Opening Remarks: Copyrightability in the U.S. Copyright Office

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The Copyright Office is really pleased to be cosponsoring this symposium with Columbia Law School on copyrightability. I am especially pleased to be able to do so because copyrightability is something that the Copyright Office knows just a *little* bit about, having registered and reviewed claims for copyright for nearly 150 years. The Copyright Office analyzes thousands of questions of copyrightability each day. Last year, we examined nearly 650,000 claims to copyright, and by the end of 2019, the Office will have registered more than 38 million claims since 1870.[1] While impressive, these numbers refer only to the number of applications, not to the total universe of works that the Copyright Office has actually reviewed. Indeed, the number of works we have examined over the years soars into the many, many millions. Each time the Copyright Office examines a work, we determine whether it's copyrightable, of course. These works span the full spectrum of musical works and sound recordings; visual works, including useful articles; and literary works, like books and computer programs. We make more copyrightability decisions than almost anywhere else in the world. For example, in just one week, we make more copyrightability decisions than are received in an entire year by all federal district courts combined.

We have looked at copyrightability in the past, the present, and even the future. From the days before motion pictures were registrable, to present-day computer software, we in the Copyright Office have seen it all. We have been able to work with the Copyright Act and all of its revisions to apply the law in a way suitable for a variety of technologies. But the world, of course, does not stop spinning. New types of work and authorship are on the horizon, and some have already begun to arrive. Artificial intelligence ("AI") has evolved and is creating and using new works, and copyright law will have to accommodate this growing field. We will be looking into the issue of copyright in AI in depth in our joint conference with the

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1. U.S. COPYRIGHT OFFICE, ANNUAL REPORT FOR FISCAL 2018 at 6 (2018), https://perma.cc/H2H6-Z8YG.

World Intellectual Property Organization in February 2020.[2]

And, lest you think copyrightability isn't cool, let me assure you that it's all the rage. Some of the Office's decisions on social dances are quite the topic of conversation. Should you be able to dance the night away at a party with a social dance like the "Electric Slide"? We think so in the Copyright Office.[3] And there is also our decision related to Kanye West's new Yeezy Boost sneakers,[4] which at least one blog said were "wildly popular" and "frequently knocked off."[5] These are just a few examples of the many cool and interesting ways that copyrightability affects not only the Copyright Office, but culture throughout America and the world.

Sometimes we review a claim more than once. Applicants have two opportunities to ask us to reconsider decisions or refusals of copyright. Once is in the registration program, and once is with our Review Board. At each stage, the Office examines the claims in detail. While some of these claims are for works that are routine, some of them are more complex, and since the Board began posting its decisions online in the spring of 2016, the Board has decided 182 second requests for reconsideration.[6] Of these, eighty percent have involved visual works, twenty percent have involved useful articles, and some have involved particularly rare works like pictograms, larger-than-life window architecture, diamond cuts, and a method to measure possible medical conditions. Don't be surprised that it sometimes takes us hours of debate to come to a conclusion on these issues, because of how interesting we find all of the decisions that we have to make. Each request gets our full attention, including a thorough review of the statute, our regulations and the case law. As a result, we have affirmed eighty-one percent of refusals and reversed only fourteen percent since the spring of 2016. And I also admit that sometimes we try to inject a little bit of humor in some of our letters on these decisions—not to take away the seriousness of the decisions, but to exercise our own creative muscles. Some say puns are the lowest form of humor, but as *Bleistein* says, we aren't supposed to judge whether a work is good or bad.[7] I would suggest a law review article to figure out how many puns you can identify in our Copyright Office decisions—there are many.

We also receive a number of applications to register logos. We are extremely careful when we review all works, and logos are no exception. We look at them distinct from their status as logos and just look at them purely as visual works to determine whether there is copyrightable artistic authorship, regardless of how the

2. *See Copyright in the Age of Artificial Intelligence*, U.S. COPYRIGHT OFFICE, https://perma.cc/27FK-AWA6 (last visited Feb. 22, 2020).

3. *See* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 805.5(B)(2) (3d ed. 2017) [hereinafter COMPENDIUM].

4. *See* Letter from Karyn A. Temple, Reg. of Copyrights & Dir., U.S. Copyright Office, et al., to Joseph Petersen, Kilpatrick Townsend & Stockton, LLP (May 8, 2019), https://perma.cc/GP2B-2BS3.

5. Rick Mescher, *A "Boost" for Copyright Protection in the Fashion Industry: Kanye's Yeezy Sneakers to Receive Copyright Registrations*, TECH. L. SOURCE (May 28, 2019), https://perma.cc/SE8R-DG3E.

6. *See Review Board Letters Online*, U.S. COPYRIGHT OFFICE, https://perma.cc/4SPL-BTC5 (last visited Feb. 22, 2020).

7. *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250 (1903) (stating that "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth" of a creative work).

work is used. We therefore have a number of decisions both affirming and reversing registration refusals specifically based on logos. Sometimes people agree with us and sometimes they don't, but we put thought and effort into each work that we analyze. Our evenhandedness should be our. . . *trademark*.

To help guide our process of examination, we created the *Compendium of Copyright Office Practices* over 50 years ago. Over the years, the *Compendium* has provided more and more guidance on copyrightability. In the early days, it spanned just 135 pages (plus appendices) and talked about many of the copyrightability concepts. For example, in § 2.6.1, it was explained that musical compositions usually have a melody, a rhythm, and harmony.[8] That section even included images of hand-drawn musical notation and lyrics which read "Your last kiss left me so sad and blue."[9] That first edition also explained that "[a] phrase consisting of a few musical notes (e.g. the NBC signature; clock chimes), standing alone, would not have sufficient substance to constitute a composition."[10] The 1973 edition explored other areas of copyrightability, such as visual works, noting that "an abstract design may be registrable even though it incorporates uncopyrightable standard geometric forms, such as circles and squares."[11] It even began to approach issues such as who is the proper author, noting that "nothing is entitled to statutory protection . . . unless it can be considered the 'writing of an author' within the meaning of the United States Constitution and the Statute."[12]

The *Compendium* didn't stop analyzing copyrightability in the early 1970s. On the contrary, over the years, we have expanded the *Compendium* to address additional issues in detail. We released a second edition in 1984, but the most comprehensive overhaul took place in 2014, when we released our 1,200-page third edition.[13] (It is, I tell you, a very enjoyable beach read, so you should take it on your next vacation.) The revision came from several years of intense study and writing, as well as consideration of the comments. It addresses almost every conceivable type of work and has an incredible number of examples intended to guide not only internal Copyright Office practice, but also public users. When we released the newest edition, the biggest splash was—any guesses? It was the monkey selfie! As you may have heard, we included "a photograph taken by a monkey" as an example of a work lacking human authorship.[14] This caught the attention of the press and overshadowed the rest of our 1,199 pages. For example, the *Los Angeles Times* noted that the *Compendium* stated that "the office will register only works that were created by human beings" and that "[t]he first example in that category is 'a photograph taken by a monkey.'"[15] The *Los Angeles Times* also did point out that "if the copyright

8. U.S. COPYRIGHT OFFICE, COMPENDIUM OF COPYRIGHT OFFICE PRACTICES § 2.6.1.II.a (1st ed. 1973).
9. *Id.*
10. *Id.* § 2.6.1.II.c.3.
11. *Id.* § 2.8.3.I.
12. *Id.*
13. COMPENDIUM, *supra* note 3.
14. *Id.* § 313.2.
15. Lauren Raab, *Monkey Selfies Can't Be Copyrighted, Federal Office Decides*, L.A. TIMES (Aug. 21, 2014), https://perma.cc/3ZGF-X3P6.

application says the work 'was inspired by a divine spirit,' that's OK,"[16] but, of course, if you say the author *is* a divine spirit or idol, we will reject that.

Other copyrightability examples permeate the third edition, and we will continue to include them as we update the *Compendium* moving forward. In fact, we are currently reviewing comments and finalizing our latest *Compendium* release. We are dedicated to making the *Compendium* a living document, and we will continue to update it regularly moving forward. The latest release will address useful articles after the *Star Athletica* decision,[17] and we are in the process of reviewing comments now, including those that we received from the Kernochan Center itself. As technological practices and the law evolve, we will also need to continue updating the *Compendium*. Perhaps after our February symposium, a revision relating to AI is in our future.

But registration is not the only time we think about copyrightability. We are continually involved in litigation dealing with copyright issues, including challenges to our registration decisions. Often, because the Office is very diligent in its efforts to get it right, many courts agree with us. For example, in *Zhang v. Heineken*, the court upheld the Copyright Office's decision to refuse registration for artwork that merely consisted of standard Chinese characters.[18] And in the *Darden v. Peters* decision, the court upheld our decision to refuse registration for maps that were based on U.S. census outline maps.[19] We also work on Supreme Court litigation with the Department of Justice and our interagency colleagues, and we have actually been very busy in the past couple of years. As you know, we had the Supreme Court decision in *Star Athletica*, which looked closely at copyrightability in the form of useful articles.[20] The Copyright Office has been at the forefront of the useful article analysis since before the first Supreme Court case on useful articles, the *Mazer v. Stein* case.[21] And, in fact, the Copyright Office's records and insights were invaluable to the government's arguments, and we were very pleased, of course, that the Court adopted our position.

Finally, we serve the Congress and have provided our expertise on copyrightability for over a century. For example, the Copyright Office worked to develop the 1909 Act and provided guidance on the new types of works subject to copyright, such as motion pictures, and on rights such as recording and performing rights in nondramatic literary works. Leading up to the comprehensive 1976 Act, we provided extensive studies and reports guiding a number of issues, including the expansion of copyright beyond the fine arts and to separable elements of useful articles. We are very appreciative that Congress has recognized our expertise and assistance throughout the years. The House Judiciary Committee Chairman, Jerry Nadler, recently stated that "[t]he Copyright Office has maintained a high level of service to the public and to Congress in spite of very limited funding and serious

16. *Id.*
17. *See* Star Athletica, LLC v. Varsity Brands, Inc., 137 S. Ct. 1002 (2017).
18. No. CV 08-6506 GAF, 2010 WL 4457460 (C.D. Cal. May 12, 2010).
19. 488 F.3d 277 (4th Cir. 2007).
20. *Star Athletica*, 137 S. Ct. 1002.
21. 347 U.S. 201 (1954).

staffing shortages."[22] And former Chairman Bob Goodlatte noted that "[a]lthough small in size, the Copyright Office is not small in importance. America's creativity is the envy of the world, and the Copyright Office is at the center of it."[23] Former House Judiciary IP Subcommittee Chairman Coble remarked that "the Copyright Office has served as a wellspring of sound advice and counsel."[24] We are, of course, glad to be of service to Congress, and plan to work with them on more copyrightability issues in the future.

So, all of this to say: We're a little bit interested in copyrightability. This is very exciting to be able to spend an entire day with the rest of the Copyright Office staff, as well as copyright nerds throughout the world. We hope that you enjoy this program and, of course, we thank Columbia for working with us on this. Thank you very much.

22. *U.S. Copyright Office: Its Functions and Resources: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 73–74 (2015).

23. *Id.* at 1.

24. *The Register's Call for Updates to U.S. Copyright Law: Hearing Before the Subcomm. on Courts, Intell. Prop. & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 1 (2013).