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Nicole Pottinger

University of Kentucky College of Law, nicolepottinger@gmail.com

Brian L. Frye

University of Kentucky College of Law, brian.l.frye@hofstra.edu

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Registration is Fundamental

NICOLE E. POTTINGER* & BRIAN L. FRYE†

ABSTRACT

*Under the Copyright Act, copyright owners can file infringement actions only if registration of their copyright claim with the Copyright Office “has been made” or “has been refused.” The United States Supreme Court recently granted certiorari in *Fourth Estate v. Wall-Street.com*, in order to decide whether registration is “made” when a claimant files a registration application or when the Copyright Office registers the claim.*

This article argues that the Court should hold that registration occurs when the Copyright Office registers the claim, in order to ensure that federal courts can benefit from the expertise of the Copyright Office. The Copyright Office recently began publishing the opinions of Copyright Office Review Board. This article uses those administrative opinions to show how the Copyright Office has developed the concepts of “originality” and “creativity” in ways that are helpful to the federal courts. It concludes with an Appendix listing the Copyright Office Review Board opinions addressing originality and explaining the basis for each decision.

INTRODUCTION

In the United States, copyright ownership has always involved registration. Initially, it required registration with a district court. Later, it required registration with the Copyright Office. Eventually, registration became largely optional. Today, copyright ownership does not require registration at all. But registration is still important, at least in part because it is a prerequisite for filing a copyright infringement action.

And yet, it is surprisingly unclear when registration actually occurs. Some circuits have held that registration occurs when the Copyright Office decides whether to register a work or reject the registration application. But others have held that a work is registered as soon as the copyright owner files a registration application. The former rely primarily on the text of the Copyright Act, and the latter rely primarily on the unfairness of making the copyright owner wait for the Copyright Office to act. On June 28, 2018, the United States Supreme Court granted certiorari in *Fourth Estate v. Wall-Street.com*, in order to resolve the disagreement.¹

The Court will probably conclude that registration occurs when the Copyright Office either registers or refuses to register a copyright claim. After all, the Copyright Act provides that

* Candidate for J.D. 2019, University of Kentucky College of Law; B.A. Centre College, 2016.

† Spears-Gilbert Associate Professor of Law, University of Kentucky College of Law. J.D., New York University School of Law, 2005; M.F.A., San Francisco Art Institute, 1997; B.A., University of California, Berkeley, 1995.

¹ *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, No. 17-571, 2018 WL 3148286, at *1 (U.S. June 28, 2018).

a copyright owner cannot file a copyright infringement action until registration “has been made” or “has been refused” by the Copyright Office.² The Court tends to rely on statutory text whenever possible, and the most natural reading of the Copyright Act requires Copyright Office action before a copyright owner can file an infringement action. While it is inconvenient for copyright owners to wait for the Copyright Office to decide their registration applications, it also provides an incentive for them to register early and often.

But waiting for the Copyright Office is also good policy. While eligibility for registration is an issue for only a tiny minority of works, the Copyright Office has extensive experience in determining whether works qualify for registration. Courts do not. Of course, courts need not defer to the Copyright Office’s registration decisions. But they can benefit from its 148 years of expertise in evaluating copyrightable subject matter.³ In particular, courts can and should consider the Copyright Office’s gloss on the concepts of “originality” and “creativity,” because courts rarely address those questions, but the Copyright Office decides them every day. As the Third Circuit observed in *Southco v. Kanebridge*, “the practice of the Copyright Office ‘reflects a body of experience and informed judgment to which courts and litigants may properly resort for guidance.’”⁴

This Article argues that “registration is fundamental” because the considered opinions of the Copyright Office help courts better understand and decide questions of copyrightable subject matter. It begins by briefly explaining the history of copyright registration and its role in copyright ownership, culminating in *Fourth Estate v. Wall-Street.com*. Then it explains the registration process, focusing on the originality, independent creation, and creativity requirements for copyrightable subject matter. It observes that if registration occurs when a copyright owner files a registration application, then rational copyright owners will not bother to register until they want to file an infringement action, and courts will lose the benefit of the Copyright Office’s insight. And then it demonstrates the value of that insight by providing a survey of selected Copyright Office Review Board Letters. The Appendix provides a table of all published Review Board letters, including a brief summary of the grounds for the Board’s decision.

THE HISTORY OF COPYRIGHT REGISTRATION

When the United States created federal copyright protection, it also created federal copyright registration.⁵ Under the Copyright Act of 1790, federal copyright protection required

² 17 U.S.C.A. § 411(a) (Westlaw through Pub. L. No. 115-223).

³ In 1870, the Library of Congress created a Copyright Department, which was the predecessor of the Copyright Office. Copyright Act of 1870, ch. 230, 16 Stat. 198, § 85 (1870).

⁴ *Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276, 286 n.5 (3d Cir. 2004) (quoting *Yates v. Hendon*, 541 U.S. 1, 4 (2004)).

⁵ See U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 101.1 (3d ed. 2017) (hereinafter COMPENDIUM (THIRD)). See generally Zvi S. Rosen & Richard Schwinn, An Empirical Study of 225 Years of Copyright Registrations (unpublished manuscript on file with IP Theory); WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE (1994).

registration with the clerk of a United States District Court.⁶ Accordingly, federal copyright registries were regional, and maintained by the various federal district courts.⁷

The Copyright Act of 1831 retained the same regional registration system.⁸ But the Copyright Act of 1870 centralized registration in the Library of Congress and required the Librarian of Congress to “make an annual report to Congress of the number and description of copyright publications for which entries have been made during the year.”⁹ The Librarian created a Copyright Department to administer copyright issues, including registration. And in 1874, the Library released its first set of guidelines for copyright registration.¹⁰

Among other things, the Copyright Act of 1897 created the office of Register of Copyrights, to be appointed by the Librarian of Congress.¹¹ In response, the Librarian created the Copyright Office, and appointed Thorvald Solberg the first Register of Copyrights. Solberg focused on improving the administration of copyright, including registration. For example, in 1891, the Copyright Office began publishing the Catalog of Copyright Entries, as well as ever-increasing amounts of copyright data.

The Copyright Act of 1909 weakened the registration requirement for copyright ownership. Under the 1909 Act, federal copyright required publication with proper notice.¹² Unpublished works retained state copyright, but publication without proper notice forfeited both state and federal copyright.¹³ While the 1909 Act did not strictly require registration, it did require timely registration in order to file an infringement action or renew a federal copyright.¹⁴ As a consequence, authors interested in copyright ownership typically registered their works.

And the Copyright Act of 1976 made registration largely optional for copyright ownership. Under the 1976 Act, federal copyright only requires fixation of an original work of authorship in a tangible medium of expression. Renewal is unnecessary, and a copyright owner can register at any time. However, the 1976 Act does make registration a prerequisite for an infringement action.

REGISTRATION UNDER THE 1976 ACT

Under the 1976 Act, in order to register a copyright claim in a work of authorship, a copyright owner must submit a registration application to the Copyright Office.¹⁵ The application

⁶ Copyright Act of 1790, ch. 15, 1 Stat. 124, § 1 (1790). The 1790 Act also required deposit of a printed copy of the work and notice of registration by publication. *Id.* § 3.

⁷ Between 1790 and 1870, about 90% of registrations were made in New York, Massachusetts, and Pennsylvania. Zvi & Schwinn, *supra* note 5.

⁸ Copyright Act of 1831, ch. 16, 4 Stat. 436. The 1831 Act eliminated the notice by publication requirement but added a requirement to deposit copies of the work with the federal government. *Id.*

⁹ Copyright Act of 1870, ch. 230, 16 Stat. 198, § 85.

¹⁰ See Rosen & Schwinn, *supra* note 5.

¹¹ Copyright Act of 1897, ch. 4, 29 Stat. 481.

¹² Copyright Act of 1909, ch. 320, 35 Stat. 1075 § 9.

¹³ Technically only general or “divestative” publication without notice forfeits copyright. While limited or “investative” publication with proper notice created federal copyright, limited publication without proper notice did not forfeit state copyright.

¹⁴ Copyright Act of 1909, ch. 320, 35 Stat. 1075.

¹⁵ A registration application consists of the completed application form, the requisite deposit copy or copies of the work, and the full filing fee. COMPENDIUM (THIRD), *supra* note 5, § 204. See also 17 U.S.C.A. § 409 (Westlaw through Pub. L. No. 115-223). The Office is currently undergoing a Modernization effort to make Registration an

is forwarded to the Registration Program, which assigns it to a registration specialist. The registration specialist will examine the application and determine whether the work constitutes copyrightable subject matter, and whether the application satisfies all of the legal and formal requirements for registration.¹⁶

Examination may take as long as a year, but the majority of applications are processed in 7 to 9 months.¹⁷ Under certain circumstances, including pending or prospective litigation, the applicant may request “special handling.”¹⁸ If the Copyright Office grants the request, the applicant may expedite examination by paying an additional fee.¹⁹ The Copyright Office tries to process applications with approved special handling requests within five business days.

If the work appears to constitute copyrightable subject matter, and the application satisfies the other requirements for registration, the Copyright Office will register the claim. Among other things, it will issue a certificate of registration and create an online public record. These will include a registration number and an effective date of registration, which is the date on which the Copyright Office received the complete application.²⁰

If the work does not appear to constitute copyrightable subject matter, or the application does not appear to satisfy the other requirements for registration, the Copyright Office will refuse to register the claim. The registration specialist assigned to the application will also specify the reasons for its decision in a letter ruling sent to the applicant.²¹ Among other things, the Copyright Office may refuse to register a copyright claim if:

- The application is incomplete.
- The work is not fixed in a tangible medium.
- The work lacks human authorship.
- The work is not protected by the Copyright Act.
- The work was not independently created.
- The work lacks the minimum level of creative authorship required for copyright.
- The work is in the public domain.
- The applicant is not qualified to register a copyright claim in the work.
- The work infringes an existing work.
- The applicant failed to submit a copy of the work.²²

easier, more straightforward process. See U.S. Copyright Office, *Copyright Modernization* (Mar. 30, 2018), <https://www.copyright.gov/copyright-modernization/>.

¹⁶COMPENDIUM (THIRD), *supra* note 5.

¹⁷ Currently, the overwhelming majority of applications are processed in 7 to 9 months, but processing times have ranged from 2 months to 28 months. See U.S. COPYRIGHT OFFICE, REGISTRATION PROCESSING TIMES 1.

¹⁸ COMPENDIUM (THIRD), *supra* note 5, § 207. According to the Copyright Office, it approves special handling requests “only in relation to [p]ending or prospective litigation, [c]ustoms matters, or [c]ontract or publishing deadlines that necessitate the expedited issuance of a certificate,” and only if “there is a compelling reason for the service.” U.S. COPYRIGHT OFFICE, CIRCULAR 10: SPECIAL HANDLING 1 (2017). As a consequence, special handling requests are rarely approved.

¹⁹ Currently, the special handling fee is \$800 per claim. U.S. COPYRIGHT OFFICE, COPYRIGHT OFFICE FEES 2 (2016).

²⁰ COMPENDIUM (THIRD), *supra* note 5, § 209.

²¹ *Id.* § 211.

²² *Id.* § 1702.

When the Copyright Office refuses to register a copyright claim, the applicant may appeal to the Copyright Office. The first step in an administrative appeal is a first request for reconsideration, in which the applicant must explain why the application was improperly refused and pay a filing fee.²³ The first request for reconsideration is reviewed *de novo* by a Registration Program staff attorney, who may either register the claim or uphold the refusal to register, ideally within four months. The Copyright Office will inform the applicant in writing of its decision to register the claim, or its reasons for upholding the refusal to register.²⁴

The next step in an administrative appeal is a second request for reconsideration, in which the applicant must explain why the application was improperly refused, specifically address the Copyright Office's reasons for upholding the refusal to register in the first request for reconsideration, and pay a filing fee.²⁵ The second request for reconsideration is reviewed *de novo* by the Copyright Office Review Board.²⁶ A majority of the Review Board may either register the claim or uphold the refusal to register. The Review Board will inform the applicant in writing of its decision to register the claim, or its reasons for upholding the refusal to register.²⁷

The Review Board's written response to a second request for reconsideration is a final agency action of the Copyright Office.²⁸ Accordingly, the applicant may appeal the Review Board's refusal to register under the Administrative Procedures Act ("APA") by filing an action against the Register of Copyrights in a federal district court.²⁹

The district court will review the Copyright Office's refusal to register for "abuse of discretion."³⁰ In other words, the district court will defer to the Review Board's findings of fact and will ask only whether the Review Board reasonably applied the controlling law to those facts. The district court's review is limited to the administrative record, and it will reverse only if the Register's decision does not reflect "reasoned decisionmaking."³¹ Accordingly, the district court does not determine whether the work is protected by copyright, but only whether the Register reasonably refused to register the copyright claim.

REGISTRATION & COPYRIGHT INFRINGEMENT ACTIONS

Under Section 411(a) of the Copyright Act, copyright owners can file a copyright infringement action only if the Copyright Office has either registered or refused to register their copyright claim in the allegedly infringed work.³² If the Copyright Office refused to register the copyright claim, the copyright owner must serve a copy of the complaint on the Register of

²³ *Id.* § 1703.1.

²⁴ *Id.* § 1703.2.

²⁵ *Id.* § 1704.1.

²⁶ The Register of Copyrights and the General Counsel of the Copyright Office may also designate representatives to serve on the Review Board.

²⁷ COMPENDIUM (THIRD), *supra* note 5, § 1704.2; *see also* 17 U.S.C.A. § 410 (Westlaw through Pub. L. No. 15-223).

²⁸ 37 C.F.R. § 202.5(g) (2017).

²⁹ 5 U.S.C.A. §§ 500–596 (Westlaw through Pub. L. No. 115-223).

³⁰ *See, e.g.,* OddzOn Prods., Inc. v. Oman, 924 F.2d 346, 348 (D.C. Cir. 1991); Atari Games Corp. v. Oman, 888 F.2d 878, 881 (D.C. Cir. 1989). Under the APA, a court may set aside agency action where it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C.A. § 706(2)(A) (Westlaw through Pub. L. 115-223).

³¹ Coach, Inc. v. Peters, 386 F. Supp. 2d 495, 499 (S.D.N.Y. 2005).

³² 17 U.S.C.A. § 411 (Westlaw through Pub. L. No. 115-223).

Copyrights, who may join the action with respect to the question of the registrability of the claim.³³

The plaintiff in a copyright infringement action must prove ownership of a valid copyright in the allegedly infringed work. A certificate of registration is *prima facie* evidence of validity, but the defendant may rebut that presumption. By contrast, if the Copyright Office refused to register the copyright claim, the plaintiff bears the burden of proving validity. But in either case, the district court must independently determine whether the allegedly infringed work constitutes copyrightable subject matter.³⁴

However, district courts hearing copyright infringement actions tend to give some deference to the Copyright Office's decision whether to register or refuse to register the plaintiff's copyright claim in the allegedly infringed work.³⁵ Specifically, they typically apply a version of *Skidmore* deference, and rely on the Copyright Office's conclusions when they are persuasive.³⁶ While district courts independently determine the validity of the copyright in an allegedly infringed work, in practice, they rarely disagree with the Copyright Office.

FOURTH ESTATE V. WALL-STREET.COM

On June 28, 2018, the Supreme Court of the United States granted certiorari in *Fourth Estate v. Wall-Street.com*, in order to determine whether Section 411(a) of the Copyright Act permits copyright owners to file an infringement action before the Copyright Office has acted on their registration application.³⁷

Fourth Estate Public Benefit Corporation ("Fourth Estate") is a Delaware public benefit corporation that produces news articles, among many other things.³⁸ Fourth Estate claims to own the copyrights in the articles it produces, and licenses those articles on a non-exclusive basis to

³³ *Id.*

³⁴ See, e.g., *I.C. ex rel. Solovsky v. Delta Galil USA*, 135 F. Supp. 3d 196, 212–13 (S.D.N.Y. 2015) ("The Court must accordingly make an independent determination as to whether plaintiff's design is entitled to copyright protection."); *Ward v. Nat'l Geographic Soc'y*, 208 F. Supp. 2d 429, 445 (S.D.N.Y. 2002) (observing that "district courts must make independent determinations of copyright validity").

³⁵ See, e.g., *Norris Indus., Inc. v. Int'l Tel. & Tel. Corp.*, 696 F.2d 918, 922 (11th Cir. 1983) ("The district court properly gave some deference to the expertise of the Register in its decision."); *Inhale, Inc. v. Starbuzz Tobacco, Inc.*, 755 F.3d 1038, 1041–42 (9th Cir. 2014) ("When interpreting the Copyright Act, we defer to the Copyright Office's interpretations in the appropriate circumstances.").

³⁶ See, e.g., *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (holding that, even when not controlling, agency decisions "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance," and that the "weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control"); *Inhale, Inc.*, 755 F.3d at 1041–42 ("Because *Chevron* deference does not apply to internal agency manuals or opinion letters, we defer to the Copyright Office's views expressed in such materials 'only to the extent that those interpretations have the 'power to persuade.'" (quoting *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000))); *Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276, 286 (3d Cir. 2004) ("We believe that the Copyright Office's longstanding practice of denying registration to short phrases merits deference."); *N.Y. Mercantile Exch., Inc. v. IntercontinentalExchange, Inc.*, 389 F. Supp. 2d 527, 543 (S.D.N.Y. 2005), *aff'd* 497 F.3d 109 (2d Cir. 2007) ("[C]ourts have found that the policies and interpretation of the Office are entitled to deference.").

³⁷ *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 138 S. Ct. 2707 (Mem) (2018).

³⁸ See *Mission and Vision*, FOURTHESTATE, <https://www.fourthestate.org/>. Fourth Estate Public Benefit Corporation was formed on July 14, 2015. DIV. OF CORPS., DEL. SEC'Y OF STATE, FILE NUMBER 5785473. It registered to do business in Florida on July 21, 2015, but its registration was revoked for failure to file an annual report. DIV. OF CORPS., FLA. SEC'Y OF STATE, DOCUMENT NUMBER F15000003173.

AHN Feed Syndicate (“Feed Syndicate”).³⁹ Fourth Estate retains the copyright in the articles it licenses to Feed Syndicate, as well as the right to sue for copyright infringement.⁴⁰ Feed Syndicate licenses Fourth Estate’s articles to third-party subscribers for publication. Feed Syndicate’s license agreement with its subscribers provides, “Prior to account cancellation you must stop display of all Feed Syndicate provided content and permanently take down, remove and/or delete all cached, saved, archived, stored or databased content or data.”⁴¹

Wall-Street.com, LLC (“Wall-Street.com”) is a Florida limited liability company owned by Jerrold D. Burden that operates a website offering financial news, among other things.⁴² On January 30, 2012, Wall-Street.com purchased a Feed Syndicate subscription, and published articles owned by Fourth Estate. At some point, Wall-Street.com canceled its Feed Syndicate subscription, but it did not remove 244 articles owned by Fourth Estate from its website.⁴³

When Fourth Estate learned that Wall-Street.com was publishing its articles without a license, it filed a copyright registration application for the 244 articles, and on March 11, 2016, it filed a copyright infringement action against Wall-Street.com and Burden in the United States District Court for the Southern District of Florida. In its complaint, Fourth Estate acknowledged that the Copyright Office had not yet registered or refused to register its copyright claims in the 244 articles at issue. Fourth Estate stated, “Upon receipt of the registration certificate for these works, Fourth Estate will file this certificate with the court,” and noted that “when issued by the Register of Copyrights the registration certificate will be dated prior to the filing of this action.”⁴⁴

Wall-Street.com filed a motion to dismiss the complaint on the ground that under Section 411 of the Copyright Act, copyright owners cannot file an infringement action until the Copyright Office has either registered or refused to register their copyright claim in the allegedly infringed work.⁴⁵ The district court agreed and dismissed the complaint, holding that “a plaintiff must first obtain registration for the work at issue prior to initiating suit.”⁴⁶ Fourth Estate appealed to the United States Circuit Court for the Eleventh Circuit, which affirmed, holding that “registration occurs when the Register of Copyrights registers the claim.”⁴⁷ And Fourth Estate filed a petition for a writ of certiorari, which the Supreme Court of the United States granted.⁴⁸

SECTION 411(A) OF THE COPYRIGHT ACT & THE REGISTRATION REQUIREMENT

Fourth Estate argues that Section 411(a) of the Copyright Act authorizes copyright owners to file an infringement action as soon as they have filed a registration application with the Copyright Office. Wall-Street.com responds that it does not authorize copyright owners to file an

³⁹ See *About, FEEDSYNDICATE*, <https://www.feedsyndicate.com/>.

⁴⁰ Complaint at 2, *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, L.L.C.*, No. 16-cv-60497 (S.D. Fla. 2016), 2016 WL 5243636.

⁴¹ *Id.* at 4.

⁴² See *WALL-STREET.COM*, <https://wall-street.com/>. Wall-Street.com, LLC was formed on October 20, 2011. DIV. OF CORPS., FLA. SEC’Y OF STATE, DOCUMENT NUMBER L11000120164.

⁴³ Complaint, *supra* note 40, at 11–16; Brief of Appellant at 3, *Fourth Estate*, No. 16-cv-60497, 2016 WL 4524044.

⁴⁴ Complaint, *supra* note 40, at 4.

⁴⁵ Motion to Dismiss at 4, *Fourth Estate*, No. 16-cv-60497, 2016 WL 5267218; see 17 U.S.C.A. § 411(a) (Westlaw through Pub. L. No. 15-223).

⁴⁶ *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com*, No. 16-60497-Civ-Scola, 2016 WL 9045625, at *1 (S.D. Fla. May 23, 2016).

⁴⁷ *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, L.L.C.*, 856 F.3d 1338, 1339 (11th Cir. 2017).

⁴⁸ *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, L.L.C.*, No. 17-571, 2018 WL 3148286, at *1 (U.S. June 28, 2018).

infringement action until the Copyright Office has either registered or refused to register their copyright claim in the allegedly infringed work.

Section 411(a) of the Copyright Act provides:

[N]o civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement.⁴⁹

In *Reed Elsevier, Inc. v. Muchnick*, the Supreme Court held that the Section 411(a) registration requirement “is a precondition to filing a claim that does not restrict a federal court’s subject-matter jurisdiction.”⁵⁰ But it did not opine on whether Section 411(a) requires registration or only application, and the various circuits disagree. The Tenth Circuit requires registration.⁵¹ The Fifth and Ninth Circuits require only application.⁵² The Eighth Circuit appears to require only application.⁵³ The Seventh Circuit rule is unclear.⁵⁴ And the First and Second Circuits have explicitly declined to adopt either rule.⁵⁵

The Eleventh Circuit had previously applied the registration rule in passing.⁵⁶ But in *Fourth Estate v. Wall-Street.com* it explicitly adopted the registration rule, based on the plain text of the Copyright Act: “Registration of a copyright has not been made in accordance with title 17’ until ‘the Register registers the claim.’ Filing an application does not amount to registration.”⁵⁷ Specifically, the court observed, “The Copyright Act defines registration as a process that requires action by both the copyright owner and the Copyright Office.”⁵⁸ As a consequence, registration occurs when the Register of Copyrights registers a copyright claim, not when a copyright owner files a registration application. This is true even though the effective date of registration is ultimately the filing date. And the court noted, “If registration occurred as

⁴⁹ 17 U.S.C.A. § 411(a) (Westlaw through Pub. L. 115-223).

⁵⁰ *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 157 (2010).

⁵¹ *See, e.g., La Resolana Architects, PA v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1197 (10th Cir. 2005).

⁵² *See, e.g., Cosmetic Ideas, Inc. v. IAC/Interactivecorp*, 606 F.3d 612, 619 (9th Cir. 2010); *Positive Black Talk Inc. v. Cash Money Records Inc.*, 394 F.3d 357, 365 (5th Cir. 2004), *abrogated by Reed Elsevier*, 559 U.S. at 167; *Apple Barrel Prods., Inc. v. Beard*, 730 F.2d 384, 386–87 (5th Cir. 1984).

⁵³ *See, e.g., Action Tapes, Inc. v. Mattson*, 462 F.3d 1010, 1013 (8th Cir. 2006) (affirming summary judgment for defendant because plaintiff failed to prove it filed a registration application before it filed its infringement action).

⁵⁴ *Compare Chicago Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 631 (7th Cir. 2003) (requiring only application), *with Gaiman v. McFarlane*, 360 F.3d 644, 655 (7th Cir. 2004) (requiring registration or refusal to register), *and Brooks-Ngwenya v. Indianapolis Pub. Sch.*, 564 F.3d 804, 806 (7th Cir. 2009) (agnostic).

⁵⁵ *Alicea v. Machete Music*, 744 F.3d 773, 779 (1st Cir. 2014); *Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 125 (2d Cir. 2014).

⁵⁶ *See M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486, 1488–89 (11th Cir. 1990) (endorsing a district court’s dismissal of a copyright infringement action because the plaintiff had not obtained a certificate of registration); *see also Kernel Records Oy v. Mosley*, 694 F.3d 1294, 1302 n.8 (11th Cir. 2012) (observing that the Eleventh Circuit adopted the registration rule in *M.G.B. Homes*, 903 F.2d at 1488–89).

⁵⁷ *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, L.L.C.*, 856 F.3d 1338, 1341 (11th Cir. 2017) (quoting 17 U.S.C.A. §§ 410(a), 411(a) (Westlaw through Pub. L. No. 115-223)).

⁵⁸ *Id.* at 1341.

soon as an application was filed, then the Register of Copyrights would have no power to “refuse registration.”⁵⁹

The circuits that have adopted the application rule have done so primarily on policy grounds.⁶⁰ For example, the Ninth Circuit adopted the application rule because it “better fulfills Congress's purpose of providing broad copyright protection while maintaining a robust federal register.”⁶¹ Similarly, courts in the Fourth Circuit have observed that the registration rule would unfairly disadvantage copyright owners.⁶²

Fourth Estate relies primarily on policy arguments in favor of the application rule. While Fourth Estate makes *pro forma* arguments that the statutory text favors the application rule over the registration rule, its real argument is that the registration rule is unfair and inconsistent with the purpose of the Copyright Act. Implicit in Fourth Estate’s argument is that most copyright owners don’t bother filing registration applications until their works are infringed. The registration rule means that they have to wait for the Copyright Office to finish examining their application before they can file an infringement action. As a consequence, they may not be able to file an action and get an injunction for 6 months or more, unless they file a special handling request and the Copyright Office approves it.

THE VALUE OF REGISTRATION

Under the 1976 Act, copyright registration is literally a formality.⁶³ While registration is a prerequisite for an infringement action, copyright owners can file an infringement action whether the Copyright Office registers or refuses to register their copyright claim. At most, registration only requires copyright owners to wait until the Copyright Office has acted. And sometimes they have to wait quite a while, as examination can take a year or more. For example, Fourth Estate’s registration application is still pending.

Accordingly, opponents of the registration requirement argue that it is pointless and unfair. If copyright owners aren’t required to register in order to own a copyright, why should they have to register in order to file an infringement action? Registration is burdensome and expensive, especially if you own a lot of copyrighted works. Why shouldn’t copyright owners be able to wait and see if anyone infringes before registering? And why should they have to pay extra for expedited review? In addition, Michael Risch has asked whether the registration requirement presents an equal protection problem, given that domestic authors must register before filing an infringement action, but foreign authors need not.⁶⁴

⁵⁹ *Id.*

⁶⁰ Others have relied solely on Nimmer’s authority. *See, e.g.,* Apple Barrel Prods., Inc. v. Beard, 730 F.2d 384, 386–87 (5th Cir. 1984) (“In order to bring suit for copyright infringement, it is not necessary to prove possession of a registration certificate. One need only prove payment of the required fee, deposit of the work in question, and receipt by the Copyright Office of a registration application.”) (citing 2 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 7.16[B][1] (1978)).

⁶¹ *Cosmetic Ideas, Inc. v. IAC/Interactivecorp*, 606 F.3d 612, 619 (9th Cir. 2010).

⁶² *Secure Servs. Tech., Inc. v. Time & Space Processing, Inc.*, 722 F. Supp. 1354, 1364 (E.D. Va. 1989) (“Were the law otherwise, the owner of a copyright would be left in legal limbo while the Copyright Office considers whether he qualifies for a certificate of registration.”).

⁶³ 17 U.S.C.A. § 408(a) (Westlaw through Pub. L. No. 115-223) (“Registration Permissive”).

⁶⁴ *See* Michael Risch, *The Real World Impact of the Copyright Registration Prerequisite*, WRITTEN DESCRIPTION (July 30, 2018), <https://writtendescription.blogspot.com/2018/07/the-real-world-impact-of-copyright.html>; *see also* 17 U.S.C.A. § 411(a) (Westlaw through Pub. L. No. 115-223) (limiting application to “United States” works).

But formalities can be valuable, especially when they enable administrative review and encourage critical reflection. Indeed, as Maitland famously observed, "Substantive law is secreted in the interstices of procedure."⁶⁵ Even if registration is a formality, it may be a formality with teeth, because it requires the Copyright Office to provide a substantive review of the copyrightability of a work of authorship before the copyright owner can file an infringement action. The authors of works the Copyright Office refuses to register may decline to file infringement actions, reducing the caseload of the district courts. And if they do file infringement actions, the district court has the benefit of Copyright Office's considered opinion on whether the work comprises copyrightable subject matter, among other things.

THE SUBJECT MATTER OF COPYRIGHT

While the Copyright Office considers many factors in determining whether a copyright claim qualifies for registration, the primary consideration is whether the work of authorship in question constitutes copyrightable subject matter. In order to make that determination, the Copyright Office asks whether the work is an "original work of authorship."⁶⁶

ORIGINALITY

"Originality" is the essence of copyright. The Supreme Court has long held that originality is the "*sine qua non*" of copyright and "a constitutional requirement" for copyright protection.⁶⁷ Accordingly, copyright can only protect "original works of authorship," and can only protect the original "elements" of a work of authorship.

In *Feist v. Rural* (1991), the Supreme Court defined "originality," holding that it requires both "independent creation" by the author of the work and "at least some minimal degree of creativity."⁶⁸ The Court explained that an element of a work is "independently created" by the author of the work so long as it was not "copied" from another work of authorship.⁶⁹ As it observed, "Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying."⁷⁰ So, if two authors independently create identical works, copyright may protect both works independently. But copyright cannot protect "facts," because they are not created by an author, but copied from the world.⁷¹

⁶⁵ See FREDERIC WILLIAM MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* (1909) (quoting HENRY SUMNER MAINE, *DISSERTATIONS ON EARLY LAW AND CUSTOM* (1883)).

⁶⁶ 17 U.S.C.A. § 102(a) (Westlaw through Pub. L. No. 115-223) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.").

⁶⁷ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345–46 (1991) (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884); *The Trade-Mark Cases*, 100 U.S. 82 (1879)).

⁶⁸ *Feist Publ'ns*, 499 U.S. at 345.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 347.

The Court also explained that “originality” requires “a modicum of creativity.”⁷² But it emphasized that the amount of “creativity” required for copyright protection is very small: “To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble or obvious’ it might be.”⁷³ For example, while copyright cannot protect “facts,” it can protect a compilation of facts, but only if the selection, coordination, or arrangement of those facts displays “some minimal level of creativity.”⁷⁴ While even most compilations of facts are sufficiently “creative” for copyright protection: “There remains a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent.”⁷⁵ Specifically, the Court held that copyright cannot protect a white pages telephone directory, because the selection, coordination, and arrangement of the listings lacks any “creativity” whatsoever.⁷⁶ “The standard of originality is low, but it does exist.”⁷⁷

CREATIVITY

Unfortunately, the Court’s explanation of the “creativity” requirement for copyright protection in *Feist* is almost entirely useless. It observed that a “mechanical or routine” or “entirely typical” element of a work is not “creative.”⁷⁸ And it insisted that “an author who claims infringement must prove ‘the existence of . . . intellectual production, of thought, and conception.’”⁷⁹ That is to say, there has to be something, rather than nothing. But what that special something might be is left unstated.⁸⁰

While the Court held that a whitepages telephone directory lacks the “modicum of creativity” required for copyright protection, it did not explain what qualities would qualify an element of a work for copyright protection. Indeed, it did not even explain what would differentiate a “creative” compilation of facts from one lacking in creativity. Perhaps the Court was invoking Justice Stewart’s admission that some qualities are hard to define, but easy to identify: “I know it when I see it.”⁸¹ Or in the alternative, perhaps it was channeling Wittgenstein’s observation that subjective experience cannot be expressed: “Whereof one cannot

⁷² *Id.* at 346.

⁷³ *Id.* at 345 (quoting 1 M. NIMMER & D. NIMMER, COPYRIGHT §§ 2.01[A], [B] (1990)).

⁷⁴ *Id.* at 358.

⁷⁵ *Id.*

⁷⁶ *Id.* at 362.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 362 (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 59–60 (1884)).

⁸⁰ Interestingly, while some lower court opinions had previously held that “creativity” is a requirement for copyright, the Supreme Court did not explicitly incorporate or rely on their holdings. *See, e.g., Atari Games Corp. v. Oman*, 888 F.2d 878, 883 (D.C. Cir. 1989) (“The level of creativity necessary and sufficient for copyrightability has been described as ‘very slight,’ ‘minimal,’ ‘modest.’”); *Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n*, 805 F.2d 663, 668 n.6 (7th Cir. 1986) (“A work is creative if it embodies some modest amount of intellectual labor.”); *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir. 1976) (“The requirement of substantial as opposed to trivial variation and the prohibition of mechanical copying, both of which are inherent in and subsumed by the concept of originality, apply to both statutory categories. There is implicit in that concept a ‘minimal element of creativity over and above the requirement of independent effort.’”) (quoting 1 MELVILLE B. NIMMER, *Nimmer on Copyright* § 10.2).

⁸¹ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

speak, thereof one must be silent.”⁸² In any case, it had nothing further to say on the subject of creativity, and has said nothing since.

Unsurprisingly, lower courts have struggled to apply the creativity requirement. They do not know what it requires and cannot even figure out what it means. So they tend to avoid it. Confronted with a threshold question of originality, courts typically conclude that the work at issue is sufficiently “creative” for copyright protection, but that the allegedly infringing work does not infringe, because it does not actually copy any original elements.⁸³ A wag might observe that copyright apparently protects everything but the white pages, but proving infringement is another matter entirely.

In any case, lower courts rarely have occasion to address the creativity requirement. The overwhelming majority of works of authorship clearly qualify for copyright protection, so validity is simply not an issue. And the Copyright Office effectively weeds out many of the most marginal works by refusing to register them. While some applicants challenge the Copyright Office’s refusal to register, and others file infringement actions on the basis of its refusal to register, most accept its assessment of the registrability of their claims.

GAUGING “ORIGINALITY”

As a policy matter, the Court should interpret the Copyright Act to require the Copyright Office to determine whether to register a copyright claim before a copyright owner can file an infringement action, in order to ensure that courts have the benefit of the Copyright Office’s expertise. Unlike the courts, the Copyright Office has long experience in evaluating the originality of works of authorship and deep familiarity with the wide range of works claimed. Registration is the *métier* of the Copyright Office, in which it has developed a fluency that the courts conspicuously lack. Specifically, the Copyright Office has created a working definition of “creativity” on which courts can and do rely.

Moreover, Congress expected and intended the courts to rely on the Copyright Office’s expertise. According to Congress, the registration requirement was intended to streamline copyright infringement litigation and keep marginal claims out of court.⁸⁴ And as the Register of Copyrights has observed, “the registration process identifies unfounded claims and assists the courts in establishing presumptive facts and applying the law.”⁸⁵ Similarly, the Department of Justice has recognized that one of the reasons for the registration requirement is to “afford courts the benefit of the Copyright Office’s expertise.”⁸⁶

Registration also provides at least some information about the salience of copyright protection. Under the 1909 Act, registration was important to copyright protection, and under earlier versions of the Copyright Act it was absolutely critical. Accordingly, registration strongly suggested that copyright was salient.

⁸² LUDWIG WITTEGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* § 7.00 (1921).

⁸³ *See, e.g., Satava v. Lowry*, 323 F.3d 805, 812 (9th Cir. 2003) (“Satava possesses a thin copyright that protects against only virtually identical copying.”).

⁸⁴ *See* H.R. REP. NO. 100-609, at 41–42 (1988) (observing that registration “promotes efficient litigation practices” by discouraging frivolous claims).

⁸⁵ STAFF OF H.R. COMM. ON THE JUDICIARY, 87TH CONG., REP. OF THE REG. OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 75 (Comm. Print 1961).

⁸⁶ Brief for the United States as Amicus Curiae, *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010) (No. 08-103), 2009 WL 1601031.

By contrast, under the 1976 Act, copyright automatically protects all original works of authorship as soon as they are fixed in a tangible medium. As Brad Greenberg memorably observed, copyright is like an Oprah giveaway: (almost) everybody gets one.⁸⁷ Registration is optional, unless a copyright owner wants to file an infringement action. And yet, many authors register, irrespective of infringement or even economic value. Presumably, copyright ownership is salient to registrants for a range of different reasons, some economic and some non-economic.

Accordingly, registration still provides evidence about the salience of copyright that courts can use to inform their decisions about damages and copyright misuse. If the author of a work filed a copyright registration application prior to publication of the work, or prior to infringement of the work, it suggests that copyright in that work was salient to the author. And if an author programmatically files copyright registration applications for their work, it suggests that copyright protection is salient to that author's business model.

Of course, copyright can be salient to authors for many different reasons. For at least some authors, copyright is truly a *quid pro quo* that encourages them to produce works of authorship. Surely Samuel Johnson was not alone in believing, "No man but a blockhead ever wrote, except for money."⁸⁸ For other authors, copyright is but one incentive among many. And for many authors, copyright is something they delegate to their agent.

In addition, authors may value copyright for many different reasons. In theory, copyright law assumes that authors are rational economic actors, who value copyright as a way of internalizing the positive externalities associated with the works of authorship they create. But in practice, many authors view copyright as a way of controlling how people use the works of authorship they create. Different people may disagree about the justification for these desires. But from a consequentialist perspective, all of them may encourage authors to create works of authorship.

THE COPYRIGHT OFFICE REVIEW BOARD

In 1995, the Copyright Office created the Review Board to provide final agency review of registration applications. The Review Board consists of the Register of Copyrights and the General Counsel of the Copyright Office, or their respective designees, and a third person designated by the Register.⁸⁹ The Review Board reviews the applicant's second request for reconsideration *de novo* and issues a formal opinion letter, taking into consideration any prior correspondence between the complainant and the Office, matters known to the Office or the Review Board, and matters of general knowledge.⁹⁰ While the decisions of the Review Board are final agency actions, they have no precedential value, although they may reflect the Copyright

⁸⁷ Brad A. Greenberg, Copyright and Trademark Troll: Fable or Fact?, at Chapman University School of Law, Law Review Symposium (Jan. 30, 2015) (Audio Recording 19:34–19:53), <http://ibc.chapman.edu/Mediasite/Play/5fee649a60414522a5a1c1627f222ff81d>.

⁸⁸ JAMES BOSWELL, LIFE OF SAMUEL JOHNSON 731 (1791).

⁸⁹ U.S. COPYRIGHT OFFICE, CIRCULAR 20: REQUESTS FOR RECONSIDERATION (2017) (hereinafter CIRCULAR 20). The third person is often the director of a different division of the Copyright Office, such as the Office of Public Information and Education.

⁹⁰ *Id.*; see also 37 C.F.R. § 202.5 (2017) (“(4) If the Review Board decides to register an applicant's work in response to a second request for reconsideration, it will notify the applicant in writing of the decision and the work will be registered. If the Review Board upholds the refusal to register the work, it will send the applicant a written notification stating the reasons for refusal.”).

Office's understanding of the Copyright Act and judicial opinions interpreting the Copyright Act.⁹¹

Historically, Copyright Office registration decisions were non-public. From 1995 to 2015, the University of New Hampshire obtained registration decisions by filing Freedom of Information Act requests and published them on its website.⁹² And then in June 2017, the Copyright Office began publishing Review Board opinion letters on its website, in order to help provide additional guidance to those undergoing the registration process.⁹³

Each letter maintains the same structure: 1) a brief description of the work; 2) a procedural history; 3) a standardized legal framework, tailored to the work at issue; and 4) analysis of the Work itself. The legal framework consists of principles derived from case law (primarily *Feist*,⁹⁴ *Atari Games*,⁹⁵ *Coach, Inc.*,⁹⁶ *Satava*,⁹⁷ and *Bleistein*⁹⁸), as well as relevant sections of the Compendium.

There are four main categories of refusals: useful articles/separation, idea/expression dichotomy, lack of creativity, and derivative works. Many works fall into multiple categories, and as a result, the Board often has to go through multiple analyses in its deliberations.⁹⁹ While the Board is able to offer helpful observations about each category, we will only be discussing originality/creativity as a representative sample.

One of the most common grounds for affirming the refusal to grant registration is on the basis that the Works do not “contain a sufficient amount of original and creative artistic or graphic authorship to sustain a claim in copyright.”¹⁰⁰

REVIEW BOARD LETTER RULINGS

Based on the available letters, the Board is more likely to reverse the decision to refuse copyright registration if the Board has categorized the Work as “text” rather than any other category of work.¹⁰¹ Of the twenty decisions the Board has reversed, nine have been categorized

⁹¹ CIRCULAR 20, *supra* note 89.

⁹² U.S. Copyright Board of Appeals Decisions <https://www.ipmall.info/content/us-copyright-office-board-appeals-decisions>.

⁹³ See United States Copyright Office, *Review Board Letters Online*, <https://www.copyright.gov/rulings-filings/review-board/>; see also George Thuronyi, *Copyright Office Launches Online Database of Review Board Decisions* (June 2, 2017), <https://blogs.loc.gov/copyright/2017/06/copyright-office-launches-online-database-of-review-board-decisions/>. The oldest Review Board opinion letters currently published on the Copyright Office website were issued in April 2016.

⁹⁴ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

⁹⁵ *Atari Games Corp. v. Oman*, 888 F.2d 878 (D.C. Cir. 1989).

⁹⁶ *Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 496 (S.D.N.Y. 2005).

⁹⁷ *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003).

⁹⁸ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

⁹⁹ For example, in deciding whether or not the raised designs in a plastic floor liner for a car was eligible for copyright protection, the Board utilized the guidelines set out in *Star Athletica v. Varsity Brands*, 137 S. Ct. 1002 (2017), to find the designs separable from the utility of the floor liner. The Board further found that “[t]he decorative pattern is a separable, non-useful work; the embossed design contains sufficient creative expression to be copyrightable under *Feist*.” See Letter from U.S. Copyright Office Review Board to Lawrence Ashery (April 19, 2018).

¹⁰⁰ See, e.g., Letter from U.S. Copyright Office to Lisa Mottes (May 25, 2018).

¹⁰¹ Categories include: architectural works, choreography, common shapes/symbols/designs, compilation, computer program, deposit, derivative work, human authorship, idea/expression dichotomy, jewelry design, labels and logos, layout and format, musical work, originality, other, rule of doubt, sound recording, text, textiles, three-dimensional

as “text.”¹⁰² A particularly illuminative example of the Board’s analysis regarding originality/creativity is the A LITTLE BIT BAD Blog Content, Brady Joke.

A. TEXTUAL WORKS

In this appeal, referred to as *Tom Brady Joke*, the Board reversed the refusal to register the copyright claim in the work.¹⁰³ The Work was described as “two-sentence textual work” and reads: “Tom Brady said he wants to give his MVP truck to the man who won the game for the Patriots. So enjoy that truck, Pete Carroll.”¹⁰⁴ The Board noted that it based its finding on on the “minimal degree of creativity” requirement laid out in *Feist*.¹⁰⁵ The Board stated that Courts and the Copyright Office have found copyright protection for jokes when the jokes are sufficiently creative, then cited to a Northern District of Georgia opinion, where the court found that a series of “You might be a redneck if . . .” jokes “evidenced a modicum of intellectual labor” and therefore were eligible for copyright protection.¹⁰⁶

In finding that the Work was sufficiently creative, the Board cautioned that the copyright in the Work is “thin,” and that works with “thin” copyright “reflect only scant creativity.” The Board’s decision to grant thin copyright protection in *Tom Brady Joke* is consistent with a decision from the Southern District of California, which held that “there is little doubt that the jokes at issue merit copyright protection” but “the jokes here are similarly constrained by their subject matter and the conventions of the two-line, setup-and-delivery paradigm.”¹⁰⁷

This decision demonstrates how the Board uses case law to inform its ultimate decision. In utilizing both *Foxworthy* and *Kaseberg*, the Board was able to apply similar reasoning to the cases to come to a decision. The Board knew that jokes were eligible for protection, and this work was longer than a simple word or phrase.¹⁰⁸ Relying on the *Foxworthy* court’s decision, the Board applied the legal standard “a modicum of intellectual labor” to the joke in front of them. In making that determination, the Board likely applied the logic in *Kaseberg* and asked whether or not the joke was derived from elements in the public domain. Presumably finding it was not, the Board found the work was eligible for “thin” copyright protection. This means that while the exact Work is protected, jokes about Tom Brady, Pete Carroll, or the Superbowl game in question will likely not be considered infringing.

B. “STANDARD” WORKS AND COMPILATIONS

In contrast, the Board often refuses to grant registration to a work for a number of reasons, including representational works, works that “are not the product of creative choice,”

work, two-dimensional work, typography, useful article, words and short phrases. Categories have been derived from the Copyright Office’s database of Review Board letters. See U.S. Copyright Office, *Review Board Letters Online*, (2018), <https://www.copyright.gov/rulings-filings/review-board/>.

¹⁰² Here, a textual work is either a computer software, a traditional “literary work,” or a mobile application. See, e.g., Letter from U.S. Copyright Office Review Board to Mehrnaz Boroumand Smith (May 4, 2017); Letter from U.S. Copyright Office Review Board to Mark A. Fowler (June 30, 2016).

¹⁰³ Letter from U.S. Copyright Office Review Board to Jayson M. Lorenzo (July 27, 2017).

¹⁰⁴ *Id.*

¹⁰⁵ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

¹⁰⁶ *Foxworthy v. Custom Tees, Inc.*, 879 F. Supp. 1200, 1219 (N.D. Ga. 1995).

¹⁰⁷ *Kaseberg v. Conaco, LLC.*, 260 F. Supp. 3d 1229, 1245 (S.D. Cal. 2017).

¹⁰⁸ Words and phrases are not eligible for copyright protection. See 37 C.F.R. 202.1(a) (2018).

works comprising of primarily geometric shapes, and works whose compilations are not sufficiently creative.

The Board is often faced with works that look similar to something found in nature, or something that is seen as “standard.” While “standard” is never defined, it is used in a variety of contexts, such as the cut of a diamond,¹⁰⁹ the design of a logo,¹¹⁰ and the layout of a commercial label.¹¹¹ In cases of this nature, the Board often applies the holding of *Satava v. Lowry*¹¹² to the particular facts.

There are two particularly illuminative appeals: *Log Cabin* and *Cod Liver*.



In *Log Cabin*, the work in question is a sculpture, comprised of logs and wood components, “arranged to look like the facade of a log cabin.”¹¹³ The Review Board denied the complainant’s appeal due to lack of originality, pointing out that the log cabin sculpture “is a simple representation of a standard log cabin facade with joinery; thus any authorship is *de minimus* and does not support registration.”¹¹⁴ The Board specifically refused to consider the author’s conceptual choices when producing the Work, following *Bleistein*.¹¹⁵

Bleistein teaches that “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the

¹⁰⁹ Letter from U.S. Copyright Review Board to Howard Rockman (Mar. 20, 2017) (“Given the deposited material, the Board cannot examine . . . structural and faceting differences between the Work and the standard round brilliant cut.”).

¹¹⁰ Letter from U.S. Copyright Review Board to Scott Warner (Dec. 12, 2017) (“To the contrary, the basic physiological characteristics of animals are considered ‘standard, stock, or common’ and are not protectable by copyright.”) (citing *Alpi Intn’l, Ltd. v. Anga Supply, LLC*, No. 13-cv-4888, 2015 WL 2170040, *3 (N.D. Cal. May 8, 2015)); *see also* *Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 901 (9th Cir. 1987) (in an infringement case concerning stuffed dinosaur toys, a court “prevent[ed] reliance upon any similarity in expression resulting from . . . the physiognomy of dinosaurs” because to do so would protect the idea of a dinosaur).

¹¹¹ Letter from U.S. Copyright Review Board to Jennette Wisner (Jan. 24, 2017) (“Similarly, the kosher certification, as a standard food label, is not copyrightable.”) [hereinafter *Cod Liver*].

¹¹² 323 F.3d 805, 810 (9th Cir. 2003) (“[E]xpressions that are standard, stock, or common to a particular subject matter or medium are not protectable under copyright law.”).

¹¹³ Letter from U.S. Copyright Office Review Board to Andrew Epstein 4 (May 25, 2018) [hereinafter *Log Cabin*].

¹¹⁴ *Id.*

¹¹⁵ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

narrowest and most obvious limits.”¹¹⁶ The court in *Bleistein* found that the appellants *were* entitled to copyright protection.

Log Cabin is an interesting appeal because it involves a work of sculptural design. Works of “three-dimensional artwork” are often refused for lack of creativity,¹¹⁷ and in refusing works, the Board has had to determine what “the narrowest and most obvious limit” truly means. *Log Cabin* demonstrates the principle that simply copying a standard design does not meet the minimum threshold for creativity, largely because the idea is a standard expression. The Compendium instructs that, “the Office cannot register a claim based solely on standard expressions that naturally follow from the idea for a work of authorship.”¹¹⁸ This guidance is derived from *Satava*,¹¹⁹ which is utilized in each Review Board letter that discusses creativity and originality.

The Board quotes *Satava* at length in explaining what the requisite level of creativity necessary to warrant protection is:

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.¹²⁰



This principle and corresponding language is demonstrated in *Cod Liver*.¹²¹ In *Cod Liver*, the Review Board refused to register a design for Cod Liver packaging artwork. This decision was made consistent with the ruling of the U.S. District Court for the Eastern District of New

¹¹⁶ *Id.* at 251.

¹¹⁷ *See, e.g.*, Letter from U.S. Copyright Office Review Board to Michael Frodsham (Oct. 13, 2016); *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003).

¹¹⁸ COMPENDIUM (THIRD), *supra* note 5, § 313.3(B).

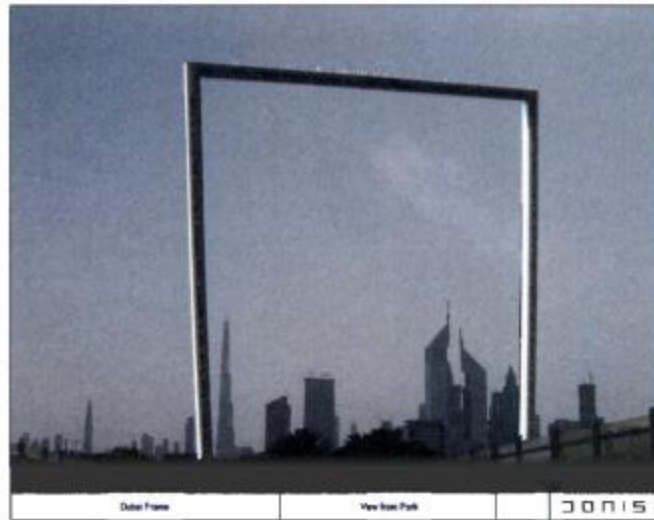
¹¹⁹ *Satava*, 323 F.3d at 811.

¹²⁰ *Id.*

¹²¹ *Cod Liver*, *supra* note 111.

York, which found that the work was not copyrightable.¹²² The Board refused to register the Work because “[s]everal of the Work’s design elements are dictated by non-creative considerations or are mandated by government rules, including the nutritional facts, the UPC code, the manufacturing information, and the kosher certification.”¹²³ The Board also noted that “the choice of using the colors of the Icelandic flag for a product imported from Iceland is not creative, nor is using a simple ocean wave design on the bottom of a can of fish. These are standard design elements that Interpage cannot claim.”¹²⁴ The Board ultimately stated, “[i]n sum, the selection and placement of the Work’s elements are not the product of a creative choice, but are typical of commercial labels.”¹²⁵

C. UNUSUAL CATEGORIES: ARCHITECTURE AND CHOREOGRAPHY

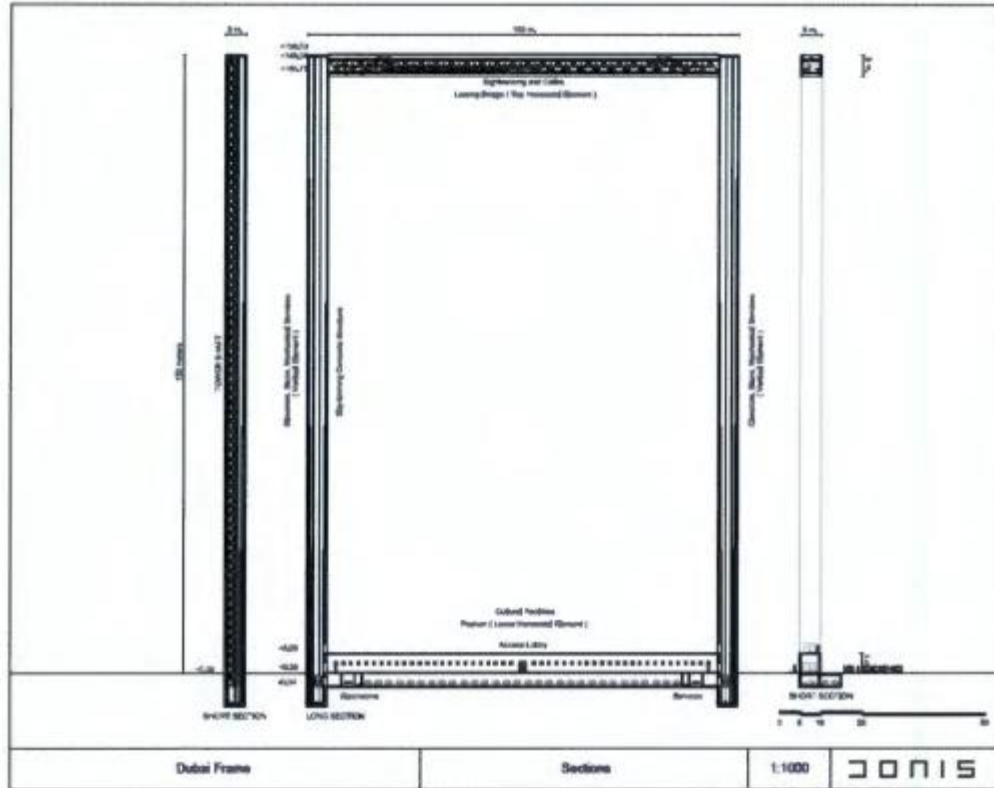


¹²² *Threeline Imps., Inc. v. Vernikov*, 239 F. Supp. 3d 542 (E.D.N.Y. 2017). The court dismissed the defendant’s copyright infringement claim.

¹²³ *Cod Liver*, *supra* note 111, at 4.

¹²⁴ *Id.*

¹²⁵ *Id.*



The Review Board can also guide courts in determining whether a work from an atypical category, such as architecture or choreography, meets the creativity/originality requirement. In *Dubai Frame*, the Board affirmed the denial of registration of a rectangular-framed permanent building because “the Work essentially is a giant rectangular outline, a common geometric shape.”¹²⁶

In its second appeal, the author argued that the Work should constitute an “architectural work” under the Copyright Act because it was “designed for human occupancy,” and it included original design elements (such as form, height, and location), which are “creative and not functionally required.”¹²⁷ The Board reversed its initial finding that the Work does not constitute an architectural work. Thus, the Board had to undertake a two-step analysis that asked “whether there are original design elements present, including the overall shape and interior architecture” and “[i]f such design elements are present, whether the design elements are functionally required.”¹²⁸

The author argued that the Work was sufficiently original “since, in ‘serv[ing] as a viewing point for other landmarks in Dubai,’ it includes original design elements (such as form, height, and location), which are creative and not functionally required.”¹²⁹ However, the Board

¹²⁶ Letter from U.S. Copyright Office Review Board to Edward Klaris 5 (Nov. 29, 2017) [hereinafter *Dubai Frame*].

¹²⁷ *Id.* at 2 (citing Letter from Ivan Proctor, Registration Specialist, to Edward Klaris (Nov. 21, 2016)).

¹²⁸ *Dubai Frame*, *supra* note 126 (citing H.R. REP. NO. 101-735, at 20-21 (1990), as reprinted in 1990 U.S.C.C.A.N. 6935, 6950).

¹²⁹ *Dubai Frame*, *supra* note 126, at 2 (citing Letter from Ivan Proctor, Registration Specialist, to Edward Klaris (Nov. 21, 2016)).

rejected this argument, stating, “the Work, externally, is exactly the kind of geometric shape that belongs squarely within the public domain.”¹³⁰

Dubai Frame is an excellent example of the relationship the Copyright Office has with the court system. The Board supported their decision using *Kitchens of Sara Lee, Inc. v. Nifty Food Corps.*¹³¹ In *Kitchens of Sara Lee*, the Second Circuit found that the scope of Sara Lee’s copyright over the packaging of their cakes did not extend to “circular and rectangular shapes.”¹³² The court in *Kitchens of Sara Lee* relied on a publication by the Copyright Office, which spelled out what was appropriate for copyright registration, “The Copyright Office does not regard as sufficient to warrant copyright registration ‘familiar symbols or designs, mere variations of typographic ornamentation, lettering or coloring, and mere listings of ingredients or contents.’”¹³³ The court specifically pointed out although that the publication “does not have the force of statute,”¹³⁴ it was a “fair summary of the law.”¹³⁵ Returning to *Dubai Frame*, the Board stated that “[t]he Work as a whole... does not satisfy even the low threshold for creativity set forth in *Feist*.”¹³⁶

Architecture is not the only unique category of registration that the Review Board has provided guidance for. In *Five-Petal Flower*, the Board refused registration for a “14-second video recording in which human silhouettes appear against a blue screen.”¹³⁷ The Board, in laying out the law regarding subject matter copyright, the Board utilized both the Compendium, and prior case law. Primarily, the Board used *Horgan v. Macmillan, Inc.*,¹³⁸ which held that “individual [dance] steps [] may be utilized as the choreography’s basic material in much the same way that words are the writer’s basic material.”¹³⁹

After finding that the individual movements collectively resulted in a *de minimus* choreography routine, The Board then had to determine “whether the combination of the static portrayals and performative movements result in copyrightable choreography.”¹⁴⁰ The Board found that while combinations of multiple movements may satisfy the requirement for copyrightable authorship if they are arranged in a creative matter, the collection and arrangement here are insufficient to enable copyright registration.

In *Five Petal Flower*, the Board heavily relied on the application of the Compendium to make its determination. Regarding copyrightability of choreography, the Board indicated that because “[i]ndividual dance steps and short dance routines are the building blocks of choreographic expression, and allowing copyright protection for these elements would impede rather than foster creative expression.”¹⁴¹ This quotation, while found in the Compendium, cites *Horgan*. *Five Petal Flower* demonstrates how the Copyright Office is able to take guidance from

¹³⁰ *Dubai Frame*, *supra* note 126, at 5 (citing COMPENDIUM (THIRD), *supra* note 5, § 906.1); *see also* *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F.2d 541, 545 (2d Cir. 1959).

¹³¹ 266 F.2d at 545 (2d Cir. 1959).

¹³² *Id.*

¹³³ *Id.* at 544 (citing U.S. COPYRIGHT OFFICE, COPYRIGHT OFFICE PUBLICATION, NO. 46 (1958)).

¹³⁴ *Kitchens of Sara Lee*, 266 F.2d at 544.

¹³⁵ *Id.*

¹³⁶ *Dubai Frame*, *supra* note 126 (citing COMPENDIUM (THIRD), *supra* note 5, § 906.1); *see also* *Kitchens of Sara Lee*, 266 F.2d at 545.

¹³⁷ Letter from U.S. Copyright Office Review Board to Puo-I “Bonnie” Lee (July 14, 2016).

¹³⁸ 789 F.2d 157, 161 (2d Cir. 1986).

¹³⁹ *Id.* at 161.

¹⁴⁰ Letter from U.S. Copyright Office Review Board to Puo-I “Bonnie” Lee 4 (July 14, 2016).

¹⁴¹ COMPENDIUM (THIRD), *supra* note 5, § 805.5(A) (citing *Horgan*, 789 F.2d at 161).

the court and expand on it, for the benefit of not only those applying for copyright protection, but for courts as well.

D. LOGOS

Works categorized as “logos” are commonly evaluated by the Board to determine if they meet the requisite level of creativity and originality. One-fifth of the Review Board letters concern logos or labels. Decisions regarding logos are often extremely fact-specific. Two decisions are particularly relevant: *American Airlines* and *Blade Piercing Skin*.



In *American Airlines*, the Review Board refused to grant the American Airlines flight symbol copyright protection because the Work did not “contain the requisite separable authorship necessary to sustain a claim to copyright.”¹⁴² The Board noted that the Work is made of basic geometric shapes, uses “exceedingly common” coloring, and “to the extent the Work evokes an airplane wing or bird design, that does not propel the design into the range of copyrightability.”

American Airlines argued that “courts have protected works consisting of unprotectable elements that result in creative abstractions or representations.” While the Board agreed with this notion, it nevertheless refused to grant registration because the Work “does not rise to the admittedly low level of creativity required by the Copyright Act.” The Board primarily relied on *Atari Games* in making this decision, noting that the court “accept[ed] the Register’s assertion that the individual graphic elements of each screen . . . are not copyrightable.”¹⁴³

This decision highlights the interplay between the courts and the Copyright Office. In *Atari Games*, the court relied on the Register’s determination that individual graphic elements on each screen of a video game were not copyrightable subject matter.¹⁴⁴ The Review Board, in turn, has relied on this decision to refuse registration for a number of logos, including *Blade Piercing Skin*.

In *Blade Piercing Skin*, the Board refused to register a logo consisting of three design elements:

¹⁴² Letter from U.S. Copyright Office Review Board to Andrew J. Avsec 4 (Jan. 8, 2018).

¹⁴³ *Atari Games Corp. v. Oman*, 979 F.2d 242, 244 (D.C. Cir. 1992).

¹⁴⁴ *Id.*



The Board found that none of the elements, alone, were sufficiently creative to merit copyright protection. The Board relied heavily on the Compendium, which notes that typeface, or mere variations thereof, is not subject to copyright protection.¹⁴⁵ More notably, the Board found that “the combination of the “C” and “T” elements together” is a “common design feature in logos, found in the Chicago Cubs, Comedy Central, CNN, and Federal Communications Commission logos, among others” and was thus not eligible for copyright protection. The Board highlights many cases where these logos were not found to merit copyright protection, including *Coach, Inc. v. Peters*.¹⁴⁶

The Board relies heavily on *Coach, Inc.* in letters regarding logos. *Coach, Inc.* was the result of an administrative appeal to the decision of the Board. The court upheld the Copyright Office’s decision, finding that the Register’s decision regarding the copyrightability of a Work is entitled to “a significant degree of deference”¹⁴⁷ Further, the court noted that there was not any authority that would allow the court, under APA review, to order defendant to register the Works at issue.¹⁴⁸ Regardless, the court found that the Office did not act arbitrarily and capriciously in refusing to register the Work at issue.

JUDICIAL REVIEW OF COPYRIGHT REVIEW BOARD DECISIONS

The Copyright Act dictates that the actions of the Register of Copyrights are subject to review under the Administrative Procedure Act.¹⁴⁹ Under the APA, “the court shall review the whole record or those parts of it cited by a party” to determine if the agency acted in an arbitrary and capricious manner.¹⁵⁰ There are three major court opinions that review the actions of the Copyright Review Board: *People Pleaser*, *Joe Unleaded*, and *Cod Liver*. While *Joe Unleaded* and *Cod Liver* are important in their own right, *People Pleaser* is much more relevant in determining how the Office determines something is sufficiently creative for copyright protection.

¹⁴⁵ COMPENDIUM (THIRD), *supra* note 5, § 913.1 (“Copyright Office cannot register a claim to copyright in typeface or mere variations of typographic ornamentation or lettering, regardless of whether the typeface is commonly used or truly unique.”).

¹⁴⁶ 386 F. Supp. 2d 495 (S.D.N.Y. 2005).

¹⁴⁷ *Homer Laughlin China Co. v. Oman*, No. 90-3160, 1991 U.S. Dist. LEXIS 10680, at *3 (D.D.C. July 30, 1991).

¹⁴⁸ *Coach, Inc.*, 386 F. Supp. 2d at 497 (citing *Atari Games Corp. v. Oman*, 979 F.2d 242, 247 (D.C. Cir. 1992)).

¹⁴⁹ 17 U.S.C.A. § 701(e) (Westlaw through Pub. L. No. 115-223) (“ . . . [A]ll actions taken by the Register of Copyrights under this title are subject to the provisions of the Administrative Procedure Act.”).

¹⁵⁰ 5 U.S.C.A. § 706 (Westlaw through Pub. L. No. 115-223).



In *Ashton v. United States Copyright Office*, plaintiff submitted an application to the U.S. Copyright Office to register a hand-painted coffee mug titled “People Pleaser” as both a two-dimensional visual artwork and as a literary work.¹⁵¹ The Office registered Plaintiff’s copyright in the visual artwork on the mug, but found that the work “lacked the creativity necessary for copyright as a literary work.” The Office refused to register the work as a literary work three separate times. The Plaintiff then sued the Copyright Office under the Administrative Procedure Act. Both parties filed Motions for Summary Judgment.

Plaintiff argued that the Work constituted a literary work consisting of three phrases: “People Pleaser in Recovery”; “Refill”; and the raised middle finger as a pictogram. Plaintiff argued that the three phrases combined reach the “requisite minimum degree of creativity to merit copyright protection.”¹⁵² Plaintiff also argued that *Feist v. Rural Telephone Inc.* does not supply the relevant standard for “creativity,” because that case “pertains to whether a compilation of data possesses sufficient creativity to merit copyright protection,” whereas his work is a poem.¹⁵³

The Copyright Office argued that its refusal was “wholly appropriate, justified by existing law and practices.”¹⁵⁴ The Office argued that short phrases categorically lack the minimum level of creativity that the Constitution requires of works subject to copyright. Further, the Office stated that “[s]ince at least 1899, it has been the practice of the Copyright Office to

¹⁵¹ *Ashton v. United States Copyright Office*, 310 F. Supp. 3d 149 (D.D.C. Mar. 8, 2018).

¹⁵² *Id.* at 154.

¹⁵³ *Id.* at 159.

¹⁵⁴ Brief for United States Copyright Office at 6, *Ashton v. U.S. Copyright Office*, 310 F. Supp. 3d 149 (D.D.C. Mar. 8, 2018).

deny registration to ‘words and phrases’ because they lack the *de minimis* creative expression required to be protected by copyright.”¹⁵⁵

The court denied plaintiff’s motion for summary judgment and granted Office’s cross-motion for summary judgment, finding no “clear error of judgment” in the Office’s decision that combined elements of plaintiff’s Work are not sufficiently creative to receive copyright protection.¹⁵⁶ The court pointed out that “[w]ithout question, the creativity standard articulated in *Feist* is applicable here” and noted that “[t]hrough the bar is low, not every work that exhibits some degree of creativity is copyrightable.”¹⁵⁷

CONCLUSION

The best reading of the text of the Copyright Act requires the Copyright Office to decide a copyright registration application before the applicant can file an infringement action. And that is as it should be. The Copyright Office can help courts evaluate the copyrightability of works more effectively and provide context for their decisions on copyrightability. In addition, the Copyright Office brings long experience with the evaluation of the copyrightability of works of authorship to the table.

While Copyright Review Board letter rulings are non-precedential and do not bind courts, they give courts access to the Copyright Office’s expertise in evaluating the eligibility of works of authorship for copyright protection. In particular, they provide useful examples of how the Copyright Office reviews the “originality” of works of authorship for the purpose of copyright protection, including a valuable gloss on the “creativity” requirement adopted by the Supreme Court in *Feist v. Rural*.

If the courts disagree with the Copyright Office’s interpretation of the requirements for copyright protection, they can correct it. But courts can also learn from the expertise of the Copyright Office. The Supreme Court should interpret the registration requirement of the Copyright Act to require Copyright Office action before copyright owners can file an infringement action.

¹⁵⁵ *Id.*

¹⁵⁶ *Ashton*, 310 F. Supp. 3d at 160.

¹⁵⁷ *Id.* at 159.

APPENDIX

Title	Year	Categories	Brief Reasoning	Outcome
Hasten Sangar AB Fabric Pattern	2018	Commons shapes/symbols/designs, Originality, Textiles, Two-Dimensional artwork	Simple combinations of basic geometric shapes and mere variations of coloration. Work is different than examples given in Compendium because this is an “obvious buffalo check or plaid arrangement.” Symbolic meaning or impression a work conveys is irrelevant. Mere simplistic arrangement of non-protectable elements is inappropriate.	Refusal Affirmed
The UEFA EURO Trophy	2018	Common shapes/symbols/designs; Two-dimensional artwork; Labels and logos; Originality	The overall shape has familiar features in Greek pottery. Contributions modifying this standard shape are de minimus. Office does not compare works that have been previously registered. <i>Titlecraft, Inc. v. Nat’l Football League</i> .	Refusal Affirmed
Periscope Logo with Circle	2018	Common shapes/symbols/designs; Two-dimensional artwork; Labels and logos; Originality	Does not contain requisite authorship because there are standard geometric shapes and colors that do not individually qualify for copyright protection. Specific design choices do not matter. Similar works registered do not matter. Combination is not enough because the logo is a mere variation of a standard map pointer vector.	Refusal Affirmed

Title	Year	Categories	Brief Reasoning	Outcome
Frigidaire Stylized Logo	2018	Common shapes/symbols/designs; Two-dimensional artwork; Labels and logos; Originality; Text; Typography; Words and short phrases	Work is mere variation of typographic ornamentation, lettering, or coloring. No argument that there is creative authorship in the work as a whole.	Refusal Affirmed
Hansel	2018	Common shapes/symbols/designs; Two-dimensional artwork; Labels and logos; Originality	The work does not contain the requisite authorship. Elements of the work are variations of geometric shapes. Simple arrangement of unprotectable elements is not registrable.	Refusal Affirmed
Meatball (Energy Burst)	2018	Common shapes/symbols/designs; Two-dimensional artwork; Labels and logos; Originality	Lacks requisite creativity because the work consists of minor variations on geometric shapes arranged in a predictable manner. Combined work not sufficient because the zig-zag pattern is common.	Refusal Affirmed

Title	Year	Categories	Brief Reasoning	Outcome
Vodafone Speechmark	2018	Common shapes/symbols/designs; Two-dimensional artwork; Labels and logos; Originality	Work is a useful article; no requisite authorship. Fails a creativity test because there are familiar symbols and designs and common geometric shapes. The work is a quotation mark.	Refusal Affirmed
The UEFA Champions League Starball Device	2018	Common shapes/symbols/designs; Two-dimensional artwork; Labels and logos; Originality	Basic geometric shapes, de minimus overall design, "individual elements are merely placed to conform to the circumference of a circle," no color variations, symbolic meaning is irrelevant	Refusal Affirmed
LARABAR Packaging Design	2018	Common shapes/symbols/designs; Two-dimensional artwork; Layout and format; Originality	Combination of words, simple shapes, basic color schemes; Number of choices an author makes in combining simple shapes, fonts, and colors must be "sufficiently high" and that threshold isn't met here. Various shapes not arranged in a random pattern-- this consists of horizontal text within and under a red banner; It is novel and unique, but those aren't the correct standards.	Refusal Affirmed
Log Cabin	2018	Three-dimensional artwork, Common shapes/symbols/designs, Originality	No "original and creative artistic or graphic authorship"; authorship is "de minimus"; standard design elements	Refusal Affirmed

Title	Year	Categories	Brief Reasoning	Outcome
Novem Car Interiors	2018	Three-dimensional artwork, Common shapes/symbols/designs, Originality	No "original and creative artistic or graphic authorship"; standard design elements; simple combination of familiar elements	Refusal Affirmed
Chatsworth 2-Tier Solar Fountain	2018	Common shapes/symbols/designs; Originality; Three-dimensional artwork	Not sufficiently creative; the arrangement of uncopyrightable elements; simple geometric designs arranged in an obvious manner; authorship is "de minimus"	Refusal Affirmed
Bulletproof shot glass with bullet	2018	Common shapes/symbols/designs; Idea/expression dichotomy; Originality; three dimensional artwork	Useful article; de minimus amount of creative expression; not sufficiently creative; use of uncopyrightable elements; minor authorial discretion; creative authorship "de minimus"	Refusal Affirmed
Floor Liner	2018	Originality, Three-dimensional artwork, Useful Article	Raised, decorative pattern of various shapes, separable and non-useful; sufficient creative expression	Refusal Reversed
JAIPUR LINK Necklace	2018	Common shapes/symbols/designs, Jewelry design, Originality	Not sufficiently creative; trivial amount of authorship; "de minimus" authorship	Refusal Affirmed
Pendant Lamp – 76	2018	Originality, Three-dimensional artwork, Useful article	Meets standard set forth in <i>Star Athletica</i> ; separable elements contain sufficient creative expression	Refusal Reversed
LIV Logo	2018	Originality, Two-dimensional artwork, Labels and Logos, Text, Typography, Words and short phrases	Doesn't meet creative authorship; doesn't rise to level of creativity; trivial variations; typeface; de minimus; common arrangement	Refusal Affirmed

Title	Year	Categories	Brief Reasoning	Outcome
ZX2 Yampa/Light Beam & Updraft Ecotread X2/Yellow Beams	2018	Originality, Two-dimensional artwork, Textiles, Derivative works, Common shapes/symbols/designs	Satisfies requirement of creative authorship, but combination of elements is derivative. Yampa is registered, Updraft is not.	Refusal Affirmed
WONKY KEY	2018	Common shapes/symbols/designs, Originality, Two-dimensional artwork	Lacks sufficient creativity; minor variation on common shapes; trivial variation on a basic design; selection as de minimus creative choice	Refusal Affirmed
UAC Triangle Design	2018	Common shapes/symbols/designs, Labels and logos, Originality, Two-dimensional artwork, Typography	Does not contain requisite authorship; combination of common geometric shapes; combination of shapes doesn't demonstrate enough creativity	Refusal Affirmed
American Airlines Flight Symbol	2018	Common shapes/symbols/designs, Labels and logos, Originality, Two-dimensional artwork	Work as not separable; basic geometric shapes; "exceedingly common" colors	Refusal Affirmed
UnCruise Whale Tail Logo	2017	Common shapes/symbols/designs, Labels and logos, Originality, Two-dimensional work	Exceedingly simplistic; familiar shape or design; animal pshysiology are considered "standard, stock, or common"; "far too simplistic"	Refusal Affirmed
Misc CA Statutes	2017	Derivative work, Idea/expression dichotomy, Originality, Text, Words and short phrases	Works are derivative of 2015 Ratings Plan; fail to demonstrate sufficient creativity; merger doctrine; changes as "De minimus"; preexisting arrangement	Refusal Affirmed
Dubai Frame	2017	Common shapes/symbols/designs, Originality, Architectural Works	Common geometric shape; lacks sufficient originality	Refusal Affirmed

Title	Year	Categories	Brief Reasoning	Outcome
HQ Artwork (unpublished) and HQ Artwork (published)	2017	Originality, Two-dimensional artwork, Derivative work, Typography	Derivative authorship as trivial; authorship as not creative; preexisting design elements not utilized in a creative manner	Refusal Affirmed
STORY Logo	2017	Originality, Two-dimensional artwork, Labels and logos, Text, Typography, Words and short phrases	Fails to satisfy requirement of creative authorship; Simplistic arrangement of non-protectable elements does not demonstrate the level of creativity necessary to warrant protection; CO do not make aesthetic judgments in evaluating copyrightability (Bleistein); trivial variation on building block of human expression	Refusal Affirmed
Wanderer	2017	Originality, Two-dimensional artwork, Useful article, Derivative work	Overall presence and placement of preexisting design elements is sufficiently creative. Thin copyright protection granted.	Refusal Reversed
Turbo Keychain	2017	Common shapes/symbols/designs, Originality, Three-dimensional artwork	"does not explain how the Work is more than an uncopyrightable, slavish copy of the necessary compressor-section components of actual turbocharger"; incorporates only the minimum basic elements necessary to replicate a miniature turbocharger; no creative authorship; no elements beyond predictable incorporation of stock features; combination as "mechanical or routine" (Feist)	Refusal Affirmed

Title	Year	Categories	Brief Reasoning	Outcome
Joe Unleaded, Joe Tall Dark and Handsome, and Wake Up Joe	2017	Text, Two-dimensional artwork, Originality, Labels and logos	Largely procedural in nature.	Refusal Reversed In Part
Gold Wood & Staggered Carbon	2017	Common shapes/symbols/designs, Originality, Textiles	Staggered Carbon: different textures of bands and arrangement exhibits copyrightable authorship. Specific combination of textures protected, not woven patterns or carbon fiber appearances generally. gold wood: lacks sufficient creativity; consists of minor variations on common shapes arranged in an obvious manner; very few elements; "de minimus" level of creativity	Refusal Reversed In Part
Stackable Multi-Color Lamp Game	2017	Three-dimensional artwork, Originality, Common shapes/symbols/designs, Derivative work	Work incorporates significant portions of preexisting and widely published, copyrighted work (Tetris). yikes. No independent authorship. De minimus minor design differences between borders used in Work and preexisting Tetris pieces.	Refusal Affirmed
UR5	2017	Useful article, Three-dimensional artwork, Originality	Geometric shapes; standard designs and shapes; not original enough to constitute protectable expression	Refusal Affirmed

Title	Year	Categories	Brief Reasoning	Outcome
Blade Piercing Skin	2017	Common shapes/symbols/designs, Labels and logos, Originality, Two-dimensional artwork	None of the Work's elements are subject to copyright protection; inconsequential differences (sharp edges or tapering and rounded edges); familiar symbols = de minimus amount of expression; not sufficiently creative overall: nestling the letter C is a common design feature in logos	Refusal Affirmed
Dieudonne Enterprises	2017	Labels and logos, Originality, Text, Two-dimensional artwork, Typography, Words and short phrases	Work doesn't rise to level of creativity; de minimus quantum of creativity; mostly text or typography; registration decisions not binding on any other applications	Refusal Affirmed
Rub Dirt	2017	Common shapes/symbols/designs, Originality, Text, Two-dimensional artwork, Typography, Words and short phrases	Traditional sports idiom/short phrase; familiar elements; Work falls below threshold of creativity	Refusal Affirmed
Move Bracelet	2017	Common shapes/symbols/designs, Originality, Jewelry design, Three-dimensional artwork	Numerous unprotectable elements doesn't necessarily result in copyrightable design; Simple shape in jewelry design; contributions as de minimus and don't demonstrate requisite creativity	Refusal Affirmed
Tricorn	2017	Three-dimensional artwork, Originality, Human authorship, Common shapes/symbols/designs	Work combines multiple geometric shapes into a design that illustrates creative choice in the positioning of the shapes in the overall work. Thin copyright protection granted.	Refusal Reversed

Title	Year	Categories	Brief Reasoning	Outcome
Trilliane Strand	2017	Three-dimensional artwork, Useful article, Originality	Work meets separability test; 3D design of numerous crystals of various shapes and sizes in an original arrangement is an artistic feature; combination of different sized octagons and pendalques in crystal crown and stand (as a whole) contains sufficient creative expression	Refusal Reversed
Amaca	2017	Three-dimensional artwork, Useful article, Originality	Separable; 3D design of metal mesh interspersed with crystals is artistic feature; intricate crystal and mesh design is sufficiently creative	Refusal Reversed
A LITTLE BIT BAD, Blog Content, Brady Joke February 3, 2015	2017	Originality, Text, Words and short phrases	Thin copyright granted; organization of elements of the joke is protectable	Refusal Reversed
Itsa Packaging Design	2017	Two-dimensional artwork, Originality, Common shapes/symbols/designs, Labels and logos, Layout and format	Thin copyright granted; Work consists of multiple design elements that put together are considered original and creative	Refusal Reversed
SmartSign S-2257 No Trespassing	2017	Two-dimensional artwork, Originality, Common shapes/symbols/designs, Words and short phrases, Compilation, Labels and logos, Typography	Not sufficiently creative; standard font, spacing, colors for signs (not product of creative choice); combination of elements not creative (choices dictated by industry guidelines and practice);	Refusal Affirmed

Title	Year	Categories	Brief Reasoning	Outcome
SIX-MODE SIMULATOR and EIGHT-MODE SIMULATOR	2017	Two-dimensional artwork, Originality, Common shapes/symbols/designs, Words and short phrases	"Sufficient, although minimal, amount of original and creative two-dimensional artwork authorship." Thin copyright protection granted, large number of elements.	Refusal Reversed
TBPF16 1(3d)	2017	Three-dimensional artwork, Originality, Jewelry design, Common shapes/symbols/designs	Uncommon shapes and designs.	Refusal Reversed
Pizza Slice Pool Float	2017	Two-dimensional artwork, Originality, Common shapes/symbols/designs, Useful article	Elements are "merely common and familiar" uncopyrightable shapes; unprotectable elements combined in an entirely standard and commonplace representation of a slice of pizza. Each claim to copyright is examined on its own merits; <i>de minimus</i> and trivial.	Refusal Affirmed
LA Rocks	2017	Three-dimensional artwork, Jewelry design, Originality, Common shapes/symbols/designs	Fails to satisfy creative authorship; arrangement of unprotectable elements not sufficiently creative; simple relation of shapes; basic configuration; standard in industry	Refusal Affirmed
Ideal Cushion Design	2017	Three-dimensional artwork, Jewelry design, Originality, Idea/expression dichotomy, Common shapes/symbols/designs	Lacks modicum of creativity; results of particular faceting technique; certain jewelry designs only have <i>de minimus</i> creativity; "creative spark is utterly lacking or trivial"	Refusal Affirmed

Title	Year	Categories	Brief Reasoning	Outcome
1994 a-code 53 syntax.txt Pseudo-code et al	2017	Computer program, Text, Originality, Rule of Doubt	Sufficiently original as textual work-- works properly registered as text; NOT enough for computer program because it doesn't fit within the definition of computer program	Refusal Reversed
Aviator Tom Cat Chair et al	2017	Three-dimensional artwork, Useful article, Originality, Common shapes/symbols/designs	Works are useful articles; basic geometric shapes; "not unusual" designs	Refusal Affirmed
Cod Liver Packaging Artwork	2017	Two-dimensional artwork, Originality, Labels and logos, Common shapes/symbols/designs, Compilations, Words and short phrases	Combination of elements not sufficiently original; typical of commercial labels;	Refusal Affirmed
Converse Flow Depths	2017	Two-dimensional artwork, Idea/expression dichotomy, Originality	Lacked originality because "it contains only material predetermined by functional considerations"; do not satisfy "de minimus" quantum of creativity; mathematical principles not entitled to copyright protection; de minimus authorship; brief descriptive labels and graphs do not rise above de minimus creativity	Refusal Affirmed
Dentalfone Mobile App-Design 1	2017	Compilation, Text, Originality, Layout and format	Sufficient (although minimal) amount of authorship; compilations-- arrangement of its specific content is enough. Graphic compilation.	Refusal Reversed

Title	Year	Categories	Brief Reasoning	Outcome
Derivative for Distribution	2017	Text, Originality	Original text and combination of standard legal language, taken as a whole, meets the low creativity threshold articulated in <i>Feist</i> . Only thin copyright protection granted.	Refusal Reversed
Experia Sock Design	2017	Two-dimensional artwork, Useful article, Originality, Common shapes/symbols/designs	Individual elements are all minor variations of common and familiar uncopyrightable shapes; common patterns not protected; arrangement are combined in a standard and commonplace manner, dictated by the shape of the sock and foot.	Refusal Affirmed
Intel Spiral	2017	Musical work, Sound recording, Originality, Rule of doubt	Musical work not copyrightable because it has few elements (one note and an arpeggio); no spark of creativity; Sound recording eligible because its more than the mere combination of two uncopyrightable common property elements	Refusal Reversed In Part
Kinon Pattern Number 014	2017	Two-dimensional artwork, Originality	Design is too familiar and ordinary to qualify for copyright protection; no two panels are ever the same-- wants to register the process. Go get a patent?	Refusal Affirmed

Title	Year	Categories	Brief Reasoning	Outcome
Louisiana Art Deco Table	2017	Three-dimensional artwork, Useful article, Originality, Common shapes/symbols/designs	Useful article; table legs not physically separable from the table itself-- the legs cannot be imagined separately and independently from the useful article; even if they could, the legs are comprised of two common geometric shapes (de minimus combination of two copyrighthable elements)	Refusal Affirmed
Michigan Appeals Reports (Volume 307)	2017	Text, Originality	"minimal degree of creativity" was found. Combination of "editorial enhancements" meets Feist requirement.	Refusal Reversed
Money Mailer Envelope	2017	Text, Two-dimensional artwork, Originality, Words and short phrases, Typography, Common shapes/symbols/designs	Insufficient claim in text-- all words and short phrases such as names, titles, and slogans; Graphic elements are not individually subject to copyright protection; combination of elements are not the product of creative choices, but are typical of envelopes or advertising generally. Other design elements lack sufficient creativity	Refusal Affirmed
Monster Eyes	2017	Common shapes/symbols/designs, Originality, Three-dimensional artwork, Two-dimensional artwork	A few solid-colored geometric shapes; combination insufficient because the five components are simplistically arranged (mirror image)	Refusal Affirmed

Title	Year	Categories	Brief Reasoning	Outcome
Nexus	2017	Jewelry design, Originality, Common shapes/symbols/designs	Simple, minor variations on common shapes or symbols consisting of a few geometric shapes arranged in an obvious manner; very few elements that are minor variations on common shapes; copyright office evaluates the final work, not the possible choices and considerations	Refusal Affirmed
Nikon Brand Logo	2017	Two-dimensional artwork, Originality, Common shapes/symbols/designs, Labels and logos, Typography, Words and short phrases	Work's constituent elements are not individually subject to protection (words, typeface, basic shapes, symbols, or coloring); combination doesn't reach level of creativity necessary for protection; typical design of a logo; intangible attributes can't be examined in an objective manner	Refusal Affirmed
Oval Sculpture - Large et al	2017	Three-dimensional artwork, Originality, Common shapes/symbols/designs	A concentric arrangement of single shapes is entirely predictable; choice of colors not sufficiently creative; tiering effect is not original; creative authorship too trivial to merit protection	Refusal Affirmed
Plain Thorn Bracelet with Logo et al	2017	Jewelry design, Originality, Common shapes/symbols/designs	Commonplace design; simple addition of a certain setting doesn't change anything	Refusal Affirmed
Range et al	2017	Two-dimensional artwork, Originality, Common shapes/symbols/designs, Other	So many issues, mostly insufficient deposits, may be a derivative work, unclear who the author is	Refusal Affirmed

Title	Year	Categories	Brief Reasoning	Outcome
Small Geometrica Fountain et al	2017	Three-dimensional artwork, Originality, Common shapes/symbols/designs	Common geometric shapes; arrangement exhibits de minimus authorship; aesthetic or emotional effects on the viewer are not factors in determining copyrightability	Refusal Affirmed
Star Brilliant Cut 57 Facet Diamond	2017	Jewelry design, Originality, Common shapes/symbols/designs, Idea/expression dichotomy	Gem cutting is generally not copyrightable; protection doesn't extend to procedure, process, or method; labor doesn't equal copyright protection; entirely composed of common geometric shapes; level of creative authorship is de minimus and trivial	Refusal Affirmed
Sunset LumenScript et al	2017	Computer program, Compilation, Originality, Human authorship	Authorship not sufficient; doesn't meet definition of computer software; uncopyrightable collection of facts; no sufficient original expression to be a compilation	Refusal Affirmed
Ten Table Thorn Link ID Bracelet	2017	Jewelry design, Originality, Common shapes/symbols/designs	Authorship not sufficient; selection is insufficient because the arrangement is at most de minimus originality	Refusal Affirmed
Visa Flag Symbol Work et al	2017	Two-dimensional artwork, Originality, Words and short phrases, Typography, Labels and logos	Registerable as literary works, not two dimensional artworks; artwork is composed of graphics that are included to function as an illustration of what the works' text describes	Refusal Affirmed

Title	Year	Categories	Brief Reasoning	Outcome
3-Dimensional Pattern 6 - Gradient Smooth et al	2016	Three-dimensional artwork, Originality, Common shapes/symbols/designs, Useful article, Textile	Works are minor variations on a basic stitching pattern in the public domain; copies of things in public domain cannot be copyrighted; pattern here is monochromatic and demonstrates one of the most basic knitting stitches	Refusal Affirmed
2013 Basketball Ring Chassis	2016	Jewelry design, Originality, Typography, Common shapes/symbols/designs	Lack of requisite creative authorship; bezeling and recessing merely accent the common rectangular and square shapes; H and T cutouts are mere variations of uncopyrightable letters or words; level of creative authorship de minimus at best	Refusal Affirmed
2015 EHIM Essentials List	2016	Text, Compilation, Originality, Derivative work	Lack of requisite separable authorship; selection, coordination, and arrangement of basic elements (categories of medications and names of medications) is insufficient to render the Work original; unprotectable facts [Satava]	Refusal Affirmed
adidas 3-Bars logo	2016	Two-dimensional artwork, Originality, Common shapes/symbols/designs, Labels and logos	Combination of elements not sufficiently original; compendium third 905; common geometric shape; basic combination of ordinary, public domain shapes	Refusal Affirmed

Title	Year	Categories	Brief Reasoning	Outcome
American Flag Bat Display	2016	Two-dimensional artwork, Three dimensional artwork, Originality, Derivative works, Common shapes/symbols/designs	simplistic arrangement of non-protectable elements; elements not protectable, arrangement is not sufficient to render it original; "pseud-rectangular shape is dictated by a symbol firmly in the public commons-- the American flag"; slight variation on a familiar symbol in 3D form; de minimus creativity	Refusal Affirmed
Apple Icon iAD	2016	Two-dimensional artwork, Originality, Common shapes/symbols/designs, Labels and logos	Elements not individually subject to copyright protection; Coach; common shape for app icons; simple combination of a few familiar symbols or designs with minor linear or spatial variations	Refusal Affirmed
Arms of Love LAR08-08C3-1 et al	2016	Jewelry design, Originality, Common shapes/symbols/designs, Compilation	Individual elements not subject to copyright; mere variations on familiar symbols; arranged in predictable and simplistic manner; symbolic meaning irrelevant to copyrightability; "a work may exhibit a 'fresh take' on a design, but still fall short of the originality requirement"	Refusal Affirmed
Aviator Sculpture et al	2016	Three-dimensional artwork, Useful article, Originality, Common shapes/symbols/designs	No separable design features; creative authorship de minimus at best, too trivial to enable copyright registration	Refusal Affirmed

Title	Year	Categories	Brief Reasoning	Outcome
Aviator Valkyrie Desk et al	2016	Three-dimensional artwork, Useful article, Originality, Common shapes/symbols/designs	No separable design features; creative authorship de minimus at best, too trivial to enable copyright registration	Refusal Affirmed
B291 Dresser et al	2016	Three-dimensional artwork, Useful article, Originality, Common shapes/symbols/designs	Little evidence of inventive combination; minimal amount of basic, geometric molding in a predictable linear fashion	Refusal Affirmed
BBM Icon	2016	Two-dimensional artwork, Originality, Common shapes/symbols/designs, Labels and logos	Constituent elements not subject to copyright protection; Combination not sufficient; graphic logo design consists only of "spatial placement or format"/ "uncopyrightable use of color, frames or borders; lacks requisite amount of creativity	Refusal Affirmed
Bowtie Pattern	2016	Two-dimensional artwork, Originality, Common shapes/symbols/designs	Bowtie element as common geometric shapes; basic combination does not possess sufficient originality; spaced in a predictable manner	Refusal Affirmed
Bug Eyes	2016	Three-dimensional artwork, Originality, Human authorship, Compilation	Not individually subject to copyright protection; selection is not sufficient; naturally occurring features; level of creative authorship as de minimus and too trivial to merit copyright protection	Refusal Affirmed

Title	Year	Categories	Brief Reasoning	Outcome
Café de Coral	2016	Two-dimensional artwork, Originality, Typography, Common shapes/symbols/designs, Words and short phrases	Elements not individually subject to copyright protection; creative aspects of character not separable from utilitarian nature of the character; not sufficient for compilation-- combining uncopyrightable elements didn't result in work with sufficient creativity; attributing anthropomorphic characteristics to designs doesn't make it qualify	Refusal Affirmed
Camarena	2016	Two-dimensional artwork, Useful article, Originality, Layout and format, Labels and logos	Bottle doesn't contain conceptually separable pictorial and graphic features (embossing, rising sun motif, stylized agave plants); not copyrightable as compilation; de minimus creative authorship	Refusal Affirmed
Canetti Cursivus Guide for Cursive Writing and Calligraphy	2016	Two-dimensional artwork, Idea/expression dichotomy, Originality, Typography	Blank forms not subject to copyright protection; not expressive; arrangement not original	Refusal Affirmed
Contenta Sculpture	2016	Three-dimensional artwork, Useful article, Originality, Common shapes/symbols/designs	Useful article that lacks separable creative authorship	Refusal Affirmed
Derrick Logo et al	2016	Two-dimensional artwork, Originality, Common shapes/symbols/designs, Labels and logos, Typography	None of the works individually subject to copyright protection; simple combination of wording; uncopyrightable coloring, words dictated by industry standards, contact information, short phrases	Refusal Affirmed

Title	Year	Categories	Brief Reasoning	Outcome
<u>Design Cube</u>	2016	Three-dimensional artwork, Useful article, Originality, Common shapes/symbols/designs	Combination of common or standard design elements contains sufficient creativity because of the way they are arranged; design elements/arrangement of more than thirty varying shapes goes beyond preordained or obvious arrangement	Refusal Reversed
<u>Desk Accessory</u>	2016	Three-dimensional artwork, Useful article, Originality, Common shapes/symbols/designs	Useful article with separability, but features don't exhibit creative authorship; work as larger version of familiar and standard pencil; "the Work is a slavish representation of a standard pencil"; comprised of standard circles and hexagonal shapes, staced in simplistic linear manner	Refusal Affirmed
<u>Double R Fleur</u>	2016	Two-dimensional artwork, Originality, Common shapes/symbols/designs, Typography	constituent elements not individually subject to copyright protection; selection and arrangement of letters and negative space is not sufficient to render Work original; intangible attributes cannot be examined in an objective manner	Refusal Affirmed

Title	Year	Categories	Brief Reasoning	Outcome
Eva Fehren X Ring et al	2016	Jewelry design, Originality, Compilation	constituent elements not individually subject to copyright protection; selection, arrangement not sufficient to render Work original; mere variations of standard X or cross design and placement are typical of jewelry but lack requisite creativity; de minimus and triivial creativity	Refusal Affirmed
Fiore Sculpture	2016	Three-dimensional artwork, Useful article, Originality, Common shapes/symbols/designs	Useful article; no separable authorship to sustain a claim in copyright; individual elements of design are not copyrightable (sunflower design, color banding, cross hatching)	Refusal Affirmed
Five-Petal Flower	2016	Choreography, Originality	Individual movements collectively result in a 14 second routine that is de minimus; simple gestures and movements; collection and arrangement are insufficient; execution of dancer is only one factor;	Refusal Affirmed
Fuck Snow Globe	2016	Three-dimensional artwork, Originality, Words and short phrases, Common shapes/symbols/designs	Individual elements not subject to protection; combination not sufficient because there are relatively few elements; simple combination of a few basic elements not protectable	Refusal Affirmed

Title	Year	Categories	Brief Reasoning	Outcome
Globe Design – Black and White et al	2016	Two-dimensional artwork, Originality, Common shapes/symbols/designs	constituent elements are standard geometric shapes and color variations that do not individually qualify for protection; arrangement not sufficient because there are only a few design elements with minor linear or spatial variations; complexity of design not enough; granting copyright in globe design would give copyright to idea of globe	Refusal Affirmed
Grace Bracelet	2016	Jewelry design, Originality, Common shapes/symbols/designs	No individual element of the Work is copyrightable; coordination and arrangement is not sufficient to render the work original; combined in standard and commonplace manner	Refusal Affirmed
Grandma Waverly Bracelet	2016	Jewelry design, Originality, Common shapes/symbols/designs, Rule of doubt	Doesn't contain requisite creativity; relatively few elements that are all common and familiar shapes; arranged in common and obvious manner; actual work that must be evaluated, not the variety of choices available to the author	Refusal Affirmed
Green & White Discs	2016	Text, Compilation, Originality, Words and short phrases	legal text lacks sufficient originality; not the result of independent creation (U.S. Government sources); heading and security text not subject to copyright protection; compilation not sufficient because it is obvious and has minor creativity;	Refusal Affirmed

Title	Year	Categories	Brief Reasoning	Outcome
HUF 12 GALAXY LOGO	2016	Two-dimensional artwork, Originality, Common shapes/symbols/designs, Labels and logos	Individual elements not subject to copyright protection; combination not protectable because it is obvious that the creative spark is lacking; arrangement neither unique nor distinctive; work is a "simple arrangement"; it is not the variety of choices available to the author that must be evaluated, but the actual work	Refusal Affirmed
Incipio name et al	2016	Two-dimensional artwork, Originality, Common shapes/symbols/designs, Typography	Constituent elements not subject to copyright; none of the Works possesses sufficient creativity in the selection, combination, and arrangement; these basic combinations of a single word or obvious variation of a familiar square shape isn't enough;	Refusal Affirmed
Intermezzo	2016	Three-dimensional artwork, Useful article, Originality, Idea/expression dichotomy, Common shapes/symbols/designs	Work is useful article and doesn't contain requisite separable authorship; doesn't have more than de minimus quantum of creativity; relatively predictable combination of two uncopyrightable elements; can't consider appeal based on the concept, process, or effort	Refusal Affirmed
Ion IQ Headset Sculpture	2016	Three-dimensional artwork, Useful article, Originality, Common shapes/symbols/designs	Work is a useful article that contains requisite separable original authorship; headphones with microphone-- no separability; elements insufficient	Refusal Affirmed

Title	Year	Categories	Brief Reasoning	Outcome
JJ 1 Logo et al	2016	Two-dimensional artwork, Originality, Labels and logos, Typography	Elements not individually subject to copyright protection; combination not sufficient-- basic variation in typographic expression; level of authorship as de minimus and trivial; cannot be described as "highly stylized"	Refusal Affirmed
Joe Unleaded et al	2016	Two-dimensional artwork, Originality, Typography, Labels and logos, Text	Not helpful	Refusal Affirmed
Kiesel Treated Finger Boards for String Instruments	2016	Three-dimensional artwork, Useful article, Originality, Common shapes/symbols/designs	Useful articles that do not contain separable authorship; mere addition of relatively few colors to a preexisting design not subject to copyright; level of creative authorship as de minimus	Refusal Affirmed
Large KONG Sculpture	2016	Three-dimensional artwork, Originality, Common shapes/symbols/designs	Work does not contain requisite separability; single shape not sufficiently creative to warrant copyright protection; fails to meet creativity threshold; simple arrangement of three spherical shapes, stacked atop each other from largest to smallest	Refusal Affirmed
Mice Mischief - Math Facts in Action	2016	Text, Originality	Work exhibits copyrightable authorship-- work satisfies creativity requirement	Refusal Reversed

Title	Year	Categories	Brief Reasoning	Outcome
Naga Gold & Silver (Season XX)	2016	Jewelry design, Originality, Common shapes/symbols/designs, Words and short phrases, Labels and logos	Fails to satisfy the requirement of creative authorship; individual scales are not protectable; too familiar and ordinary to qualify for copyright protection; common accessory and jewelry design, natural design; initials and name are uncopyrightable; design elements result from unprotectable, functional considerations; combination not copyrightable because elements are "repeated in a standard geometric arrangement or a commonplace design"	Refusal Affirmed
Nationwide Framework Logo	2016	Two-dimensional artwork, Originality, Typography, Common shapes/symbols/designs, Labels and logos	individual elements not subject to copyright protection; combination not protectable because the Work is little more than a white square set within a blue rectangle over the word "Nationwide"; intangible attributes are not evident from deposit and cannot be examined in an objective manner;	Refusal Affirmed

Title	Year	Categories	Brief Reasoning	Outcome
Octagon with ADT Monogram	2016	Two-dimensional artwork, Originality, Common shapes/symbols/designs, Typography, Labels and logos	Constituent elements not subject to copyright; selection, coordination, and arrangement consist of little more than a blue octagon with a white boarder and a rectangle consisting of letters ADT printed at its center. Common geometric shapes must be sufficiently creative; variations in coloring alone are not eligible for copyright protection;	Refusal Affirmed
Ornamental Thermostat Cover with Ten Images et al	2016	Two-dimensional artwork, Compilation, Originality, Useful article, Common shapes/symbols/designs	Digital Image Works: commonplace to a multitude of industries, including the heating and electrical industry; Cover Works: plain casing and four to ten images-- elements already registered or are not protectable because they are additional mere familiar designs such as simple arrows; combination doesn't warrant protection because they are dictated by the function of the thermostat	Refusal Affirmed
Pattern for Paper and Textile Products	2016	Two-dimensional artwork, Originality, Common shapes/symbols/designs	Thin copyright protection granted to the specific pattern; does not extend to any variations	Refusal Reversed
People Pleaser	2016	Two-dimensional artwork, Text, Originality, Common shapes/symbols/designs, Words and short phrases	Short phrases categorically lack minimum level of creativity; de minimus creative expression	Refusal Affirmed

Title	Year	Categories	Brief Reasoning	Outcome
Promise Bracelet	2016	Jewelry design, Originality, Common shapes/symbols/designs, Rule of doubt	Common and familiar forms that are in the public domain; obvious arrangement; not enough creativity to merit copyright protection; stylistic choices and design alternatives have no bearing on the board's analysis	Refusal Affirmed
Q Family	2016	Three-dimensional artwork, Useful article, Originality	Appearance not separable from utilitarian function of crash test dummy.	Refusal Affirmed
Ribbon Sculpture Design B	2016	Three-dimensional artwork, Useful article, Originality	Useful article that does not contain the requisite separable authorship necessary	Refusal Affirmed
Ring No. 43245 et al	2016	Jewelry design, Originality, Common shapes/symbols/designs	Unprotectable elements; designs are "mere variations on a common or standardized design or familiar symbol"	Refusal Affirmed
Rosen Tagescreme 30 ml FS	2016	Two-dimensional artwork, Originality, Common shapes/symbols/designs, Words and short phrases, Labels and logos, Layout and format	Many of the works' elements not eligible for protection; combination is not sufficient because they are typical of product labels.	Refusal Affirmed
Skeleton - Stegosaurus Stenops	2016	Three-dimensional artwork, Originality, Human authorship	Work is created by, or intended to duplicate, nature	Refusal Affirmed

Title	Year	Categories	Brief Reasoning	Outcome
Sparkle 1 TransactionSent et al	2016	Sound recording, Originality	Simplistic arrangement of non-protectable elements; only a few musical notes standing alone are not enough; no aesthetic judgements; unique or distinctive shape or style for purposes of aesthetic appeal doesn't mean the work constitutes a copyrightable work of art	Refusal Affirmed
Spinner Hat et al	2016	Two-dimensional artwork, Originality, Common shapes/symbols/designs, Words and short phrases, Typography	Constituent elements not subject to copyright protection; selection, coordination, or arrangement not sufficient; typical propeller beanie set in a blue background with words "spinner hat" below the design	Refusal Affirmed
SPLAT Design	2016	Two-dimensional artwork, Originality, Common shapes/symbols/designs	Constituent elements not subject to copyright protection; Selection, coordination, arrangement are insufficient to render work original. Basic geometric shapes not protectable.	Refusal Affirmed
Starburst Volcano Pattern on Knife Handles et al	2016	Two-dimensional artwork, Useful article, Originality, Common shapes/symbols/designs	Work is conceptually separable but doesn't meet de minimus quantum of creativity; mere placement of shapes in an arc configuration, however, is a common design approach and does not render the design sufficiently creative	Refusal Affirmed

Title	Year	Categories	Brief Reasoning	Outcome
Sysmex Logo	2016	Two-dimensional artwork, Originality, Common shapes/symbols/designs,	Selection, coordination, and arrangement of "two misshapen ovals and rectangles, separated but curved lines" is not sufficient; trademark argument; not sufficiently original for copyright	Refusal Affirmed
Transitional Contour Corbel et al	2016	Three-dimensional artwork, Useful article, Originality, Common shapes/symbols/designs	Conceptually separable, but the individual elements are not subject to copyright protection. Combination of conceptually separable individual elements is NOT sufficient because the placement of shapes is based on structural support elements + is obvious and predictable.	Refusal Affirmed
Volcano Pattern on Knife Handles et al	2016	Two-dimensional artwork, Useful article, Originality, Common shapes/symbols/designs	Works do not contain requisite separable authorship; does not meet low de minimus threshold of creativity	Refusal Affirmed
VV Design	2016	Two-dimensional artwork, Originality, Typography, Common shapes/symbols/designs	Constituent elements not subject to copyright protection; combination not original because the design consists of little more than two overlapping Vs that are colored to depict a three-dimensional typeface	Refusal Affirmed
WE ARE FREEKIN AWESOME	2016	Two-dimensional artwork, Originality, Words and short phrases, Typography	Selection, arrangement, coordination does not reflect sufficient choice and authorial discretion that is not so obvious or minor that the "Creative spark is utterly lacking or so trivial as to be nonexistent."	Refusal Affirmed

Title	Year	Categories	Brief Reasoning	Outcome
What Is In Your Soul - Round Locket et al	2016	Jewelry design, Originality, Common shapes/symbols/designs, Compilation	No individual element of the work is copyrightable; selection and arrangement do not display minimal level of creativity-- selection is de minimus (few number of elements); potential cancellation of other registration	Refusal Affirmed
Zig Zag Chandelier	2016	Three-dimensional artwork, Useful article, Originality, Common shapes/symbols/designs	Useful article that does not contain requisite separability to sustain a claim in copyright; this would maybe be different after Star Athletica	Refusal Affirmed