



**Copyright Review Board**

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

November 4, 2022

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**Re: Second Request for Reconsideration for Refusal to Register Upward-logo-vertical  
(SR # 1-9177244401; Correspondence ID: 1-4RDE69N)**

Dear Mr. Pampalone:

The Review Board of the United States Copyright Office (“Board”) has considered Christopher Tierney’s (“Tierney”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the work titled “Upward-logo-vertical” (“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 composed of a design element and the name and location of a company. The elements of the logo are arranged in a standard, vertical configuration, in a white and black color scheme. At the top of the design is a graphic of a spike of grain, such as barley or wheat, in white against a black background. Below this graphic is a rectangular black box with the name of the company in white lettering on two lines. On the first line is the name “UPWARD” and below it are the words “Brewing Company.” Below that, at the bottom of the design, is the location of the company “Catskill Mountains New York.” “Catskill Mountains” is depicted in black lettering in a cursive font and the “New York” is centered immediately below in non-cursive font. The Work is as follows:



## II. ADMINISTRATIVE RECORD

On August 28, 2020, Tierney filed an application to register a copyright claim in the Work. In a November 3, 2020 letter, a Copyright Office registration specialist refused to register the claim, finding that it “lack[ed] the authorship necessary to support a copyright claim.” Initial Letter Refusing Registration from U.S. Copyright Office to Michael Pampalone at 1 (Nov. 3, 2020).

In a letter dated November 25, 2020, Tierney requested that the Office reconsider its initial refusal to register the Work. Letter from Michael Pampalone to U.S. Copyright Office (Nov. 25, 2020) (“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 was “insufficiently creative to support a claim in copyright,” as it consisted of a “garden-variety configuration of . . . [a] few elements [that] in no way demonstrates the necessary creativity required to support a claim in copyright.” Refusal of First Request for Reconsideration from U.S. Copyright Office to Michael Pampalone at 3 (Apr. 13, 2021).

In a letter dated July 13, 2021, Tierney 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 Michael Pampalone to U.S. Copyright Office (July 13, 2021) (“Second Request”). In that letter, Tierney asserted that the Work is sufficiently creative because “it embodies completely original design elements, authored by Mr. Tierney, which depict Mr. Tierney’s original ‘expression’ . . . .” *Id.* at 2. Tierney described the pictorial element of the design as a “Spike Design” that the author “melded” into a U shape, or “U Design,” and asserted that “both the Spike Design and the U Design contain the necessary amount of original authorship to merit registration of the Upward Logo Design and the combination of the various elements embodied by the Upward Logo Design creates an original and distinctive overall impression in the work.” *Id.* at 3.

## III. DISCUSSION

After carefully examining the Work and applying the relevant legal standards, the Board finds that the Work does not contain the requisite originality 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 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.* There is no question here that Mr. Tierney created the Work. 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.* at 358–9. 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. *See, e.g.*, 37 C.F.R. § 202.1(a) (prohibiting registration of “[w]ords and short phrases such as names, titles, and 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 claim. 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, 883 (D.C. Cir. 1989); *Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 498–99 (S.D.N.Y. 2005).

A mere simplistic arrangement of non-protectable elements does not demonstrate the level of creativity necessary to warrant protection. *See Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) (“[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.”); *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).

Similarly, while the Office may register a work that consists merely of geometric shapes, for such a work to be registrable, the “author’s use of those shapes [must] result[] in a work that, as a whole, is sufficiently creative.” COMPENDIUM (THIRD) § 906.1; *see also Atari Games Corp.*, 888 F.2d at 883 (“[S]imple shapes, when selected or combined in a distinctive manner indicating some ingenuity, have been accorded copyright protection both by the Register and in court.”). Thus, the Office would register, for example, a wrapping paper design that consists of circles, triangles, and stars arranged in an unusual pattern with each element portrayed in a different color, but would not register a picture consisting merely of a purple background and evenly spaced white circles. COMPENDIUM (THIRD) § 906.1.

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

The Work contains two distinct types of elements: a design element and typographic elements, neither of which are independently copyrightable. The white element at the top of the design is composed of a repeating rhomboid shape arranged to represent a spike of grain. This obvious arrangement for a brewery that uses such materials does not meet the standard for creativity. *See id.* (stating that a work is registrable where it “combines multiple types of geometric shapes in a variety of sizes and colors, culminating in a creative design that goes beyond the mere display of a few geometric shapes in a preordained or obvious arrangement”).

The U-shaped black backdrop for the grain is also merely a slight variation of a geometric shape because it is a rectangle with its two bottom edges rounded.

Tierney asserts that the typographic portions of the Work “incorporate novel and original fonts, also authored by Mr. Tierney.” Second Request at 3. However, typography, stylized letters, or mere variations of typographic ornamentation are not copyrightable. 37 C.F.R. § 202.1(a). Letters are the building blocks of expression and cannot be protected by copyright law “regardless of how novel and creative the shape and form of the typeface characters may be.” COMPENDIUM (THIRD) § 906.4; *see also id.* § 313.3(D) (“The copyright law does not protect typeface or mere variations of typographic ornamentation or lettering.”); *Eltra Corp. v. Ringer*, 579 F.2d 294, 298 (4th Cir. 1978) (noting Congress has consistently refused copyright protection to typeface).

Nor does the combination of these unprotectable elements rise to the level of creativity necessary for copyright registration. Where a design combines uncopyrightable elements, it is protected only when the “elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.” *Satava*, 323 F.3d at 811. Here, the Work consists of a simple graphic representing a spike of grain above words indicating the name of a company and its location. The Work is a logo, in name and by design, and it depicts what it is trying to sell—a common practice in advertising. *See Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F.2d 541, 544 (2d Cir. 1959). Similarly, the vertical stacking of the elements is a common arrangement in advertising practice and thus not sufficiently original.

#### 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