



United States Copyright Office

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October 26, 2016

Thomas Kenney
Pierce & Mandell, P.C.
11 Beacon Street
Boston, MA 02108

Re: Second Request for Reconsideration for Refusal to Register Green & White Discs; Correspondence ID: 1-1700F0X

Dear Mr. Kenney:

The Review Board of the United States Copyright Office ("Board") has considered At Ease Computing, Inc.'s ("At Ease's") second request for reconsideration of the Registration Program's refusal to register a text and compilation claim in the work titled "Green & White Discs" ("Work"). After reviewing the application, deposit copy, and relevant correspondence, along with the arguments in the second request for reconsideration, the Board affirms the Registration Program's denial of registration.

Additionally, At Ease referenced seven works, similar to the Work, which the Copyright Office has previously registered. For reasons discussed below, the Board questions the validity of those registrations and will be referring them to the Copyright Office's Registration Program for potential cancellation.

I. DESCRIPTION OF THE WORK

The Work consists of two O-shaped labels, one green and one white, meant to be affixed to optical discs.

The green label contains the words "Department of Homeland Security Sensitive Security Information U.S. Government Property" at the top. It then includes blank spaces for "Date" and "Originator" on the left side of the label and "Disc ____ of ____" on the right side of the label. The following appears at the bottom of the label in white text:

WARNING: This record contains Sensitive Security Information that is controlled under 49 CFR Parts 15 and 1520. No part of this record may be disclosed to persons without a 'need to know,' as defined in 49 CFR Parts 15 and 1520, except with the written permission of the Administrator of the Transportation Security Administration or the Security of Transportation. Unauthorized release may result in civil penalty or other action. For U.S.

government agencies, public disclosure is governed by 5 U.S.C. 552 and 49 CFR Parts 15 and 1520.

The white label contains the words "This medium is FOR OFFICIAL USE ONLY Department of Homeland Security U.S. Government Property" at the top. The following appears below the heading in black text:

The attached materials contain department of homeland security information that is 'FOR OFFICIAL USE ONLY,' or other types of sensitive but unclassified information requiring protection against unauthorized disclosure. The attached materials will be handled and safeguarded in accordance with DHS management directives governing protection and dissemination of such information."

The label then includes blank spaces for "Date" and "Originator" on the left side of the label and "Disc ____ of ____" on the right side of the label. The following text appears at the bottom of the label:

At a minimum, the attached materials will be disseminated only on a 'NEED TO KNOW' basis and when unattended, will be stored in a locked container or area offering sufficient protection against theft, compromise, inadvertent access and unauthorized disclosure.

Reproductions of the Work are included as Appendix A.

II. ADMINISTRATIVE RECORD

On October 3, 2014, At Ease filed an application to register a copyright claim in the Work. In a November 6, 2014 letter, a Copyright Office registration specialist refused to register the claim, finding that it "lacks the authorship necessary to support a copyright claim." Letter from Shawn Thompson, Registration Specialist, to Thomas Kenney, Pierce & Mandell, P.C. (Nov. 8, 2014).

In a letter dated February 5, 2015, At Ease requested that the Office reconsider its initial refusal to register the Work. Letter from Thomas Kenney, Pierce & Mandell, P.C. to U.S. Copyright Office (Feb. 5, 2015) ("First Request"). After reviewing the Work in light of the points raised in the First Request, the Office re-evaluated the claims and again concluded that the Work "does not contain a sufficient amount of original and creative authorship to support a copyright registration." Letter from Stephanie Mason, Attorney-Advisor, to Thomas Kenney, Pierce & Mandell, P.C. (Aug. 14, 2015).

In a letter dated November 13, 2015, At Ease requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Work. Letter from Thomas Kenney, Pierce & Mandell, P.C., to U.S. Copyright Office (Nov. 13, 2015) ("Second Request"). In that letter, At Ease argued that "the selection and arrangement of the

text on the media constituted sufficient original authorship to warrant copyright registration.” *Id.* at 2. At Ease also noted in its first request that the compilation of terms in the text of the label was “substantial” and the arrangement of the terms was “unique to the author.” First Request at 2.

III. DISCUSSION

A. *The Legal Framework – Originality*

A work may be registered if it qualifies as an “original work[] of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102(a). In this context, the term “original” consists of two components: independent creation and sufficient creativity. *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). First, the work must have been independently created by the author, *i.e.*, not copied from another work. *Id.* Second, the work must possess sufficient creativity. *Id.* Only a modicum of creativity is necessary, but the Supreme Court has ruled that some works (such as the alphabetized telephone directory at issue in *Feist*) fail to meet even this low threshold. *Id.* The Court observed that “[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity.” *Id.* at 363. It further found that there can be no copyright in a work in which “the creative spark is utterly lacking or so trivial as to be virtually nonexistent.” *Id.* at 359.

The Office’s regulations implement the longstanding requirement of originality set forth in the Copyright Act and described in the *Feist* decision. *See, e.g.*, 37 C.F.R. § 202.1(a) (prohibiting registration of “[w]ords and short phrases such as names, titles, slogans; familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering, or coloring”); *id.* § 202.10(a) (stating “to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form”). Some combinations of common or standard design elements may contain sufficient creativity with respect to how they are juxtaposed or arranged to support a copyright. Nevertheless, not every combination or arrangement will be sufficient to meet this test. *See Feist*, 499 U.S. at 358 (finding the Copyright Act “implies that some ‘ways’ [of selecting, coordinating, or arranging uncopyrightable material] will trigger copyright, but that others will not”). A determination of copyrightability in the combination of standard design elements depends on whether the selection, coordination, or arrangement is done in such a way as to result in copyrightable authorship. *Id.*; *see also Atari Games Corp. v. Oman*, 888 F.2d 878 (D.C. Cir. 1989).

A mere simplistic arrangement of non-protectable elements does not demonstrate the level of creativity necessary to warrant protection. For example, the United States District Court for the Southern District of New York upheld the Copyright Office’s refusal to register simple designs consisting of two linked letter “C” shapes “facing each other in a mirrored relationship” and two unlinked letter “C” shapes “in a mirrored relationship and positioned perpendicular to the linked elements.” *Coach Inc. v. Peters*, 386 F. Supp. 2d 495,

496 (S.D.N.Y. 2005). Likewise, the Ninth Circuit has held that a glass sculpture of a jellyfish consisting of clear glass, an oblong shroud, bright colors, vertical orientation, and the stereotypical jellyfish form did not merit copyright protection. *See Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003). The language in *Satava* is particularly instructive:

It is true, of course, that a combination of unprotectable elements may qualify for copyright protection. But it is not true that *any* combination of unprotectable elements automatically qualifies for copyright protection. Our case law suggests, and we hold today, that a combination of unprotectable elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.

Id. (internal citations omitted).

B. Analysis of the Work

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

First, the Board finds that the legal text in the Work, along with the Work's other constituent elements, lacks sufficient originality. Specifically, the legal text on both discs is not the result of independent creation, having been copied verbatim from U.S. government sources. The legal text on the green disc consists exclusively of the "distribution limitation statement" text required by the Transportation Security Administration (TSA). Protection of Sensitive Security Information, 49 C.F.R. § 1520.13. The legal text on the white disc is a verbatim reproduction of the sample "For Official Use Only" cover sheet published by the Department of Homeland Security. DEP'T. OF HOMELAND SEC., MD 11042.1, SAFEGUARDING SENSITIVE BUT UNCLASSIFIED (FOR OFFICIAL USE ONLY) INFORMATION 13 (2005), https://www.dhs.gov/xlibrary/assets/foia/mgmt_directive_110421_safeguarding_sensitive_but_unclassified_information.pdf.

Additionally, the Board finds that the Work's main heading, headings with spaces for recording information, and basic security text are not individually subject to copyright protection. *See* 37 C.F.R. § 202.1(a) (prohibiting registration of "words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, [and] lettering or coloring"); *see also* COMPENDIUM (THIRD) § 313.4(G) (noting that the Office will not register the words, short phrases, or other *de minimis* text that appears in the headings for a blank form").

Next, the Board finds that, viewed as a whole, the compilation of the elements that comprise the Work are not sufficient to render the Work original. Although the individual elements in the work are not copyrightable on their own, works comprised of public domain

elements may be copyrightable if the selection, arrangement, or modification of those elements reflects 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.” *Feist*, 499 U.S. at 359; COMPENDIUM (THIRD) § 312.2. Here, however, the Work consists of very few elements—a heading, three blank spaces with headings, and non-original legal text. The Board finds that the Work’s combination of elements is an extremely simple configuration which lacks the requisite amount of creativity to warrant copyright protection. *See Feist*, 499 U.S. at 359. The selection of terms and the basic linear arrangement on the discs is a very basic and common arrangement for terms on a label. *See* COMPENDIUM (THIRD) § 913.1 (mere special placement or format of label elements is not copyrightable).

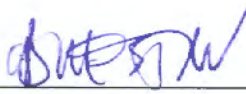
At Ease’s argument that it is unaware of any other parties utilizing substantially similar terms in a substantially similar arrangement does not militate in favor of registration, not least because, as noted above, the TSA mandates that parties use the Work’s exact legal text. Second Request, at 1. A work’s uniqueness does not necessarily argue for its originality; a work may be one-of-a-kind and yet fail to contain a sufficient amount of creative expression. *See Feist*, 449 U.S. at 362; COMPENDIUM (THIRD) § 310.1.

Finally, At Ease points out that the Office has registered similar works by At Ease, namely Confidential Blue (TX 6-007-624), Classified SCI Yellow (TX 6-007-625), Top Secret Orange (TX 6-007-626), Secret Red (TX 6-007-627), Unclassified Green (TX 6-007-628), Rainbow Discs (TX 7-431-027), and Rainbow Drives (TX 7-431-003) (“Prior Registrations”). Upon review of these Prior Registrations, and in light of the principles of copyrightability discussed above, the Board questions the validity of the Prior Registrations and thus is referring them to the Copyright Office’s Registration Program for potential cancellation pursuant to 37 C.F.R. §201.7. The Registration Program will be in contact regarding the results of that referral.

IV. CONCLUSION

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

BY:



Chris Weston
Copyright Office Review Board

Appendix A

