



Copyright Review Board  
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000

November 4, 2022

John McIlvaine, Esq.  
The Webb Law Firm  
One Gateway Center  
420 Ft. Duquesne Blvd., Suite 1200  
Pittsburgh, PA 15222

**Re: Second Request for Reconsideration for Refusal to Register XBUDD Main Logo (SR # 1-8908834291; Correspondence ID: 1-4T22AJS)**

Dear Mr. McIlvaine:

The Review Board of the United States Copyright Office (“Board”) has considered Colin M. Budd’s second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the work titled “XBUDD Main Logo” (“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 Work is a two-dimensional artwork consisting of overlapping stylized letters “X” and “B.” The letters are rendered in white and centered in a black square.

The Work is as follows:



## II. ADMINISTRATIVE RECORD

On June 8, 2020, Mr. Budd filed an application to register a copyright claim in the Work. In a July 16, 2020 letter, a Copyright Office registration specialist refused to register the claim, determining that the Work lacked sufficient creative authorship. Initial Letter Refusing Registration from U.S. Copyright Office to John McIlvaine at 1 (July 16, 2020).

On October 16, 2020, Mr. Budd requested that the Office reconsider its initial refusal to register the Work, arguing that the Copyright Office had applied an “incomplete and more rigorous” standard for originality than that established by the Supreme Court in *Feist Publ’ns v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991). Letter from John McIlvaine to U.S. Copyright Office at 2 (Oct. 16, 2020) (“First Request”). After reviewing the Work in light of the points raised in the First Request, the Office reevaluated the claims and again concluded that the Work could not be registered. Refusal of First Request for Reconsideration from U.S. Copyright Office to John McIlvaine (May 14, 2021). The Office explained that the Work “does not exhibit sufficient original and creative authorship upon which a copyright registration is possible.” *Id.* at 4.

In a letter dated August 16, 2021, Mr. Budd 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 John McIlvaine to U.S. Copyright Office (Aug. 16, 2021) (“Second Request”). He again argued that the Copyright Office had applied a more stringent standard for originality than required by the Supreme Court in *Feist* and that the Work contained the requisite degree of creativity due to its use of “deconstructed lettering” to form a “unique and creative block.” *Id.* at 2.

## III. DISCUSSION

After carefully examining the Work and considering the arguments made in the First and Second Requests, the Board finds that the Work does not contain the requisite originality necessary to sustain a claim to copyright.

A work may be registered for copyright if it is an “original work[] of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102(a). In *Feist*, the Supreme Court explained that this requirement of originality contains two components: that it was independently created (rather than copied from another work) and sufficiently creative. 499 U.S. at 345. Though the requisite level of creativity is “not particularly stringent,” there nonetheless is “a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent.” *Id.* at 358–59. Works that do not meet this low threshold for creativity are not eligible for copyright. *Id.* at 359.

The Office’s regulations implement these well-established principles. 37 C.F.R. § 202.10(a). Common shapes, familiar symbols and designs, and “mere variations of typographic ornamentation, lettering or coloring” do not qualify for copyright. *Id.* § 202.1(a); see also U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 906.1 (3d ed. 2021) (“COMPENDIUM (THIRD)”) (“The Copyright Act does not protect common geometric shapes, either in two-dimensional or three-dimensional form.”); COMPENDIUM (THIRD) § 906.4 (stating that “typeface, typefont, lettering, calligraphy, and typographic ornamentation”

are generally not registrable, as they “are mere variations of uncopyrightable letters or words, which in turn are the building blocks of expression”). A work comprised merely of unprotectable elements may be registrable if such elements are configured in a creative manner, though not every combination or arrangement of unprotectable elements will be creative enough to qualify for copyright. *See Feist*, 499 U.S. at 358. Indeed, “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.” *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003).

Applying these legal standards, the Board finds that the Work does not contain the requisite creativity necessary to sustain a claim to copyright. Both the individual elements of the Work and the Work as a whole fail to demonstrate sufficient creativity.

The individual elements of the Work are the overlapping stylized letters “X” and “B” in white and a black square. Neither stylized letters nor common shapes are copyrightable. *See* COMPENDIUM (THIRD) §§ 906.1, 906.4. The individual elements of the Work thus do not show sufficient creativity to support a copyright claim. Similarly, the combination of these unprotectable elements in the Work is not sufficiently creative for copyright registration. Again, the Work consists merely of three basic elements—two white letters and a black square—that are arranged in a simple, obvious fashion: the letters are overlapped and centered in the square. Accordingly, the elements used are not sufficiently numerous and their arrangement is not sufficiently original to render the Work as a whole copyrightable. *See Satava*, 323 F.3d at 811; *Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 498–99 (S.D.N.Y. 2005) (upholding Copyright Office’s refusal to register simple designs consisting of arrangements of pairs of the letter “C”). Though Mr. Budd argued in the Second Request that the Office applied a “more rigorous” standard for originality than promulgated in *Feist*, Second Request at 2, *Feist* itself made clear that “[t]he standard of originality is low, but it does exist.” *Feist*, 499 U.S. at 362. Here, as was the case in *Feist*, the Work is “garden-variety” and does not meet the threshold. *Id.*

In the Second Request, Mr. Budd makes several additional arguments in support of registrability. First, he argues that the Work as a whole is copyrightable because the textual matter in the Work aids or augments its graphic elements, relying on dicta in *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1080–81 (9th Cir. 2000). Second Request at 1–2. In *Ets-Hokin*, the Ninth Circuit observed that textual matter on a label will not be copyrightable unless it aids or augments a graphical illustration, but ultimately did not reach the issue of whether the liquor bottle label at issue—which consisted exclusively of text—was eligible for copyright. *Ets-Hokin*, 225 F.3d at 1080–81. Here, the Work contains no copyrightable graphical illustration that the letters could augment—the only non-textual element is a plain black box. Thus, this dicta from *Ets-Hokin v. Skyy Spirits, Inc.* is inapplicable here.

The remainder of Mr. Budd’s arguments pertain to factors that are not relevant to the determination of whether a work is sufficiently creative. He argues that the Work is creative due to its use of “deconstructed lettering,” stating that the letters in the Work “cannot simply be read as an ‘X’ or a ‘B’ in its individual components” and are instead “seen as an originally produced graphic work of several different interpretations, depending upon the viewer’s standpoint.” Second Request at 2. That viewers may reach different interpretations of the Work is inapposite,

because “[t]he symbolic meaning or impression of a work is irrelevant” to whether it is sufficiently creative. COMPENDIUM (THIRD) § 310.3. Mr. Budd further argues that the arrangement of elements in the Work is copyrightable because works receive “broad protection” if an author “combines design elements into one design among endless variations of expression.” Second Request at 2. He does not provide any authority or additional analysis in support of this argument, and, in any event, the Copyright Office does not consider design alternatives in evaluating creativity. COMPENDIUM (THIRD) § 310.8. He also argues that the Work is copyrightable because it was “influenced by the author’s original creativity and experience in graphic design,” Second Request at 2, yet an “author’s skill, experience, or artistic judgment” and their “personal or professional history [are] irrelevant to the determination of copyrightability.” COMPENDIUM (THIRD) § 310.6. Finally, Mr. Budd emphasizes the alleged novelty of the Work, stating that the arrangement of elements in the work resulted in “a new and creative drawing” and that the Work “required creativity to create an entire new image.” Second Request at 2. However, the Office does not consider novelty in evaluating originality. COMPENDIUM (THIRD) § 310.1; *see also Feist*, 499 U.S. at 345 (“Originality does not signify novelty.”).

#### 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

Suzanne V. Wilson, General Counsel and Associate  
Register of Copyrights  
Maria Strong, Associate Register of Copyrights and  
Director of Policy and International Affairs  
Jordana Rubel, Assistant General Counsel