



**United States Copyright Office**

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**Re: Second Request for Reconsideration for Refusal to Register AEIOU Keyboard, AEIOU Keyboard Design, and AEIOU Technical Drawing; SR Nos. 1-2550824381, 1-2550833421, and 1-2556651811; Correspondence IDs: 1-1ALP899 and 1-1AJWEA9**

Dear Mr. McAllister:

The Review Board of the United States Copyright Office (“Board”) has considered Paul Streitz’s second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the work titled “AEIOU Keyboard” and two technical drawing claims in the works titled “AEIOU Keyboard Design” and “AEIOU Technical Drawing” (collectively, the “Works”). After reviewing the applications, deposit copies, and relevant correspondence, along with the arguments in the second requests for reconsideration, the Board affirms the Registration Program’s denial of registration for all three Works.

**I. DESCRIPTION OF THE WORKS**

The three Works are two-dimensional works that use colored letters arranged in a pattern as would be seen on a typing keyboard.

*First*, the AEIOU Keyboard consists of colored capital wooden letters arranged in three rows on a white background. The design includes four colors that visually separate the letters. The letters are arranged, in reading order from left to right and then top to bottom, as: AEBFGLMRVW IOCHNPSXY UDJKQTZ. The AEIOU Keyboard is depicted as follows:



*Second*, the AEIOU Keyboard Design is an on-screen keyboard with three rows of keys that appear in four different colors, with a fifth color bordering the top and bottom of each letter key and as the color for the background of the “enter” and “delete” keys. The letters on the keyboard are lower case and are arranged, in reading order from left to right and top to bottom, as: aebfglmrvw iochnpsxy udjkqtz. The AEIOU Keyboard Design is depicted as follows:



*Finally*, the AEIOU Technical Drawing is a depiction of a black physical keyboard with standard layout (akin to a QWERTY<sup>1</sup> keyboard) for all non-letter elements in white, and with the letters arranged, in reading order from left to right and top to bottom, as: AEBFGLMRVW IOCHNPSXY UDKQTZ. The AEIOU Technical Drawing is depicted as follows:

<sup>1</sup> QWERTY refers to the standard layout on typewriters using the Latin alphabet, and derives its name from the first five letters on the top row of letters on a typical keyboard.



## II. ADMINISTRATIVE RECORD

On July 13, 2015, Mr. Streitz filed three applications to register copyright claims in the three Works. In an October 23, 2015, letter, a Copyright Office registration specialist refused to register the claims for the AEIOU Keyboard and AEIOU Keyboard Design, finding that both lack “the authorship necessary to support copyright claims.” Letter from Beth Garner, Registration Specialist, to Paul Streitz (October 23, 2015). In an October 25, 2015 letter, a Copyright Office registration specialist refused to register the claim for the AEIOU Technical Drawing, also finding a lack of “the authorship necessary to support a copyright claim.” Letter from Adrienne Brown, Registration Specialist, to Paul Streitz (October 25, 2015).

In December 2015, Mr. Streitz requested that the Office reconsider its initial refusal to register all of the Works. Letter from Paul Streitz to U.S. Copyright Office (December 28, 2015) (“First Request”). After reviewing the Works in light of the points raised in the First Request, the Office re-evaluated the claims in the Works and again concluded that they did not “contain a sufficient amount of original and creative authorship to support a copyright registration,” and because “copyright protection does not extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery.” Letter from Stephanie Mason, Attorney-Advisor, to Paul Streitz (April 25, 2016).

Mr. Streitz subsequently requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the works. Letter from Paul Streitz to U.S. Copyright Office (July 18, 2016) (“Second Request”). Mr. Streitz explained why he chose the layout, letter order, and colors for each of the three works, and included detailed step-by-step instructions outlining the process he took in making those choices. Specifically, he asserted “[t]he AEIOU Keyboard is the product of a very deliberate process to create a keyboard of a complex, non-simplistic design that is made explicit by the colors of the letter groups.” *Id.* at 2. Moreover, he claimed “the AEIOU Keyboard is eligible for copyright protection because those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship and the design rises far above where the arrangement itself is simplistic.” *Id.* (internal quotes omitted).

Mr. Streitz also stated that he chose the specific layout to develop a keyboard that would help children learn the alphabet and how to type more easily than they currently learn:

Eventually, the teaching of the alphabet to school children will not be from a linear recitation of A B C D, but by viewing and learning the AEIOU Keyboard. Thus, the learning of the alphabet and the learning of the keyboard will be approached simultaneously making the transition to keyboard typing that much easier. The AEIOU Keyboard will eventually displace the QWERTY Keyboard first in devices such as GPS keyboards, point of sale purchase keyboards, or on machines where the user must input the letters using one-finger. The next step will be electronic-touch keyboards where a user can switch from AEIOU to QWERTY. Eventually, QWERTY will disappear in several generations.

*Id.*, Ex. 1.<sup>2</sup>

### III. DISCUSSION

#### A. The Legal Framework

##### 1) *Originality*

The Copyright Office will register a work 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

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<sup>2</sup> In addition to the administrative history discussed above, on June 21, 2017, the Office received correspondence from Mr. Streitz’s counsel, noting that they had been retained in this matter, requesting a suspension of the Second Request proceedings, and inquiring about the possibility of further briefing. On July 11, 2017, counsel followed-up with “supplemental arguments for second reconsideration request.” The Office declined to consider the supplemental arguments, noting that the regulations require a showing of good cause to suspend or waive time requirements, and that the “Copyright Office does not consider a change in representation nearly a year after the filing of a request for a Second Reconsideration to be good cause for which a suspension or extension of time is warranted.” Even if the Board had considered the supplementary briefing, however, it would not have altered the Board’s decision; none of the arguments in that supplemental filing differ materially from Mr. Streitz’s contentions, which did not persuade the Board to reverse the decision to refuse registration of the Works.

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).

Copyright Office registration specialists (and the Board) do not make aesthetic judgments in evaluating the copyrightability of particular works. *See* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 310.2 (3d ed. 2017) (“COMPENDIUM (THIRD)”). The attractiveness of a design, the espoused intentions of the author, the design’s visual effect or its symbolism, the time and effort it took to create, or the design’s commercial success in the marketplace are not factors in determining whether a design is copyrightable. *See, e.g., Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

## 2) *Systems, Methods of Operation, and Merger*

Section 102(b) of the Copyright Act provides that the copyright in a work does not “extend to any idea, procedure, process, system, method of operation, concept, principle or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” 17 U.S.C. § 102(b). This section codifies the longstanding principle, first originated by the Supreme Court in *Baker v. Selden*, that while copyright law protects the original expression of ideas it does not extend to protect the underlying ideas themselves. 101 U.S. 99, 102, 104 (1879) (holding that a copyright in a book describing a bookkeeping system with blank forms protected only how the rightsholder “explained and described a peculiar system of book-keeping” and did not grant the right to prevent others from using the system described in this book or “the exclusive right to make, sell, and use account-books prepared upon the plan set forth in such book.”).

A closely related principle, also stemming from *Baker*, is the merger doctrine. When there is only one way, or only a limited number of ways, to convey the idea that the author seeks to express, the author’s expression cannot be protected under copyright law because that would result in a monopoly over the idea itself and prevent others from using that same idea in other works. *See* MELVILLE & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.18[C][2] (2014). On the other hand, the fact that one author has copyrighted one expression of an idea will not prevent other authors from creating and copyrighting their own expressions of the same idea. *See* 1 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 2.3.2 (2015). Thus, the Office’s regulations expressly preclude registration of “methods [or] systems . . . as distinguished from the particular manner in which they are expressed or described in a writing.” 37 C.F.R. § 202.1(c); *see also* COMPENDIUM (THIRD) § 313.4(G). To ensure that merger should not prevent registration, the Office examines works to determine whether they contain “an appreciable amount of written or artistic expression” that can be separated from the work’s underlying idea. *Id.* at 313.4 (G).

### **B. Analysis of the Works**

After careful examination, the Board finds that all three Works are not copyrightable for several separate and independent reasons. First, all three Works lack the creativity necessary for copyright protection. Second, as the applicant has conceded, the design of all three Works is

dictated by an underlying method or system—what the applicant believes is the optimal method of teaching children how to type. Finally, the AEIOU Keyboard Design and AEIOU Technical Drawing also are useful articles that embody a method or system without any protectable separable elements.

*First*, none of the Works meet the low threshold of creativity embodied in the Copyright Act. They all are composed only of a letter arrangement (using all of the letters of the alphabet exactly once), with the letters in one of four colors. The Works' colors—yellow, green, red (or orange with regard to the AEIOU Keyboard Design), and blue—are standard colors used when introducing colors to young children, for whom the Works were designed. Merely by way of example, the colors included in a Crayola® four-pack of crayons includes the same four colors as the AEIOU Technical Drawing and AEIOU Keyboard, and classic Lego Duplo blocks for children consisted predominantly of these same four colors up until the late 1990s. *See* <http://shop.crayola.com/crayons-markers-colored-pencils/crayons/bulk-classpacks/4-ct-crayons--24-boxes-per-case-pack-5200040010.html>; Duplo, BRICKSET YOUR LEGO® SET GUIDE, <https://brickset.com/sets/theme-Duplo>. Moreover, the letters in each of the Works are arranged in even rows exactly matching the number of letters per row as a standard QWERTY keyboard layout.

As explained in the Compendium, “combining expected or familiar pairs or sets of colors is not copyrightable” and “letters of the alphabet” are uncopyrightable elements. COMPENDIUM (THIRD) §§ 906.3, 907.2. The Compendium also notes that, “[a]s a general rule, typeface, typefont, lettering, calligraphy, and typographic ornamentation are not registrable.” COMPENDIUM (THIRD) § 906.4. While the combination of uncopyrightable elements can in many instances result in a copyrightable work, such a work must be “as a whole ... sufficiently creative and original.” *Id.* at § 906. Here, the combination of uncopyrightable elements simply are not “numerous enough and their selection and arrangement original enough.” to warrant protection overall. *Satava v. Lowry*, 323 F.3d at 811. Each of the letters of the alphabet are used one time, the rows match the number of rows and number of items in each row of a standard QWERTY keyboard, and the addition of colors does not push the Works over the creativity threshold.

*Second*, even apart from the lack of creative authorship, the design choices in the Works are dictated entirely by an underlying system or method and thus are not subject to copyright protection under the merger doctrine. Specifically, according to the applicant, the designs were selected to facilitate use of a new method for typing and learning the alphabet and, “[e]ventually, the teaching of the alphabet to school children will not be from a linear recitation of A-B-C-D, but by viewing and learning the AEIOU keyboard.” Second Request, Ex. 1. Thus, as the applicant effectively concedes, the sole and explicit purpose of the coloration and placement of the letters is to teach children how to better use keyboards. *Id.* at 3-4. If the Office granted

copyright protection for the selection and arrangement here, it would effectively be granting a monopoly for a specific method of teaching the alphabet and typing, which is the precise result the merger doctrine is intended to prevent.<sup>3</sup>

#### IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the copyright claims in the Works. This decision constitutes final agency action in this matter pursuant to 37 C.F.R. § 205.5(g).

BY:   
Catherine Zaller Rowland  
Copyright Office Review Board

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<sup>3</sup> Because the Board finds that the Works are unoriginal, it is unnecessary to engage in a useful article analysis here. The Board notes, however, that there are significant concerns that the AEIOU Technical Drawing and AEIOU Keyboard may be useful articles without separable copyrightable authorship. *See Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1007 (2017) (quoting 17 U.S.C. § 101) (noting that copyright protection is limited to the “‘pictorial, graphic, or sculptural features’ [that] ‘can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.’”).