

Curious Cases of Copyrightability Before the Copyright Office

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INTRODUCTION

Administering the national registration program is a core function of the Copyright Office. In most cases, determining copyrightability of a claim submitted for registration is simple, and the Office does not need to correspond over or otherwise belabor the mine run of applications to determine whether a work possesses the creative spark necessary to register a copyright interest. As the Supreme Court has noted, “the requisite level of creativity is extremely low,” and “[t]he vast majority of works make the grade quite easily.”¹

Sometimes, however, applied-for works invoke modes of authorship that test that standard, and the Copyright Office must resolve these claims. Applicants may contest refusals to register claims, culminating in the ability to lodge a final administrative appeal to the Copyright Office Review Board. As a member of that Board for the past four years, I’ve seen the Office apply established principles of copyrightability to a variety of dynamic claims.

I. THE COPYRIGHT OFFICE’S ADMINISTRATIVE PROCESSES TO EVALUATE COPYRIGHTABILITY

While protection subsists upon creation of a copyrightable work, registration of claims to copyright can confer important benefits, including a legal presumption of the validity of the copyright and, if timely made, the ability to recover statutory damages and attorneys’ fees.² When an application to register a claim to copyright is filed, the copyrightability of the asserted work is examined by a registration specialist who has been trained to faithfully apply the copyright law as well as the Office’s own administrative practices in examining claims to copyright, including its

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1. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

2. 17 U.S.C. §§ 101, 410, 412 (2017).

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regulations and *Compendium of U.S. Copyright Office Practices* (“*Compendium*”).³ Although the Office receives hundreds of thousands of applications annually, it refuses only a small minority of claims on the basis of copyrightability; in 2018 the Office rejected around 25,000 registration claims.⁴ To be sure, while flat-out refusals are proportionately low, that number may mask the overall number of claims that assert insufficiently copyrightable subject matter. When questions of copyrightability arise, the Office may correspond with the applicant to try to register the claim; in 2018 the Office corresponded on twenty-nine percent of claims, and a full nine percent of claims were ultimately abandoned by the applicant, including claims for which the Office questioned whether the work at issue contained copyrightable subject matter.⁵

The Office’s registration regulations set forth two avenues for reconsideration of a refusal. If registration is denied, the applicant is entitled by regulation to request that this initial refusal by the Registration Program be reconsidered and to submit additional supporting documentation.⁶ If the refusal is maintained, the applicant may request a second reconsideration from the Copyright Office Review Board (“Board”). Decisions by the Board are nonprecedential and constitute final agency action, and denials can be challenged under the Administrative Procedures Act.⁷ The Board consists of the Register of Copyrights and the General Counsel (or their designees), and a third member designated by the Register.⁸ While every level of the registration system regularly handles novel claims as they arise, the reconsideration procedures create a natural winnowing mechanism. As a result, the Board in particular often must resolve idiosyncratic or unusual requests to register claims to copyright.

The Copyright Office received forty-four second requests for reconsideration in fiscal 2018.⁹ The Office’s website hosts a filterable online index of Board decisions from April 2016 to present, addressing some of the Office’s most complex claims, some of which are discussed below.¹⁰

3. See U.S. COPYRIGHT OFFICE, *COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES* (3d ed. 2017) [hereinafter *COMPENDIUM*]. For more about the registration examination training process, see Letter from Karyn A. Temple, Register of Copyrights, to Representatives Jerrold Nadler & Doug Collins, House Judiciary Comm. 20–21 (May 31, 2019), <https://perma.cc/CX5Y-WZQB>.

4. U.S. COPYRIGHT OFFICE, *FISCAL 2018 ANNUAL REPORT* 6–7 (2019), <https://perma.cc/Z9EF-YRDK>.

5. *Id.* at 7. The Office has been working to reduce the correspondence necessary through various regulatory and educational initiatives, and it currently corresponds with twenty-six percent of claimants. U.S. COPYRIGHT OFFICE, *REGISTRATION PROCESSING TIMES* (2019), <https://perma.cc/UEK7-Z5RC>.

6. 37 C.F.R. § 202.5(b) (2018).

7. 37 C.F.R. § 202.5(c), (g) (2018).

8. 37 C.F.R. § 202.5(f) (2018).

9. U.S. COPYRIGHT OFFICE, *supra* note 4, at 7.

10. *Review Board Letters Online*, COPYRIGHT.GOV, <https://perma.cc/K8DC-WCBB> (last visited Jan. 23, 2020).

II. TYPICAL CONSIDERATIONS IN COPYRIGHTABILITY EVALUATIONS

Many of the Office’s rejections on the basis of copyrightability involve considerations regarding whether the work contains subject matter that the Office’s regulations consider “material not subject to copyright,” namely:

- Words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents;
- Ideas, plans, methods, systems, or devices, as distinguished from the particular manner in which they are expressed or described in a writing;
- Blank forms, such as time cards, graph paper, account books, diaries, bank checks, scorecards, address books, which are designed for recording information and do not in themselves convey information;
- Works consisting entirely of information that is common property, such as standard calendars, height and weight charts, tape measures and rulers, schedules of sporting events, and lists or tables taken from public documents; and
- Typeface as typeface.

Section 202.1 of the Office’s regulations, first established in 1959, codifies this list of material, which has been approvingly cited by a variety of courts.¹¹ In addition, although not the focus of this essay, many requests for reconsideration involve allegedly separable and original aspects of useful articles otherwise unprotectable under the Copyright Act.¹² In evaluating applications, the Office also considers other limitations on copyright protection, including fixation, authorship, and the enumerated categories of copyrightable subject matter under § 102.¹³

Each of these considerations stems from established case law and is further explained in the Office’s guidance materials and public information. For example, *Compendium* Section 313.3(B) states:

In some cases, there may be only one way or only a limited number of ways to express

11. 37 C.F.R. § 202.1 (2018); *see* *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F.2d 541, 544 (2d Cir. 1959) (concluding that the Office’s regulation barring the registration of short phrases is “a fair summary of the law”); *CMM Cable Rep., Inc. v. Ocean Coast Props., Inc.*, 97 F.3d 1504, 1519 (1st Cir. 1996) (“It is axiomatic that copyright law denies protection to ‘fragmentary words and phrases’ and to ‘forms of expression dictated solely at functional considerations’” because they “do not exhibit the minimal level of creativity necessary to warrant copyright protection.”); *Situation Mgmt. Sys. v. ASP Consulting L.L.C.*, 560 F.3d 53, 61 (1st Cir. 2009) (stating that “*descriptions* of a process or system are copyrightable, but the underlying process or system itself is not”); *Murray Hill Publ’ns v. ABC Commc’ns*, 264 F.3d 622, 633 (6th Cir. 2001) (concluding that the phrase “Good Morning Detroit. This is J.P. on JR in the A.M. Have a swell day” is “not worthy of copyright protection in its own right”).

12. 17 U.S.C. § 101 (2017); *see* *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1007 (2017) (in some instances, “a feature incorporated into the design of a useful article is eligible for copyright protection”).

13. 17 U.S.C. §§ 101, 102(a) (2017).

a particular idea, procedure, process, system, method of operation, concept, principle, or discovery. . . . For example, the Office cannot register a claim in the mere idea for a story that is based on a common theme, such as “a quarrel between a Jewish father and an Irish father, the marriage of their children, the birth of grandchildren and a reconciliation.” See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2d Cir. 1930). The Office cannot register a claim based solely on standard programming techniques that are commonly used to achieve a specific result in a computer program. See, e.g., *Sega Enterprises, Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1524 (9th Cir. 1992). Likewise, the Office cannot register a claim based solely on standard expressions that naturally follow from the idea for a work of authorship, such as a sculpture that depicts a brightly colored jellyfish swimming in a vertical orientation. See *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003).¹⁴

Similarly, other sections of the *Compendium* document the Office’s recognition that copyrightable authorship requires creative input from a human author.¹⁵ In this way, the Office’s regulations and guidance documents are intended to reflect established principles of copyright law—including the settled legal principles of *scènes à faire* and merger—to guide the administration of the registration program and educate applicants about the standards for copyright protection.

Letters from the Board demonstrate how the Office has analyzed certain claims to copyright under these standards. In *Pizza Slide Pool Float*, the Office refused to register a claim in visual art that it concluded was an “entirely standard and commonplace representation of a slice of pepperoni pizza.”¹⁶ Pointing to case law declining to protect depictions of candy canes and Chinese food dishes, the Board concluded that registration would not serve the interests of copyright and “would essentially grant copyright protection to the idea” of a basic slice.¹⁷ In *Story Log*, the Board concluded that to register a repetition of the mark STORY with a stylized “O” would impermissibly extend copyright protection to typeface.¹⁸ In *Nationwide*, the Board concluded the four corners of a logo featuring a square, a rectangle, the color blue, and the word “NATIONWIDE,” even when taken together, were insufficient to render it original.¹⁹ And in *Canetti Cursivus Guide for Cursive Writing and Calligraphy*, the Board upheld a refusal to register an unembellished blank form designed to train users to write in cursive.²⁰

14. COMPENDIUM, *supra* note 3, § 313.3(B).

15. See *id.* §§ 306, 313.2.

16. Letter from Chris Weston, Copyright Office Review Bd., to Jeanette Wiser, Epstein Drangel LLP (July 11, 2017), <https://perma.cc/G2XL-2WSP>.

17. *Id.* at 5 n.2 (citing *Ellison Educ. Equip., Inc. v. Tekservices, Inc.*, 903 F. Supp. 1350, 1360 (D. Neb. 1995); *Oriental Art Printing, Inc. v. Goldstar Printing Corp.*, 175 F. Supp. 2d 542, 546 (S.D.N.Y. 2001)).

18. Letter from Regan A. Smith, Copyright Office Review Bd., to Bryce J. Maynard, Buchanan Ingersoll & Rooney PC 4 (Nov. 28, 2017), <https://perma.cc/ABK7-ZE7N>.

19. Letter from Catherine Rowland, Copyright Office Review Bd., to Ryan J. Aaron, Nationwide Mutual Insurance Co. (Apr. 21, 2016), <https://perma.cc/V6UD-7DE> (citing *Coach Inc. v. Peters*, 386 F. Supp. 2d 495, 498 (S.D.N.Y. 2005)).

20. Letter from Regan A. Smith, Copyright Office Review Bd., to James C. Evans, Canetti Cursivus Guide LLC (Sept. 27, 2018), <https://perma.cc/C5DV-9HD2> (citing *Baker v. Selden*, 101 U.S. 99, 102–04 (1879)).

III. CHALLENGES TO COPYRIGHTABILITY EVALUATIONS

A. IT IS ART, BUT IS IT COPYRIGHTABLE?

In keeping with the Supreme Court's holding in *Bleistein*, the Copyright Office endeavors to apply the same standards regardless of commerciality or artistic reception.²¹ For example, in the case of logos, the Office must determine whether there is copyrightable authorship in a given logo regardless of its trademark strength. As an obvious example, the Office would not register a claim to copyright in the federally trademarked colors Tiffany blue or UPS brown, since colors themselves are not copyrightable.²² This limitation makes sense because, unlike trademark rights, copyright protection is not limited to specific goods and services, or to use in commerce.

Conversely, because the Office must evaluate each application from the perspective of administering the copyright law, it is sometimes placed in the odd position of asking, "This work may be art, but is it copyrightable?"²³ An example was acclaimed American artist Cady Noland's sculpture *Log Cabin*. In this work, the façade of a basic log cabin, the artist "construct[ed] the front of a house . . . to showcase the failed promise of the American dream, including using smooth logs, installing window and door openings, [and] settling on the dimensions of the piece."²⁴ The application also conceded "that the shape of the façade, and the inclusion of a [sic] window and door openings are typical features [that] are found in architecture," although registration was sought as a sculptural, rather than architectural, work.²⁵ After careful consideration, the Board concluded that the work was "a simple representation of a standard log cabin façade with joinery; thus any authorship is de minimis."²⁶ The Board noted, however, that it did not "evaluate or dismiss the Work (or its value) as an art object"; rather, it cited legislative history cautioning that "[t]he phrase 'original works of authorship' . . . does not include requirements of . . . esthetic merit, and there is no intention to enlarge the standard

21. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.").

22. *Compare* 37 C.F.R. § 202.1(a) (1992) (coloring not copyrightable), *with* U.S. Trademark Registration No. 2,359,351 (registration for Tiffany blue, "a shade of blue often referred to as robin's-egg blue which is used on boxes"), *and* U.S. Trademark Registration No. 2,131,693 (registration for UPS brown, "the color brown applied to the vehicles used in performing the services"). *See also* U.S. Trademark Registration No. 3,361,597 (registration by Christian Louboutin for "a red lacquered outsole on footwear that contrasts with the color of the adjoining ('upper') portion of the shoe").

23. Elsewhere in this Issue, Megan Noh suggests that one approach to addressing this perceived problem of uncopyrightability in certain works recognized as art could be to eliminate the copyrightability requirement in favor of a more tailored standard for works to receive protection under the Visual Artists Rights Act ("VARA"). *See generally* Megan E. Noh, *U.S. Law's Artificial Cabining of Moral Rights: The Copyrightability Prerequisite and Cady Noland's Log Cabin*, 43 COLUM. J.L. & ARTS 353 (2020).

24. Letter from Karyn A. Temple, Copyright Office Review Bd., to Andrew Epstein, Barker, Epstein & Loscocco (May 25, 2018), <https://perma.cc/G9J6-33AN> (citing Letter from Andrew Epstein to U.S. Copyright Office 2–3 (Dec. 8, 2017) ("Second Request")).

25. *Id.* at 4.

26. *Id.*

of copyright protection to require them.”²⁷ Accordingly, it stood by the principle that “in considering whether the Work meets the minimum degree of creativity for copyright protection, the Board must explicitly avoid weighing the artistic merit of a particular work.”²⁸

In other cases, sculptural works have received registration, but only after unprotectable dynamic or natural elements were disclaimed from protection. For example, *Tricorn* concerned the copyrightability of a sculpture that combined geometric shapes (triangles, circular mesh screens, a pole, and an arrangement of circles at the bottom), augmented by light and running water effects; the sculpture is currently installed in a bed of water at a Washington, D.C., park.²⁹ In requesting reconsideration, the applicant suggested that:

[T]he [Work’s] creative authorship elements are best describe[d] if we consider the sculpture as a light box that reacts to both sunlight and artificial lighting depending on the position of the viewer, the season of the year, the urban obstacles surrounding the sculpture—building and trees—the hour of the day, and, on how this same viewer moves around the object during the day or night. It is a work of Kinetic Art in its most basic interpretation.³⁰

The second request for reconsideration further explained that water moving across the surface of the pond upon which the base of the work is installed “creat[es] ripples [that] alter the image produced when light travels across its surface.”³¹ But while the overall artistic impact of the sculpture might rely upon transient, natural, and non-fixed elements, the Board noted that the water or lighting elements were lacking in human authorship or fixation and must be excluded. Considering the remainder of the work as a whole, the Board concluded that a modest amount of creativity remained, sufficient to generate a thin copyright interest.³²

B. SEARCHING FOR A GHOST IN THE MACHINE

Other challenges to established authorship requirements come from unexpected corners. In *Lumenscript*, an applicant sought to register two electronic data files as computer programs intended to be used to recreate the lighting conditions of, respectively, the peak of Mount Fuji and a generic sunset.³³ Specifically, the data, which was gathered by spectrometers at the relevant locations, was intended to be used as an input to a microcontroller which would run an array of light-emitting

27. *Id.* at 5 (citing H.R. REP. NO. 94-1476, at 51 (1976)).

28. *Id.*

29. Letter from Regan A. Smith, Copyright Office Review Bd., to Duilio Passariello (July 27, 2017), <https://perma.cc/4HDD-DGWH>.

30. *Id.* at 3 (quoting Letter from Duilio Passariello to U.S. Copyright Office 1 (Feb. 5, 2016) (on file with the U.S. Copyright Office)).

31. *Id.* (quoting Letter from Duilio Passariello to U.S. Copyright Office 1–2 (Sept. 23, 2016) (on file with the U.S. Copyright Office)).

32. *Id.* at 2–3 (citing *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 304 (7th Cir. 2011) (stating that “authorship is an entirely human endeavor”)).

33. Letter from Chris Weston, Copyright Office Review Bd., to William F. Lang IV, *Teledumen LLC* (Mar. 16, 2017), <https://perma.cc/M78C-W6CP>.

diodes that produce light of given wavelengths in a luminaire. Evaluating the deposits, the Board first concluded that the works were formatted data files which failed to meet the statutory definition of a computer program, because they lacked commands and did not serve as “a set of instructions to be used directly or indirectly in a computer to bring about a certain result.”³⁴ In its reasoning, the Board noted that the Copyright Act distinguishes computer programs from computer databases, and that the applicant had admitted that while its *other* files “may contain looping, branching, and subroutine commands, making them more than mere data files,” this could not be said of the works at issue.³⁵

Next, the Board considered whether the data files were alternatively protectable under the broader category of literary works.³⁶ It concluded that the works, essentially data gathered by scientific instruments, were unprotectable compilations of facts. Here, the works were each a collection of information about “particular wavelengths and intensity of light at a particular place over a particular period of time.”³⁷ Such factual information is not protectable, and the application did not indicate any creativity in selecting, coordinating, or arranging this data beyond a dutiful fidelity to observable natural phenomena.³⁸ Moreover, in this case, the factual data was collected by a mechanical process rather than as a product of human authorship. As the *Compendium*, following the guidance of the Commission on New Technological Uses of Copyrighted Works (“CONTU”), states, “the Office will not register works produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author.”³⁹ While photographs of a sunset are generally registrable, reflecting creative choices by the author of the photograph, here, the applicant’s formatted data files were more analogous to HTML code generated by website design software, or to the outputs of X-rays or MRI machines—all examples for which the Office’s established guidance indicates copyright protection is typically unavailable.⁴⁰

C. NO BONES ABOUT IT

The Copyright Office applies the human authorship requirement equally to

34. *Id.* at 5–6 (citing 17 U.S.C. § 101 (2010)).

35. *Id.* (citing Letter from William F. Lang IV, Lang Patent Law LLC, to U.S. Copyright Office 9 (Sept. 17, 2014)).

36. *Id.* at 6–7.

37. *Id.* at 7.

38. *Id.*; see also *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347–48 (1991).

39. *COMPENDIUM*, *supra* note 3, § 313.2.

40. *Compare* Letter from Chris Weston to William F. Lang IV, *supra* note 33, at 7, with *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 54 (1884) (holding that “arranging the costume, draperies, and other various accessories in [a] photograph, arranging the subject so as to present graceful outlines, [and] arranging and disposing the light and shade” made a photograph “an original work of art” subject to copyright protection), and *COMPENDIUM*, *supra* note 3, §§ 313.2 (stating there is no copyrightable authorship in random or automated mechanical processes lacking human creative input, including medical imaging such as X-rays and MRIs), 1006.1(A) (stating that the Office will not register claims for website HTML if HTML was generated automatically by web design software because in such instances “the website designer is not considered the author of the resulting markup language”).

ancient bones and futuristic genetic mutations. Twice, the Board has rejected claims to register copyrightable interests in recreated dinosaur skeletons.⁴¹ To start, “[t]he Office will not register works produced by nature, animals, or plants.”⁴² But while dinosaur fossils surely rest comfortably in the public domain, these efforts to obtain copyright interests in assemblies of, respectively, a stegosaurus and a hadrosaur unearthed additional angles for the Board to analyze. First, applicants both contended that the creation of bone replicas and fill-ins to complete skeletons from molded casts was creative. Applying the reasoning of a Ninth Circuit opinion limiting protection for stuffed dinosaur toys, the Board concluded that the fabrication of these replicas was dictated by the physiognomy of the remainder of the skeleton, and that the overall desire to be faithful to the rest of the natural structure precluded sufficient creativity in the replica designs.⁴³ For similar reasons, the Board also concluded that the assemblies of skeletons did not exhibit the necessary modicum of creativity. Despite pointing out that the stegosaurus is an extinct animal that “no human being has ever seen,” that applicant admitted that the work’s assembly was based upon scientific interpretations of how the animal’s various bones may have appeared, with the goal of creating a “complete skeleton.”⁴⁴ The typical skeletal arrangement of a hadrosaur, apparently the “most common” family of dinosaurs and dinosaur fossils, also represented a standard depiction of realistic physiognomy.⁴⁵

Related logic compelled earlier Board refusals of genetically altered fish and poinsettia plants. In *GloFish Red Zebra Danio Glowing in Artificial Sunlight*, the Board refused to register a claim in “a living work of authorship,” namely, a glowing Red Zebra Danio fish.⁴⁶ The Copyright Office pointed out that “genetically modified living things do not fall under one of the categories of copyrightable authorship enumerated in Section 102(a).”⁴⁷ Nor was it persuaded that the injection of non-native DNA into a fish’s genetic makeup was akin to “a painter using paint on a canvas,” transforming the fish into a pictorial, graphic, or sculptural work.⁴⁸ In any event, the Board pointed out that the appearance of the sentient fish was affected by other uncontrollable factors, including the “amount of available light, feeding habits,

41. Letter from Catherine Rowland, Copyright Office Review Bd., to Thomas Kjellberg, Cowan, Liebowitz & Latman, P.C. (Nov. 22, 2017), <https://perma.cc/NAH6-HPKN>; Letter from Karyn A. Temple, Copyright Office Review Bd., to Alberto Q. Amatong, Jr., Amatong McCoy LLC (Sept. 24, 2019), <https://perma.cc/BD8X-TUUM>.

42. COMPENDIUM, *supra* note 3, § 313.2.

43. See Letter from Catherine Rowland to Thomas Kjellberg, *supra* note 41; Letter from Karyn A. Temple to Alberto Q. Amatong, Jr., *supra* note 41 (both citing *Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 901 (9th Cir. 1987)).

44. Letter from Catherine Rowland to Thomas Kjellberg, *supra* note 41 (citing Letter from Thomas Kjellberg, Cowan & Liebowitz & Latman, to U.S. Copyright Office 1 (Feb. 9, 2016) (on file with the U.S. Copyright Office)).

45. Letter from Karyn A. Temple to Alberto Q. Amatong, Jr., *supra* note 41.

46. Letter from William J. Roberts, Jr., Copyright Office Review Bd., to Tamsen Barrett, Fulbright & Jawarski LLP (Sept. 5, 2013), <https://perma.cc/8ML5-EB5Y> (citing Letter from Tamsen Barrett to Copyright R&P Division 2–3 (Mar. 14, 2011) (on file with the U.S. Copyright Office)).

47. *Id.* at 2.

48. *Id.* at 3 (citing Letter from Tamsen Barrett to Copyright R&P Division 3 (Mar. 14, 2011) (on file with the U.S. Copyright Office)).

level of nutrients in the water, age, etc.”⁴⁹ In a sense, the Board’s approach can be analogized to the First Circuit’s memorable holding that the relevant “district court properly determined that a chicken sandwich is not eligible for copyright protection.”⁵⁰ When confronted with a potential work that seemingly fell outside of the enumerated categories of authorship, the Office considered whether there were sufficient indicia of authorship within those categories—pictorial, graphic, or sculptural elements in the case of the fish; literary text in the form of a trademark or recipe in the case of the sandwich. Similar reasoning, as well as analysis of the exclusion of “discoveries” from copyright protection under § 102(b), compelled the Board to reject an application to register two genetically modified poinsettia plants.⁵¹

D. BUT CAN YOU DANCE TO IT?

An area of recent and recurring interest is the line between copyrightable choreography and uncopyrightable dance steps. When Congress added choreography to the list of categories of copyrightable works without defining the term, it considered self-evident that “‘choreographic works’ do not include social dance steps and simple routines.”⁵² Under its authority to interpret and implement the Copyright Act, the Office has defined choreography as “the composition and arrangement of ‘a related series of dance movements and patterns organized into a coherent whole.’”⁵³ Because choreography is a series of dance movements, individual dance steps are not separately copyrightable because they are basic building blocks of choreography, much like music notes or simple shapes.⁵⁴ The Office rejects claims that consist merely of social dances, such as square dances or break dances, or short dance steps, such as the “YMCA” or celebratory football end zone dances.⁵⁵

For this reason, the Board in 2013 rejected a claim to “Ode to the Endzone,” a dance that combined end zone dance moves performed previously by other football players, including the “Heisman Trophy pose,” the “California Quake,” and the “Funky Chicken.”⁵⁶ After rejecting copyrightability of the constituent dance moves for lack of originality, the board rejected the full claim because, viewed as a whole, *Ode to the Endzone* was a “fairly haphazard collection of routines and dance steps”

49. *Id.* at 4 (citing *Kelley v. Chi. Park Dist.*, 635 F.3d 290 (7th Cir. 2011)).

50. *Lorenzana v. S. Am. Rests. Corp.*, 799 F.3d 31, 34 (1st Cir. 2015).

51. Letter from David O. Carson, Copyright Office Review Bd., to Nishan Kottahachchi, Cooley, Godward & Kronish, LLP (Oct. 26, 2011), <https://perma.cc/BR6N-FQEJ> (citing H.R. REP. NO. 94-1476 (1976)).

52. H.R. REP. NO. 94-1476, at 54 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5667; S. REP. NO. 94-473, at 52 (1975).

53. COMPENDIUM, *supra* note 3, § 805.1; *see also* *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 161 (2d Cir. 1986) (adopting *Compendium* definition).

54. *See* COMPENDIUM, *supra* note 3, § 805.5(A) (“Individual dance steps and short dance routines are the building blocks of choreographic expression, and allowing copyright protection for these elements would impede rather than foster creative expression.”).

55. COMPENDIUM, *supra* note 3, § 805.5(A), (B).

56. Letter from William J. Roberts, Jr., Copyright Office Review Bd., to Henry M. Abromson, Greber & Associates, PC (Sept. 27, 2013) (on file with author).

rather than a series of dance movements organized into a coherent whole.⁵⁷ Similar logic underpinned the Board's rejection of choreography claims directed at videos of performers wearing inflated animal costumes and doing dances such as the YMCA; the claims lacked dramatic content or theme and instead consisted of a "brief routine" and "relatively few steps."⁵⁸

More recently, this issue has arisen in litigation around the video game *Fortnite*, a game that can be played for free but sells ways to personalize a user's avatar, such as costumes or "emotes," dance movements players can use to express themselves in the game. The company developing the game sold emotes reproducing well-known dance moves, such as the "Carlton" dance performed by the character Carlton Banks on the TV show *The Fresh Prince of Bel-Air*. The actor who played Carlton, Alfonso Ribeiro, attempted to register the dance move, but the Office rejected the application. The rejection noted that the Carlton "consists of a simple routine made up of three dance steps," the combination of which was a simple routine that did not rise to the level of choreography.⁵⁹ That case, as well as similar cases involving dance moves such as the "Floss" and the "Milly Rock," was later dismissed by the plaintiff as a result of the Supreme Court's decision in *Fourth Estate Public Benefit Corp. v. Wall-Street.com* because none of the dance moves had received final registration or refusal of their claims as required to initiate litigation under § 411(a).⁶⁰ None of those dance claims have had second reconsideration requests come before the Board.

IV. CONCLUSION

In the course of administering the Copyright Act, the Copyright Office must routinely determine whether works are original and sufficiently creative to be registered. In most cases, application of established legal rules easily separates out works with the required modicum of creative spark from the unprotectable. At the edges, new creations and innovations will continue to push and refine these rules, as they should. This refinement does not indict the various and long-tested legal assumptions underpinning copyright protection. Rather, pressures from evolving claims of authorship help clarify copyright doctrine to ensure it continues to protect eligible expression while sustaining a robust public commons of material.

57. *Id.* at 6–7; *cf.* COMPENDIUM, *supra* note 3, § 805.1 (choreography is "a related series of dance movements and patterns organized into a coherent whole").

58. Letter from William J. Roberts, Jr., Copyright Office Review Bd., to Anthony M. Zelli, Dinsmore & Shohl LLP (Sept. 27, 2013) (on file with author).

59. Motion to Dismiss, Exhibit M at 7–8, *Ribeiro v. Take-Two Interactive Software, Inc.*, No. 2:18-cv-10417 (C.D. Cal. Feb. 13, 2019), ECF No. 49-16 (correspondence with Copyright Office).

60. *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com*, 139 S. Ct. 881, 892 (2019) (holding registration is "made" when "the Register has registered a copyright after examining a properly filed application").