United States Copyright Office
Library of Congress · 101 Independence Avenue SE · Washington, DC 20559-6000 · www.copyright.gov

August 27, 2014

Law Offices of Louis L. Wu
Attn: Louis L. Wu
P.O. Box 10074
Oakland, CA 94610

Re: SAMPLE FLOC ANALYZER IMAGE
Correspondence ID: 1-2K8ZU2

Dear Mr. Wu:

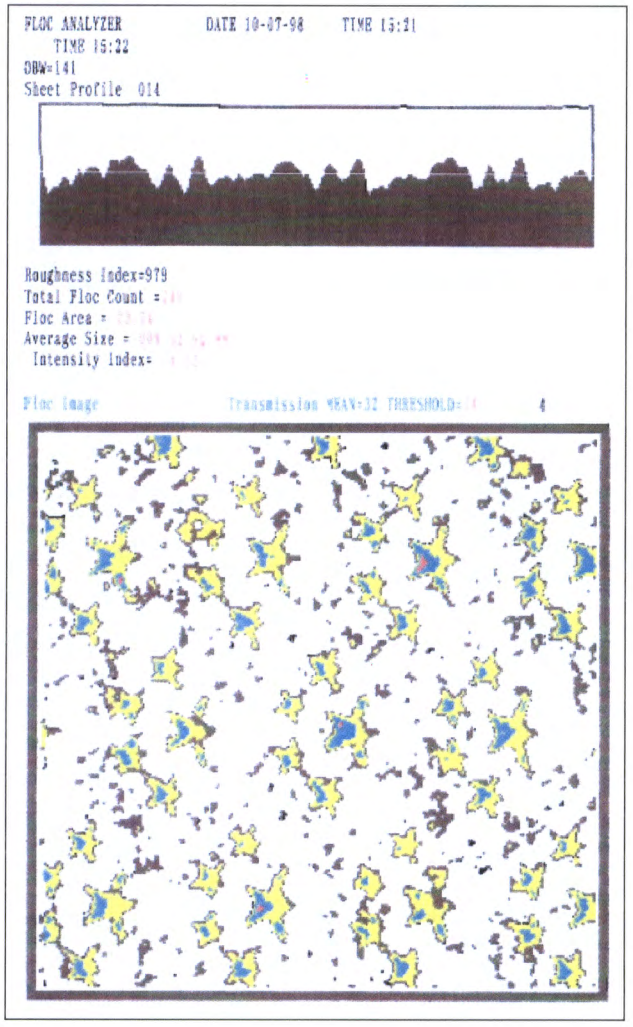
The Review Board of the United States Copyright Office (the "Board") is in receipt of the second request for reconsideration of the Registration Program's refusal to register the work entitled: *Sample Floc Analyzer Image*. You submitted this request on behalf of your client, MK Systems, Inc., on September 16, 2009. On July 19, 2013, the Board sent you a letter to determine your client's continued interest in the request for a second reconsideration. *Letter from William J. Roberts to Louis L. Wu* (July 19, 2013). On January 24, 2014, you notified the Board that your client remained interested in a second reconsideration. *E-mail from Louis L. Wu to William J. Roberts* (Jan. 25, 2014, 12:09 EST) (on file with author).

The Board has examined the application, the deposit copies, and all of the correspondence in this case. After careful consideration of the arguments in your second request for reconsideration, the Board affirms the Registration Program's denial of registration of this copyright claim. The Board's reasoning is set forth below. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action on this matter.

I. DESCRIPTION OF THE WORK

Sample Floc Analyzer Image (the "Work") is a computer-generated readout comprised of the following elements: (1) Text that includes one- to three-word labels followed by corresponding numbers representative of data generated by specialized software and hardware; (2) Artwork that includes a graphical representation of data generated by specialized software and hardware; (3) A color scheme that includes the colors red, blue, yellow, and black (also generated by specialized software and hardware); and (4) A photograph of a portion of a sheet of paper that has been enlarged and lighted so that the

paper's levels of transparency ("flocculation" or "floc") are ascertainable. The below image is a photographic reproduction of the Work from the deposit materials:



II. ADMINISTRATIVE RECORD

On March 17, 2009, the United States Copyright Office (the "Office") issued a letter notifying MK Systems, Inc. (the "Applicant") that it had refused registration of the above mentioned Work. *Letter from William Briganti, Assistant Chief, Visual Arts and Recordation Division, to Louis L. Wu* (Mar. 17, 2009). In its letter, the Office stated that it could not register the Work because it did not include "any copyrightable text, artwork, or photography." *Id.*

In a letter dated February 21, 2009, you requested that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusal to register the Work. *Letter from Louis L. Wu to Copyright RAC Division* (Feb. 21, 2009) ("First Request"). Upon reviewing the Work

in light of the points raised in your letter, the Office concluded that the Work "does not contain any authorship that would support a copyright" and again refused registration. *Letter from Virginia Giroux-Rollow, Attorney-Advisor, to Louis L. Wu* (June 30, 2009) ("Response to First Request").

Finally, in a letter dated September 16, 2009, you 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 Louis L. Wu to Copyright R&P Division* (Sept. 16, 2009) ("Second Request"). In arguing that the Office improperly refused registration, you claim the Work includes at least the minimum amount of creativity required to support registration under the standard for originality set forth in *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991). *Second Request* at 1-2. In support of this argument, you claim the Work includes text, artwork, and photography that have been "selected, coordinated, or arranged in such a way that the [Work] as a whole constitutes an original work of authorship." *Id.* at 1.

You also maintain that "at least one" of the Work's individual elements is sufficiently original to warrant registration, citing the "photographic element" as an example. *Id.* Specifically, regarding the photographic element, you claim: "Technically, the image was obtained in a manner similar to how ordinary photography works, except using a camera with software and hardware specific to paper or other thin specimens. Not only did the author select the particular specimen used, the particular region of the specimen imaged, the orientation of the particular specimen used, and the precise time the image was taken, the author created the specialized software and hardware. . . . In turn, the software and hardware were used to carry out the author's choice of the angle of photography, lighting, color enhancements, and other creative directives of the author." *Id.* at 3. In addition to the above, you further clarify that the Applicant is not attempting to protect the process used to create the Work, but the specific arrangement of "text, artwork, and photography" found in the deposit image included with the copyright application. *Id* at 4.

III. DECISION

A. *The Legal Framework*

All copyrightable works must qualify as "original works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a). As used with respect to copyright, the term "original" consists of two components: independent creation and sufficient creativity. *See Feist*, 499 U.S. at 345. 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.* While only a modicum of creativity is necessary to establish the requisite level, the Supreme Court has ruled that some works (such as the telephone directory at issue in *Feist*) fail to meet this 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 nonexistent." *Id.* at 359.

The Office's regulations implement the long-standing requirements of originality and creativity set forth in the law and, subsequently, the *Feist* decision. *See* 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"); *see also* 37 C.F.R. § 202.10(a) (stating "[i]n order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form").

Of course, 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 grade. *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"). Ultimately, the determination of copyrightability in the combination of standard design elements rests 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.D.C. 1989).

To be clear, the mere simplistic arrangement of unprotectable elements does not automatically establish the level of creativity necessary to warrant protection. For example, the Eighth Circuit upheld the Copyright Office's refusal to register a simple logo consisting of four angled lines which formed an arrow and the word "Arrows" in a cursive script below the arrow. *See John Muller & Co., Inc. v. NY Arrows Soccer Team, Inc.*, 802 F.2d 989 (8th Cir. 1986). Likewise, the Ninth Circuit held that a glass sculpture of a jellyfish that consisted of elements including clear glass, an oblong shroud, bright colors, proportion, 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 court's language in *Satava* is particularly instructional:

> [i]t 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) (emphasis in original).

Finally, Copyright Office Registration Specialists (and the Board) do not make aesthetic judgments in evaluating the copyrightability of particular works. They are not influenced by the attractiveness of a design, the espoused intentions of the author, the design's uniqueness, its visual effect or appearance, its symbolism, the time and effort it took to create, or its commercial success in the marketplace. *See* 17 U.S.C. § 102(b); *see also Bleistein v. Donaldson*, 188 U.S. 239 (1903). The fact that a work consists of a unique or distinctive shape or style for purposes of aesthetic appeal does not automatically mean that the work, as a whole, constitutes a copyrightable "work of art."

B. *Analysis of the Work*

After carefully examining *Sample Floc Analyzer Image* and applying the legal standards discussed above, the Board finds that the Work fails to satisfy the requirement of creative authorship.

The Board finds that none of the Work's constituent elements, considered individually, are sufficiently creative to warrant protection. As noted, 37 C.F.R. § 202.1(a) identifies certain elements that are not copyrightable. These elements include "[w]ords and short phrases such as names, titles, slogans; familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering, or coloring." *Id.* Here, the Work is a computer-generated readout comprised of the following elements: (1) text that includes one- to three-word labels followed by corresponding numbers that represent data generated by specialized software and hardware; (2) a graphical representation of "floc" data generated by specialized software and hardware; (3) a color scheme that includes the colors red, blue, yellow and black (also generated by specialized software and hardware); and (4) a photograph of a portion of a sheet of paper that has been enlarged and lighted so that the paper's "floc" levels are ascertainable. Consistent with the above regulations, neither the Work's short textual labels and corresponding numerical data, nor its simple color scheme are eligible for copyright protection. *See id.*; *see also J. Racenstein & Co., Inc. v. Wallace*, 51 U.S.P.Q. 2d 1031 (S.D.N.Y. 1999) (indicating a word or short phrase, alone, generally cannot support a copyright claim); *see also Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 498-99 (indicating mere variations in typographic ornamentation or lettering cannot support a copyright claim); *and see Boisson v. Banian, Ltd.*, 273 F.3d 262, 271 (2d Cir. 2001) (indicating mere coloration cannot support a copyright claim).

The graphical representation of "floc" data and the enlarged photograph of a portion of a sheet of paper are also, considered individually, ineligible for copyright protection. We find that the creation of this subject matter is attributable to a process of software and hardware acting on a piece of paper, rather than the Applicant. As explained in the Office's rejection of the Applicant's *First Request*, the Office (and the Board, as well) views any elements that are functionally driven or predetermined by the requirements of a machine or process as not within the ambit of copyright protection. *Response to First Request* at 1; *see also* 17 U.S.C. § 102(b) ("in no case does copyright protection extend to an idea, procedure, process, technique, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, illustrated, or embodied in a work"). While the Board

recognizes that it is possible to produce a work with the assistance of specialized software and hardware that is sufficiently creative to warrant registration, we find that the graph and photo at issue do not reach that level of sophistication.

Regarding the graph, users of the Applicant's specialized software and hardware may have control over instructing the machine to recognize certain areas or levels of "floc" transparency to portray in graphical form, but the resulting representation of "floc" data is produced by the machine itself (more specifically the system or process embodied in the machine's specialized software and hardware). Accordingly, we find that the graph element, considered individually, lacks a sufficient level of creativity to warrant copyright registration.

Regarding the photograph, we find this element to be ineligible for protection for the same reasons the graph does not warrant registration. Like with the graph, our understanding of the specialized software and hardware at issue indicates that the end photograph is a product of a computer-generation process. Aside from a user feeding a sheet of paper into a machine and instructing a computer program to analyze the "floc" of a specific portion of the paper, we can find no creative authorship in the photographic output that is attributable to the Applicant (as opposed to the specialized software and hardware that is designed to analyze "floc" and display results).

We disagree with your claim that the process at work in the software and hardware can be likened to "how ordinary photography works." *See Second Request* at 3 (stating "[t]echnically, the image was obtained in a manner similar to how ordinary photography works, except using a camera with software and hardware specific to paper or other thin specimens"). Though you may be correct in claiming that the user, by electing to feed paper into the Applicant's machine and instructing specialized software and hardware to select a portion of the paper to analyze, has technically decided the "angle of photography, lighting, color enhancements, and other creative directives" (*see id.*), we find these process-driven choices distinguishable from the "modest expression of personality" conveyed as a result of the creative choices that are often cited as support for the general copyrightability of photographs. *See* M. NIMMER & D. NIMMER, 1 NIMMER ON COPYRIGHT § 2.08(E)(1) (2014) (hereafter "Nimmer") (explaining that "almost any[] photograph may claim the necessary originality to support a copyright merely by virtue of the photographers' [sic] personal choice of subject matter, angle of photograph, lighting, and determination of the precise time when the photograph is to be taken."); *see also Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1076 (9th Cir. 2000) (quoting Nimmer at § 2.08(e)(1)). Here, the user is not making creative choices in the copyright sense, but is implementing the process and method of operation for which the "Floc Analyzer" is designed.

Regarding the various colors that appear in the photograph, we find that such coloration is likewise attributable to process. Based on our understanding of the specialized software and hardware at issue, a user may select what colors to apply to certain "floc" properties, but ultimately has little choice in how the process analyzes and assigns those colors, or even what colors and/or levels of "floc" will show up in a resulting photograph.

Thus, we find that the photograph's basic color scheme is insufficient to qualify for copyright protection. *See generally Boisson v. Banian, Ltd.*, 273 F.3d at 271.

Based on the above, the Board concludes that none of the Work's constituent elements are sufficiently creative to qualify for registration under the Copyright Act.

The Board further concludes that the Work, considered as a whole, fails to meet the creativity threshold set forth in *Feist*. 499 U.S. at 359. As explained, the Board accepts the principle that combinations of unprotectable elements may be eligible for copyright registration. However, in order to be accepted, such combinations must contain some distinguishable variation in the selection, coordination, or arrangement of their elements that is not so obvious or minor that the "creative spark is utterly lacking or so trivial as to be nonexistent." *Id.*; *see also Atari Games,* 888 F.2d at 883 (finding a work should be viewed in its entirety, with individual noncopyrightable elements judged not separately, but in their overall interrelatedness within the work as a whole). Viewed as a whole, the Applicant's Work consists of the simple arrangement of (1) several short pieces of text and numbers, (2) a computer-generated graph design, (3) a computer-generated photograph, and (4) a general color scheme. This basic combination of unprotectable elements and statistical data, arranged so that they can appear together on a computer-generated informational readout is, at best, *de minimis*, and fails to meet the threshold for copyrightable authorship. *Feist,* 499 U.S. at 359; *see also Atari Games,* 888 F.2d at 883. Accordingly, we conclude that the Work, as a whole, lacks the requisite "creative spark" necessary for registration. *Feist,* 499 U.S. at 359; *Satava*, 323 F.3d at 811.

IV. CONCLUSION

In sum, the Board finds that both the individual elements that comprise the Work, as well as the Applicant's selection, organization, and arrangement of those elements lack the sufficient level of creativity to make the Work eligible for registration under the Copyright Act.

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register *Sample Floc Analyzer Image*. This decision constitutes final agency action on this matter. 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

BY: _____
William J. Roberts, Jr.
Copyright Office Review Board