The requests for reconsideration state that Lionsgate has licensed from the San Diego Comic Convention “the right to create derivative artwork or its original artwork U.S. Registration no. VA 1-908-071.” Letters from Jill M. Pietrini to U.S. Copyright Office, 7 fn. 3 (June 29, 2017) (“Second Requests”).

Next to this preexisting artwork (and omitting the words “San Diego International”), the HQ Artwork (unpublished) deposit features the interlocking letters “H” and “Q,” colored in yellow. The letter “Q” is stylized in a manner that resembles a power symbol:



**HQ Artwork (unpublished)**

The HQ Artwork (published) deposit includes the same preexisting artwork from registration number VA 1-908-071, now superimposed on the side of a stylized yellow letter “H” that has been drawn with linear perspective. The yellow letter “H” interlocks with a yellow letter “Q” that is also drawn with linear perspective and again, resembles a power symbol:



**HQ Artwork (published)**

## **II. ADMINISTRATIVE RECORD**

On March 15, 2016, Lionsgate filed applications to register copyright claims in the Works. Both applications excluded preexisting artwork contained in registration number VA 1-908-071.

In August 3, 2016 letters, a Copyright Office registration specialist refused to register the claims, finding that the “new material” in each of the Works lacked “a sufficient amount of original authorship.” Letters from Wilbur King, Registration Specialist, to Monica Danner (Aug. 3, 2016).

In letters dated November 2, 2016, Lionsgate requested that the Office reconsider its initial refusals to register the Works. Letters from Jill M. Pietrini, to U.S. Copyright Office (Nov. 2, 2016) (“First Requests”). After reviewing the Works in light of the points raised in the First Request, the Office re-evaluated the claims and again concluded that the Works do “not contain a sufficient amount of *new* original and creative artistic or graphic authorship to support [] claim[s] in copyright.” Letters from Stephanie Mason, Attorney-Advisor, to Jill M. Pietrini (Mar. 29, 2017).

In letters dated June 29, 2017, Lionsgate requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusals to register the Works. Letters from Jill M. Pietrini, to U.S. Copyright Office (June 29, 2017) (“Second Requests”). In those letters, Lionsgate argued that the quantum of creativity required for a derivative work to qualify for copyright protection is “quite low” and that the Works satisfied that standard; and that even new material consisting of a short statement will suffice, Second Requests at 2, 3. It urged the Office to consider the Works in their “entirety to determine” whether they are original. Second Requests at 4.

### 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. *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).

## 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* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 311.1 (3d ed. 2017) (“COMPENDIUM (THIRD)”) (citing H.R. REP. NO. 94-1476, at 57 (1976)). 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) (providing that 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) § 311.1 (citing *Waldman Publishing 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 International, 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.” *L. Batlin & Son*, 536 F.2d at 490; *Durham Industries, Inc. v. Tomy Corp.*, 630 F.2d 905, 911 (2d Cir. 1980). 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.*, 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. *Boyd’s 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 in order 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 creative authorship necessary to sustain a claim to copyright.

As noted above, both Works necessarily exclude the preexisting artwork from previous registration VA 1-908-071. The Board’s consideration is therefore limited to the new material added by each Works; that is, the stylization of the yellow letters “H” and “Q” (and corresponding slanting of the preexisting COMIC CON logo in HQ Artwork (published)). These added contributions are not protectable under the Office’s longstanding regulation providing that “mere variations of typographic ornamentation, lettering or coloring” are all ineligible for copyright protection. 37 C.F.R. § 202.1(a), (e); see *CMM Cable Rep. Inc. v. Ocean Coast Properties, Inc.*, 97 F.3d 1504, 1519 (1st Cir. 1996) (citing the Office’s regulation and noting, “[i]t is axiomatic that copyright law denies protection to ‘fragmentary words and phrases’”); see also COMPENDIUM (THIRD) § 313.4(C)-(D) (“individual . . . letters . . . are not copyrightable [] because they do not contain sufficient creative authorship”). Stylized letters are but trivial variations on basic building blocks of expression; they cannot be copyrighted “regardless of how novel and creative the shape and form of the typeface characters may be.” COMPENDIUM (THIRD) § 906.4; see *Eltra Corp. v. Ringer*, 579 F.2d 294, 298 (4th Cir. 1978) (finding the

Copyright Office properly refused to register a typeface design and noting, “typeface has never been considered entitled to copyright”); *Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc.*, 634 F.Supp. 769, 772 (W.D. Pa. 1986) (noting “distinctive typeface” is not copyrightable).

To be sure, Lionsgate argues that the Works are “not simply ‘two letters positioned side-by-side’” but that the “artistic decisions were made in order to provide a three dimensional effect to those perceiving the work.” Second Requests at 5. The additional use of linear perspective in HQ Artwork (published) is a standard artistic technique that, when added to two yellow letters, does not elevate the Work to the level of creativity required to receive protection. See COMPENDIUM (THIRD) § 905 (“Merely bringing together only a few standard forms or shapes with minor linear or spatial variations does not satisfy [the] requirement” that “a visual art work must contain a sufficient amount of creative expression.”). Similarly, the interlocking of two yellow stylized letters lacks even the modicum of creativity required for copyright protection. See *Coach*, 386 F. Supp. 2d at 496 (finding 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” uncopyrightable).

Viewed as a whole, the Board finds that the derivative authorship in each of the Works is simply too trivial to merit copyright protection. See, e.g., *Past Pluto Productions Corp. v. Dana*, 627 F.Supp. 1435, 1441 (S.D.N.Y. 1986) (stating “derivative works, in order to be copyrightable, must ‘contain some substantial not merely trivial originality;’” finding green foam Statue of Liberty hat lacked originality where the only additional elements included symmetry of spikes in the crown, the phrase “Statue of Liberty 1886-1986,” green foam, and a hole in which the purchaser’s head could go) (citations omitted); *Towle Mfg., Co. v. Godinger Silver Art Co.*, 612 F.Supp. 986, 992 (S.D.N.Y. 1985) (finding derivative work, a cut glass baby bottle, not copyrightable because plaintiff had not “utilized preexisting design elements in a sufficiently original manner to warrant copyright protection” but “instead, merely placed a number of common glassware cuttings on its bottle in an apparently common configuration without significant changes or additions.”); *We Shall Overcome Found.*, 2017 WL 3981311 at \*13 (finding alteration of three words in well-known hymn lacked “the originality required for protection as a derivative work”).

In its Second Requests, Lionsgate relies heavily on *American Greetings Corporation v. Kleinfab Corporation*, 400 F.Supp. 228 (S.D.N.Y. 1975), a case primarily about copyright notice requirements under the 1909 Copyright Act. See Second Requests at 6-7. The *American Greetings* case involved an illustration that was first published in a 1967 book, and was later reproduced on a porcelain container, with the additional words “Put on a Happy Face.” The copyright notice on the container specified 1973 as the year of publication, and the defendant challenged that notice as defective on the ground that the notice should have included the earlier date. In the course of upholding the adequacy of the copyright notice on one depiction of the infringed work, the court found that the addition of the words “Put on a Happy Face” to the existing illustration was sufficient to qualify it as an independently copyrightable, derivative work under the 1909 Act, and that the notice on the container was therefore adequate. *Id.* at 232-33.

Lionsgate’s reliance on *American Greetings* makes too much out of too little. That case did not squarely address the question of whether the addition of the short phrase to the

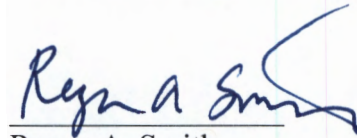
preexisting work was sufficiently creative on its own to be copyrightable. Moreover, that decision predates the Supreme Court's decision in *Feist*. As a result, the Board doubts that a court evaluating the derivative work at issue in *American Greetings* for copyrightability today would reach the same result. See, e.g., *Magic Marketing*, 634 F.Supp. at 772 (holding "terse phrases on envelopes" were not copyrightable because they "do not exhibit a sufficient degree of creativity."); *CMM Cable Rep.*, 97 F.3d at 1519 (similar); *Past Pluto Productions Corp.*, 627 F.Supp. at 1441.

In sum, because the Works do not contain any derivative authorship that is also creative, they do not support registrations as two-dimensional artwork.

#### 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:



Regan A. Smith  
Copyright Office Review Board