LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. 2012-6]

Registration of Claims to Copyright

AGENCY: Copyright Office, Library of Congress.

ACTION: Statement of Policy; Registration of Compilations.

SUMMARY: The Copyright Office issues this statement of policy to clarify the practices relating to the examination of claims in compilations, and particularly in claims of copyrightable authorship in selection and arrangement of exercises or of other uncopyrightable matter. The statement also clarifies the Office's policies with respect to registration of choreographic works.

DATES: *Effective* [INSERT DATE OF PUBLICATION IN THE **FEDERAL REGISTER**].

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SUPPLEMENTARY INFORMATION: The Copyright Office is issuing a statement of policy to clarify its examination practices with respect to claims in "compilation authorship," or the selection, coordination, or arrangement of material that is otherwise separately uncopyrightable. The Office has long accepted claims of registration based on the selection, coordination, or arrangement of uncopyrightable elements, because the Copyright Act specifically states that copyrightable authorship includes compilations. 17 U.S.C. 103.

The term "compilation" is defined in the Copyright Act:

> A "compilation" is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.

17 U.S.C. 101 ("compilation"). This definition's inclusion of the terms "preexisting material" or "data" suggest that individually uncopyrightable elements may be compiled into a copyrightable whole. The legislative history of the 1976 Act supports this interpretation, stating that a compilation "results from a process of selecting, bringing together, organizing, and arranging previously existing material of all kinds, *regardless of whether the individual items in the material have been or ever could have been subject to copyright*." H.R. Rep. 94-1476, at 57 (emphasis added).

Viewed in a vacuum, it might appear that *any* organization of preexisting material may be copyrightable. However, the Copyright Act, the legislative history and the Supreme Court's decision in *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (U.S. 1991), lead to a different conclusion.

In *Feist*, interpreting the congressional language in the section 101 definition of "compilation," the Supreme Court found protectable compilations to be limited to "a work formed by the collection and assembling of preexisting material or data that are selected, coordinated, or arranged *in such a way that* the resulting work as a whole constitutes an original work of authorship." *Feist* at 356, *quoting* 17 U.S.C. 101 ("compilation") (emphasis by the Court). The Court stated:

> The purpose of the statutory definition is to emphasize that collections of facts are not copyrightable per se. It conveys this message through its tripartite structure, as emphasized above by the italics. The statute identifies three distinct elements and requires each to be met for a work to qualify as a copyrightable compilation: (1) the collection and assembly of pre-existing material, facts, or data; (2) the selection, coordination, or arrangement of those materials; and (3) the creation, by

> virtue of the particular selection, coordination, or arrangement, of an "original" work of authorship. . . .
>
> Not every selection, coordination, or arrangement will pass muster. This is plain from the statute. … [W]e conclude that the statute envisions that there will be some fact-based works in which the selection, coordination, and arrangement are not sufficiently original to trigger copyright protection.

Feist, 499 U.S. at 357-358 (U.S. 1991)

The Court's decision in *Feist* clarified that some selections, coordinations, or arrangements will not qualify as works of authorship under the statutory definition of "compilation" in section 101. However, a question that was not present in the facts of *Feist* and therefore not considered by the Court, is whether the selection, coordination, or arrangement of preexisting materials must relate to the section 102 categories of copyrightable subject matter.

In *Feist*, Rural Telephone's alphabetical directory was found deficient due to a lack of originality, i.e., of sufficient creativity. Had the items contained in the directory (names, addresses and telephone numbers) been selected, coordinated, or arranged in a sufficiently original manner, there is no question that the resulting compilation would have fit comfortably within the category of literary works -- the first category of copyrightable authorship recognized by Congress in section 102. But what if an original selection, coordination, or arrangement of preexisting material did not fall within a category of section 102 authorship? For instance, is a selection and arrangement of a series of physical movements copyrightable, if the resulting work as a whole does not fit within the categories of pantomime and choreographic works or dramatic works, or any other category?

Although the *Feist* decision did not address this question, the Copyright Office concludes that the statute and relevant legislative history require that to be registrable, a compilation must fall within one or more of the categories of authorship listed in section 102. In other words, if a

selection and arrangement of elements does not result in a compilation that is subject matter within one of the categories identified in section 102(a), the Copyright Office will refuse registration.

The Office arrives at this conclusion in accordance with the instruction of the Supreme Court in *Feist*: "the established principle that a court should give effect, if possible, to every clause and word of a statute," citing *Moskal v. United States,* 498 U.S. 103, 109-110 (1990). Applying this principle, the Office finds that in addition to the statutory definition of "compilation" in section 101, Congress also provided clarification about the copyrightable authorship in compilations in section 103(a) of the Copyright Act:

> The *subject matter of copyright as specified by section 102 includes compilations* and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

17 U.S.C. 103(a). (emphasis added).

Section 103 makes it clear that compilation authorship is a subset of the section 102(a) categories, not a separate and distinct category. Section 103 and the definition of "compilation" in Section 101 also mark a departure from the treatment of compilations under the 1909 Act, which listed composite works and compilations as falling within the class of "books." The 1976 Act significantly broadened the scope of compilation authorship to include certain selection, coordination, or arrangement that results in a work of authorship. But that expansion also makes it clear that not every selection, coordination, or arrangement of material is copyrightable. Only selection, coordination, or arrangement that falls within section 102 authorship is copyrightable, i.e., is selected, coordinated, or arranged *in such a way* that the resulting work as a whole constitutes an

original work of authorship. Moreover, section 103 provides that compilations fall within "[t]he subject matter of copyright as specified by section 102," and the legislative history of the 1976 Act confirms what this means: "Section 103 complements section 102: A compilation or derivative work is copyrightable if it represents an 'original work of authorship' *and falls within one or more of the categories listed in section 102*." H.R. Rep. 94-1476 at 57 (1976) (emphasis added).

This requirement indicates that compilation authorship is limited not only by the tripartite structure of the statutory definition of "compilation," but that in addition, a creative selection, coordination, or arrangement must *also* result in one or more congressionally recognized categories of authorship.

Although the statute together with the legislative history warrant this conclusion, it is far from obvious when the statutory definition of "compilation" is read in isolation. Moreover, other portions of the legislative history have obscured this interpretation.

The legislative history states that the term "works of authorship" is said to "include" the seven categories of authorship listed in section 102 (now eight with the addition of "architectural works"), but that the listing is "illustrative and not limitative." H.R. Rep 94-1476, at 53. If these categories of authorship are merely illustrative, may courts or the Copyright Office recognize new categories of copyrightable authorship? Given that Congress chose to include some categories of authorship in the statute, but not other categories, did Congress intend to authorize the courts or the Copyright Office to recognize authorship that Congress did not expressly include in the statute? For instance, the decision to include "pantomimes and choreographic works" as a new category of authorship that did not exist under the 1909 Act was the subject of much deliberation, including a commissioned study and hearings. Copyright Office Study for

Congress. Study No. 28, "Copyright in Choreographic Works," by Borge Varmer; Copyright Law Revision, Part 2, Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, House Comm. on the Judiciary (February 1963) at 8-9. Similarly, the decision not to include typeface as copyrightable authorship was a deliberate decision. H.R. Rep 94-1476, at 55. Could Congress have intended the courts or the Office to second-guess such decisions, or accept forms of authorship never considered by Congress?

Again, the answer lies in the legislative history. First, the legislative history states that "In using the phrase 'original works of authorship,' rather than 'all the writings of an author,' the committee's purpose was to avoid exhausting the constitutional power of Congress to legislate in this field, and to eliminate the uncertainties arising from the latter phrase." H.R. Rep 94-1476, at 51. Thus, one goal of the illustrative nature of the categories was to prevent foreclosing the congressional creation of new categories:

> The history of copyright law has been one of gradual expansion in the types of works accorded protection, and the subject matter affected by this expansion has fallen into one of two categories. In the first, scientific discoveries and technological developments have made possible new forms of creative expression that never existed before. In some of these cases the new expressive forms--electronic music, filmstrips, and computer programs, for example--could be regarded as an extension of copyrightable subject matter Congress had already intended to protect, and were thus considered copyrightable from the outset without the need of new legislation. In other cases, such as photographs, sound recordings, and motion pictures, statutory enactment was deemed necessary to give them full recognition as copyrightable works.
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> Authors are continually finding new ways of expressing themselves, but it is impossible to foresee the forms that these new expressive methods will take. The bill does not intend either to freeze the scope of copyrightable technology or to allow unlimited expansion into areas completely outside the present congressional intent. Section 102 implies neither that that subject matter is unlimited nor that new forms of expression within that general area of subject matter would necessarily be unprotected.
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> The historic expansion of copyright has also applied to forms of expression which, although in existence for generations or centuries, have only gradually

> come to be recognized as creative and worthy of protection. The first copyright statute in this country, enacted in 1790, designated only "maps, charts, and books"; major forms of expression such as music, drama, and works of art achieved specific statutory recognition only in later enactments. Although the coverage of the present statute is very broad, and would be broadened further by explicit recognition of all forms of choreography, *there are unquestionably other areas of existing subject matter that this bill does not propose to protect but that future Congresses may want to*.

Id. (emphasis added.)

This passage suggests that Congress intended the statute to be flexible as to the scope of established categories, but also that Congress also intended to retain control of the designation of entirely new categories of authorship. The legislative history goes on to state that the illustrative nature of the section 102 categories of authorship was intended to provide "sufficient flexibility to free the courts from rigid or outmoded concepts of *the scope of particular categories*." *Id*. at 53 (emphasis added). The flexibility granted to the courts is limited to *the scope* of the categories designated by Congress in section 102(a). Congress did not delegate authority to the courts to create new categories of authorship. Congress reserved this option to itself.

If the federal courts do not have authority to establish new categories of subject matter, it necessarily follows that the Copyright Office also has no such authority in the absence of any clear delegation of authority to the Register of Copyrights.

Interpreting the Copyright Act as a whole, the Copyright Office issues this policy statement to announce that unless a compilation of materials results a work of authorship that falls within one or more of the eight categories of authorship listed in section 102(a) of title 17, the Office will refuse registration in such a claim.

Thus, the Office will not register a work in which the claim is in a "compilation of ideas," or a "selection and arrangement of handtools" or a "compilation of rocks." Neither ideas,

handtools, nor rocks may be protected by copyright (although an expression of an idea, a drawing of a handtool or a photograph of rock may be copyrightable).

On the other hand, the Office would register a claim in an original compilation of the names of the author's 50 favorite restaurants. While neither a restaurant nor the name of a restaurant may be protected by copyright, a list of 50 restaurant names may constitute a literary work – a category of work specified in section 102(a) – based on the author's original selection and/or arrangement of the author's fifty favorite restaurants.

An example that has occupied the attention of the Copyright Office for quite some time involves the copyrightability of the selection and arrangement of preexisting exercises, such as yoga poses. Interpreting the statutory definition of "compilation" in isolation could lead to the conclusion that a sufficiently creative selection, coordination or arrangement of public domain yoga poses is copyrightable as a compilation of such poses or exercises. However, under the policy stated herein, a claim in a compilation of exercises or the selection and arrangement of yoga poses will be refused registration. Exercise is not a category of authorship in section 102 and thus a compilation of exercises would not be copyrightable subject matter. The Copyright Office would entertain a claim in the selection, coordination or arrangement of, for instance, photographs or drawings of exercises, but such compilation authorship would not extend to the selection, coordination or arrangement of the exercises themselves that are depicted in the photographs or drawings. Rather such a claim would be limited to selection, coordination, or arrangement of the photographs or drawings that fall within the congressionally-recognized category of authorship of pictorial, graphic and sculptural works.

As another example, Congress has stated that the subject matter of choreography does not include "social dance steps and simple routines." H.R. Rep. 94-1476 at 54 (1976). A

compilation of simple routines, social dances, or even exercises would not be registrable unless it results in a category of copyrightable authorship. A mere compilation of physical movements does not rise to the level of choreographic authorship unless it contains sufficient attributes of a work of choreography. And although a choreographic work, such as a ballet or abstract modern dance, may incorporate simple routines, social dances, or even exercise routines as elements of the overall work, the mere selection and arrangement of physical movements does not in itself support a claim of choreographic authorship.

A claim in a choreographic work must contain at least a minimum amount of original choreographic authorship. Choreographic authorship is considered, for copyright purposes, to be the composition and arrangement of a related series of dance movements and patterns organized into an integrated, coherent, and expressive whole.

Simple dance routines do not represent enough original choreographic authorship to be copyrightable. *Id.* Moreover, the selection, coordination or arrangement of dance steps does not transform a compilation of dance steps into a choreographic work unless the resulting work amounts to an integrated and coherent compositional whole. The Copyright Office takes the position that a selection, coordination, or arrangement of functional physical movements such as sports movements, exercises, and other ordinary motor activities alone do not represent the type of authorship intended to be protected under the copyright law as a choreographic work.

In addition to the requirement that a compilation result in a section 102(a) category of authorship, the Copyright Office finds that section 102(b) precludes certain compilations that amount to an idea, procedure, process, system, method of operation, concept, principle or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work. In the view of the Copyright Office, a selection, coordination, or arrangement of

exercise movements, such as a compilation of yoga poses, may be precluded from registration as a functional system or process in cases where the particular movements and the order in which they are to be performed are said to result in improvements in one's health or physical or mental condition. *See, e.g, Open Source Yoga Unity v. Choudhury,* 2005 WL 756558, *4, 74 U.S.P.Q.2d 1434 (N.D. Cal. 2005) ("Here, Choudhury claims that he arranged the asanas in a manner that was both aesthetically pleasing and in a way that he believes is best designed to improve the practitioner's health.").[1] While such a functional system or process may be aesthetically appealing, it is nevertheless uncopyrightable subject matter. A film or description of such an exercise routine or simple dance routine may be copyrightable, as may a compilation of photographs of such movements. However, such a copyright will not extend to the movements themselves, either individually or in combination, but only to the expressive description, depiction, or illustration of the routine that falls within a section 102(a) category of authorship.

The relationship between the definition of compilations in section 101 and the categories of authorship in section 102(a) has been overlooked even by the Copyright Office in the past. The Office has issued registration certificates that included "nature of authorship" statements such as "compilations of exercises" or "selection and arrangement of exercises." In retrospect, and in light of the Office's closer analysis of legislative intent, the Copyright Office finds that such registrations were issued in error.

The Office recognizes that in one unreported decision, a district court concluded, albeit with misgivings, that there were triable issues of fact whether a sufficient number of individual yoga asanas were arranged in a sufficiently creative manner to warrant copyright protection. See

[1] The court in *Open Source Yoga Unity* did not address section 102(b). *See also* the discussion of *Open Source Yoga Unity* below.

Open Source Yoga Unity, discussed above. However, that court did not consider whether section 102(a) or (b) would bar a copyright claim in such a compilation.

The Copyright Office concludes that the section 102(a) categories of copyrightable subject matter not only establish what is copyrightable, but also necessarily serve to limit copyrightable subject matter as well. Accordingly, when a compilation does not result in one or more congressionally-established categories of authorship, claims in compilation authorship will be refused.

Dated: June 18, 2012

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Maria A. Pallante
Register of Copyrights

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