



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

May 5, 2023

Timothy C. Bradley, Esq.  
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400 West Maple Road, Suite 350  
Birmingham, MI 48009

**Re: Second Request for Reconsideration for Refusal to Register Up Down Up Down (SR # 1-11052736397; Correspondence ID: 1-598RV5V)**

Dear Mr. Bradley:

The Review Board of the United States Copyright Office (“Board”) has considered Represent Holdings, LLC’s (“Represent Holdings”)<sup>1</sup> second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the work titled “Up Down Up Down” (“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 square two-dimensional graphic artwork in black, gray, and white colors. The Work consists of the words “UP DOWN UP DOWN” in white above a row of four white arrows that alternate directionally between “up” and “down.” The words and arrows are superimposed over a gray Japanese character, which translated into English means “samurai.” The background is black. The Work is as follows:



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<sup>1</sup> In addition to Represent Holdings, CoryXKenshin LLC is listed as a claimant on the registration application.

## II. ADMINISTRATIVE RECORD

On December 16, 2021, Represent Holdings filed an application to register a copyright claim in the Work. On December 21, 2021, a Copyright Office registration specialist refused to register the claim, finding that the Work “lacks the authorship necessary to support a copyright claim.” Initial Letter Refusing Registration from U.S. Copyright Office to Timothy Bradley at 1 (Dec. 21, 2021) (“First Refusal”). The First Refusal explained that “[c]opyright does not protect familiar symbols or designs; basic geometric shapes; words and short phrases such as names, titles, and slogans; or mere variations of typographic ornamentation, lettering or coloring.” *Id.* It further explained that “copyright does not extend to any idea, concept, system, or process which may be embodied in a work.” *Id.*

On March 21, 2022, Represent Holdings requested that the Office reconsider its initial refusal to register the Work. Letter from Timothy C. Bradley to U.S. Copyright Office (Mar. 21, 2022) (“First Request”). The First Request asserted that “the English words, Japanese characters, and coloring, in combination with the placement and juxtaposition of these various elements” satisfies the “modicum of creativity standard” for originality. *Id.* at 2. After considering the points raised in the First Request, the Office reevaluated the claims and again concluded that the Work cannot be registered because it “does not contain a sufficient amount of creativity either elementally, or as a whole.” Refusal of First Request for Reconsideration from U.S. Copyright Office to Timothy Bradley at 1 (June 14, 2022) (“Second Refusal”). Specifically, the Office found that the component parts of the Work—the shapes, words, lettering, and coloring—were not creative elements on their own. Considering the Work as a whole, the Office found that the selection, coordination, and arrangement of these elements into a “simple configuration” lacked sufficient creativity. *Id.* at 3.

In a letter dated September 14, 2022, Represent Holdings 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 Timothy C. Bradley to U.S. Copyright Office (Sept. 14, 2022) (“Second Request”). In the Second Request, Represent Holdings contended that the Office “has not adequately considered the Work as a whole” and that, even if the individual elements comprising the Work are not independently protectable, these elements “have been selected, coordinated, and/or arranged in a sufficiently creative manner” to warrant copyright protection. *Id.* at 1–2. Represent Holdings explained that the Work “juxtaposes modern video game commands . . . in both text and symbolic form in sharp white, with the commands being highly contrasted (both visually and conceptually) over the gray Japanese characters for the ancient Samurai, representing a modern video game player who represents and espouses the ancient Samurai code.” *Id.* at 2. In addition, Represent Holdings claims that the Work has been subject to “extensive copying by others,” which demonstrates that the Work possesses sufficient creativity to be registered. *Id.*

## III. DISCUSSION

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

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 the copyright context, the originality requirement 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). Concerning the requisite level of creativity, *Feist* requires only a “modicum of creativity.” *Id.* at 346–47. The Supreme Court explained that there is nonetheless “a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent” such that they fail to meet even the low threshold for creativity and, consequently, are not eligible for copyright protection. *Id.* at 359.

The Office’s regulations implement these well-established principles. *See* 37 C.F.R. § 202.1(a). Common shapes, words and short phrases, familiar symbols or designs, and “mere variations of typographic ornamentation, lettering or coloring” do not qualify for copyright protection. *Id.* § 202.1(a); *see also* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.3(D) (3d ed. 2021) (“COMPENDIUM (THIRD)”) (stating that “lettering” and “mere variations of typographic ornamentation” are not copyrightable). A work comprised 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 protection. *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.

First, the Board finds that the individual elements of the Work are not protectable. The individual elements are the phrase “UP DOWN UP DOWN,” four small arrows, and the Japanese character for the word translated as “samurai” in English. The words “UP DOWN UP DOWN” are not sufficiently original because words and short phrases contain a *de minimis* amount of authorship. *See* 37 C.F.R. § 202.1(a); COMPENDIUM (THIRD) § 313.4(C) (noting that catchphrases, mottos, and slogans, and other short expressions are not protected by copyright). The arrows are “familiar symbols or designs,” which are also not protectable by copyright. 37 C.F.R. § 202.1(a); *see John Muller & Co., Inc. v. New York Arrows Soccer Team*, 802 F.2d 989, 990 (8th Cir. 1986) (affirming the refusing to register logo consisting of four irregularly spaced lines with the word “Arrows” in cursive script below); COMPENDIUM (THIRD) § 906.2 (“copyright law does not protect mere variations on a familiar symbol or design”); *see also id.* § 313.4(J) (listing “[a]rrows and other directional or navigational symbols” as examples of unprotectable familiar symbols or designs). The Japanese character, like lettering, is also insufficiently creative to receive copyright protection. *See* 37 C.F.R. § 202.1(a); COMPENDIUM (THIRD) § 906.4 (citing “calligraphy consist[ing] of standard Chinese characters” as an example of typeface characters that are not registerable).

Likewise, the Board finds that the Work as a whole, does not exhibit the requisite “modicum of creativity” for registration. Rather than failing to “adequately consider” the Work as a whole, as Represent Holdings contends in the Second Request, the Office previously

considered whether there was sufficient creativity in the entirety of the Work and determined that there was not. *See* Second Refusal at 3. The Board agrees with this conclusion. The words “UP DOWN UP DOWN” and four arrow symbols, all expressed in solid white against a black rectangular background, are centered in the foreground of the Work. The four arrows correspond to the sequence of the four words (*i.e.*, an “up” arrow appears first, then a “down” arrow, and so on). The words and arrows are superimposed over the Japanese character, which is depicted in solid gray and, like the words and arrows, is centered in the middle of the Work’s black background. This selection of a few uncopyrightable elements, arranged symmetrically and in an obvious way (*e.g.*, the four directional arrows mirror the English words for the direction), does not display the minimal level of creativity necessary to satisfy the originality requirement for compilations. *See Feist*, 499 U.S. at 358–59; COMPENDIUM (THIRD) § 312.2. Instead, the Work merely brings together a few familiar symbols, English words, and a non-English character centered in a rectangle. *See* COMPENDIUM (THIRD) § 905 (explaining that visual art works that consist of a “few standard forms or shapes with minor linear or spatial variations” do not contain a “sufficient amount of creative expression”). Accordingly, the Board finds the Work as a whole insufficiently creative to receive copyright protection.


To the extent that Represent Holdings asserts that the Work satisfies the creativity requirement because it “represents a modern video game player who represents and espouses the ancient Samurai code,” any symbolic meaning or impression is irrelevant to the Office’s determination of whether the Work “possess[es] the minimal creative spark required by the Copyright Act and the Constitution.” *Feist*, 499 U.S. at 363; *see* COMPENDIUM (THIRD) § 310.3 (“[T]he Office will focus only on the actual appearance . . . of the work that has been submitted for registration, but will not consider any meaning or significance that the work may evoke.”). Nor does the Office consider “the author’s . . . creative intent[] or intended meaning” in assessing creativity. COMPENDIUM (THIRD) § 310.5.

Finally, Represent Holdings contends that the Work has been the target of copying by others and, therefore, the Work possesses a “a sufficient quantum of originality to support a copyright.” Second Request at 2 (citing 1 NIMMER ON COPYRIGHT § 2.01[B][1] (2022) (noting that “if any author’s independent efforts contain sufficient skill to motivate another’s copying, there is *ipso facto* a sufficient quantum of originality to support a copyright”). The Board disagrees because evidence of copying is not the standard for originality. Mere copying does not make otherwise uncopyrightable material, such as a logo comprised entirely of a few words and common shapes, sufficiently creative to receive copyright protection. Further, Represent Holdings’ selective quotation from Nimmer’s treatise excludes important context. The treatise is not restating how courts evaluate originality, but simply commenting that, from looking at pre-*Feist* cases that considered the relationship between effort and originality, “one may initially posit” that courts were inclined to protect “any author’s efforts” so long as they “contain[ed] sufficient skill to motivate another’s copying.” 1 NIMMER ON COPYRIGHT § 2.01[B][1]. The treatise goes on to acknowledge that some author’s efforts have been “deemed too trivial or insignificant to support copyright” and that courts have “invoked at least a minimal requirement of creativity over and above the requirement of independent effort” to meet the necessary

quantum of originality. *Id.* As explained above, the Work falls short of the creativity threshold established in *Feist*.<sup>2</sup>

#### 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.



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**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

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<sup>2</sup> Even if “copying by others” were relevant to assessing whether a work possesses the required minimal degree of creativity, here, Represent Holdings merely asserts that the Work has been subject to “extensive copying,” including sales of “counterfeit versions” on “third party websites,” Second Request at 2, but neither cites examples nor provides documentary evidence of the alleged copying.