



United States Copyright Office

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January 3, 2019

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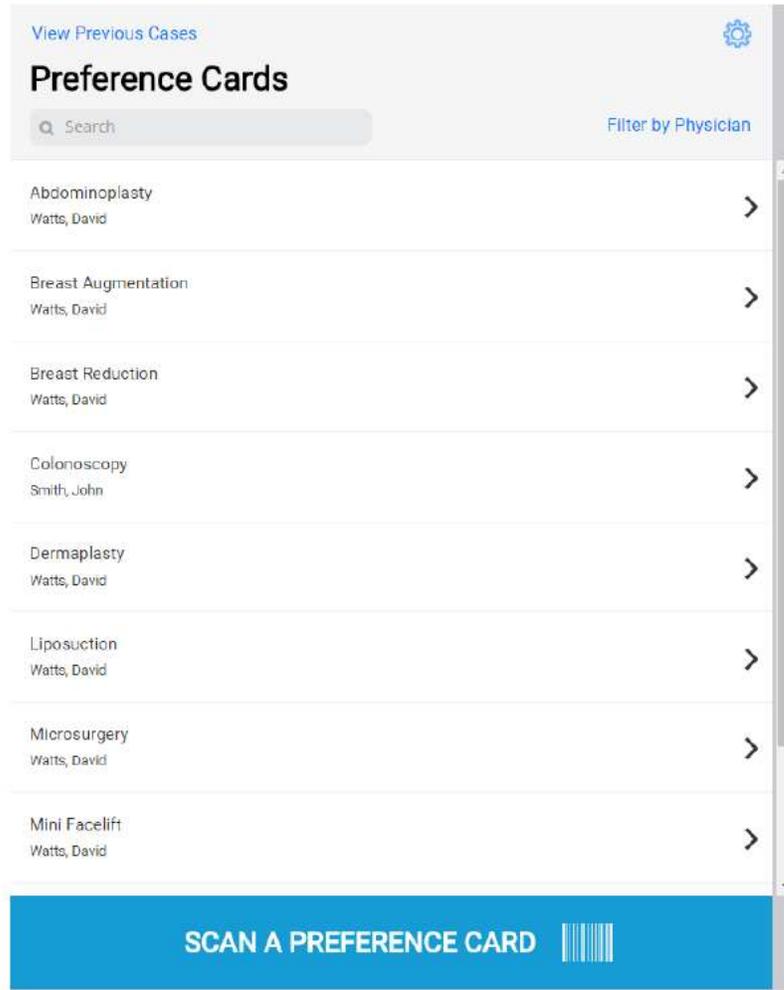
Re: Second Request for Reconsideration for Refusal to Register Preference Cards; Correspondence ID: 1-3GOLRY3; SR # 1-6638829681

Dear Mr. Bliss:

The Review Board of the United States Copyright Office (“Board”) has considered American Association for Accreditation of Ambulatory Surgery Facilities’ (“Applicant’s”) second request for reconsideration of the Registration Program’s refusal to register a text claim in the work titled “Preference Cards” (“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.

I. DESCRIPTION OF THE WORK

The deposit for the Work is a seventeen-page PDF file of screenshots taken from a software application regarding medical professionals’ preferences and case information. The application allows users to filter information by physician and procedure, including information on a physician’s preferred medical instruments and supplies. The first page of the deposit shows a list of medical procedures (*i.e.*, abdominoplasty, breast augmentation, breast reduction, colonoscopy) in alphabetical order along with names of medical professionals and arrows indicating more information on subsequent screens. For reference, the first page is as follows:



The remaining pages show more aspects of the software application, including: the ability to see specific information on physician preferences, such as specific tools and supplies (*e.g.*, specific brands, types, and numbers of pads and closures); the ability to add surgery items, anesthesia records, and cases; the ability to include preference card notes; the ability to duplicate procedures and apply similar information to multiple medical professionals; and information on past cases. Despite this detail, it appears that Applicant is seeking registration of the form depicted in the deposit and not the specific notes and information. Applicant is also not seeking to register a computer program.

II. ADMINISTRATIVE RECORD

On June 1, 2018, Applicant applied to register a copyright claim in the Work. In a letter dated August 16, 2018, a Copyright Office registration specialist refused to register the claim,

finding that the Work “does not contain a sufficient amount of authorship on which to base a claim.” Letter from K. Buscaglia, Registration Specialist, to Daniel H. Bliss, Howard & Howard Attorneys PLLC (Aug. 16, 2018).

In November 2018, Applicant requested that the Office reconsider its initial refusal to register the Work. Letter from Daniel H. Bliss to U.S. Copyright Office (Nov. 16, 2018) (“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 mechanical, obvious, and routine compilation visible in this work lacks the creativity necessary to support a registration.” Letter from Stephanie Mason, Attorney-Advisor, to Daniel Bliss, at 3 (March 25, 2019). The Office also noted that general claims of layout or format are not registrable. *Id.*

In a letter dated June 20, 2019, Applicant 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 Daniel H. Bliss to U.S. Copyright Office (June 20, 2019) (“Second Request”). Applicant argued that “the particular arrangement of the wording and designs . . . [specifically] the symbols, procedures and arrangement of words, rows, and columns shows a minimal degree of creativity” and that “the copyright claimant is *not* claiming any utilitarian aspects or function and the work is not an idea or process.” *Id.* at 3.

III. DISCUSSION

A. *The Legal Framework – Originality*

A work may be registered if it qualifies as an “original work[] of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102(a). In this context, the term “original” consists of two components: independent creation and sufficient creativity. *See Feist 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 authorship necessary to sustain a claim to copyright.

The constituent elements—words, short phrases, times, dates, and names such as “abdominoplasty,” and “scan a preference card”—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”); *see also* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.4(G) (3D ED. 2014) (“COMPENDIUM (THIRD)” (noting that the Office

will not register “words, short phrases, or other *de minimis* text that appears in the headings for a blank form”).

Applicant asserts that the Work contains more than “merely words and short phrases” and that, viewed as a whole, the “particular arrangement of the wording and designs on the preference cards show some minimal degree of creativity.” Second Request at 2-3. Of course, uncopyrightable elements may be protectable if selected and combined “in a distinctive manner indicating some ingenuity.” *Atari Games Corp.*, 888 F.2d at 883. Here, however, the combination of the Work’s features, when viewed as a whole, constitutes only *de minimis* creativity.

The Work is an alphabetical listing of medical procedures, with subcategories of medical devices for each procedure, also listed in alphabetical order. The Board finds this selection and arrangement to be mechanical and simply not creative. An alphabetical listing of medical procedures and medical devices does not display sufficient creativity. *See Feist*, 499 U.S. at 363 (noting that “there is nothing remotely creative about arranging names alphabetically in a white pages directory. It is an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course”); *see also Key Publ’ns, Inc. v. Chinatown Today Publ’g Enters., Inc.*, 945 F.2d 509, 513 (1991) (noting that original “[a]rrangement ‘refers to the ordering or grouping of data into lists or categories that go beyond the mere mechanical grouping of data as such, for example, the alphabetical, chronological, or sequential listings of data.’”) (quoting Copyright Office, *Guidelines for Registration of Fact-Based Compilations* 1 (Rev. Oct. 11, 1989)).

Second, the list of procedures appears to be an exhaustive list of a particular physician’s procedures, and the list of medical devices and supplies displayed is also exhaustive, listing each device and supply required for specific medical procedures. *See* COMPENDIUM (THIRD) § 312.2; *see also Matthew Bender & Co, Inc. v. West Pub. Co.*, 158 F.3d 674, 682 (2d Cir. 1998) (“The creative spark is missing where industry conventions or other external factors so dictate selection that any person composing a compilation of the type at issue would necessarily select the same categories of information”). Moreover, the selection and listing of medical devices is not dictated by Applicant’s creative choices, but by the requirements of each medical procedure. This inevitable selection and arrangement does not display more than *de minimis* creativity. *See* COMPENDIUM (THIRD) § 312.2 (noting that “a selection, coordination, and/or arrangement of data that is practically inevitable, such as a standard organizational chart” is not protected). Indeed, the arrangement of the elements—a list of information on one side of the screen with arrows placed on the other side of the screen indicating more information on subsequent screens—is a common and obvious way to convey to a user how and where to find more information. An alphabetical list is the simplest way to present the information, and to a user, the arrow logically leads to the following screen for each item in the list.

Applicant also argues that “arrangement and format of the cards shows a minimal degree of creativity.” First Request at 2. The Copyright Office does not register general claims of format and layout because they are templates of expression and do not constitute the expression itself. *See id.* § 313.3(E) (noting that the general layout or format of a form is not copyrightable). Similarly, blank forms that are designed for recording information and do not in themselves convey information are not copyrightable. *See* 37 C.F.R. § 202.1(c); *see also Utopia Provider Sys. Inc. v. Pro-Med Clinical Sys., LLC*, 596 F.3d 1313, 1322 (11th Cir. 2010) (finding that templates for emergency room physicians to capture encounters with patients were uncopyrightable “blank forms”). Importantly, Applicant states that “preference cards are used for collecting medical information” and can be edited by users to fill in information (for example, the note that Dr. Watts prefers to operate while grooving to classic funk). Second Request at 2-3.

Finally, the blank form portion of the Work is a user-determined, unfixed system with fill-in spaces designed for recording information. The Office will not register the empty fields or lined spaces. *See* COMPENDIUM (THIRD) § 313.4(G) (also noting “the Office cannot register the words, short phrases, or other *de minimis* text that appears in the headings for a blank form, even if the applicant attempts to register the work as a compilation of uncopyrightable material”). Thus, this aspect of the Work does not evidence an appreciable quantum of original, creative expression.

Accordingly, the Board finds that the Work's selection, coordination, and arrangement of unprotectable fields, facts, and information does not demonstrate the creative authorship necessary for copyright registration.

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.



U.S. Copyright Office Review Board

Karyn A. Temple, Register of Copyrights
and Director, U.S. Copyright Office

Regan A. Smith, General Counsel and
Associate Register of Copyrights

Catherine Zaller Rowland, Associate Register of
Copyrights and Director, Public Information
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