COPYRIGHTABLE AUTHORSHIP

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COPYRIGHTABLE AUTHORSHIP:

What Can Be Registered

301 What This Chapter Covers

This Chapter discusses the U.S. Copyright Office's practices and procedures for evaluating **copyrightable** authorship. For guidance on practices and procedures relating to specific types of works, see the following Chapters:

- For a general overview of the registration process, see **Chapter 200**.
- For guidance in determining who may file an application and who may be named as the **copyright claimant**, see **Chapter 400**.
- For guidance in identifying the work that will be submitted for registration, see **Chapter 500**.
- For guidance in completing the application, see **Chapter 600**.
- For a discussion of **literary works**, see **Chapter 700**.
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- For a discussion of **renewal registrations**, see **Chapter 2100**.

302 The Legal Framework

The Copyright Act protects "original works of authorship **fixed** in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." **17 U.S.C. § 102(a)**.

Section 410(a) of the statute states that the **Register of Copyrights** shall register a **claim** to copyright and issue a **certificate of registration** if the U.S. Copyright Office determines that "the material deposited constitutes **copyrightable** subject matter and that the other legal and formal requirements have been met." If the Office determines that "the material deposited does not constitute copyrightable subject matter or that the claim is invalid for any other reason, the Register shall refuse registration and shall notify the **applicant** in writing of the reasons for such refusal." **17 U.S.C. § 410(b)**.

In determining whether a work is copyrightable, the Office analyzes questions such as:

- Is the work eligible for copyright protection in the United States?
- Has the work been fixed in a tangible medium of expression?
- Was the work created by a human author?
- Does the work constitute copyrightable subject matter?
- Is the work sufficiently original?
  - Was the work independently created?
  - Does the work possess at least some minimal degree of creativity?

If the answer to all of these questions is "yes," the work is copyrightable and the claim may be registered, as long as there are no other issues in the registration materials that raise questions concerning the claim and as long as the other legal and formal requirements have been met.

These questions are discussed in Sections **304** through **308** below. For information on how the Office interprets these questions when examining **derivative works**, **compilations**, and **collective works**, see Sections **311** and **312**.

For information on how the Office interprets these questions when examining specific types of **literary works**, **works of the performing arts**, and visual art works, see **Chapters 700**, **800**, and **900**.

303 Copyrightability Is Determined Based on U.S. Copyright Law

The U.S. Copyright Act is the exclusive source of copyright protection in the United States. To register a work with the U.S. Copyright Office, all **applicants**—both foreign and domestic—must satisfy the requirements of U.S. copyright law. In determining whether a work is **copyrightable**, the Office applies U.S. copyright law pursuant to title 17 of the U.S. Code, even if the work was created in a foreign country, first **published** in a foreign country, or created by a citizen, domiciliary, or habitual resident of a foreign country.

304 Eligibility

The U.S. Copyright Office may register a work of authorship if it is eligible for copyright protection in the United States. All U.S. works—both **published** and **unpublished**—created on or after January 1, 1978, are eligible for U.S. copyright protection. **17 U.S.C. § 104(a)**, **(b)**. Additionally, all unpublished **foreign works** and most published foreign works are eligible for U.S. copyright protection. *Id.* For more information on the eligibility requirements for published foreign works, see **Chapter 2000**, Section 2003.

305 The Fixation Requirement

A work of authorship may be deemed **copyrightable**, provided that it has been "**fixed** in any tangible medium of expression, now known or later developed, from which [it] can be perceived, reproduced, or otherwise communicated, either directly or indirectly with the aid of a machine or device." **17 U.S.C. § 102(a)**. Specifically, the work must be fixed in a **copy** or **phonorecord** "by or under the authority of the author" and the work must be "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." **17 U.S.C. § 101** (definition of "fixed").

The terms "copy" and "phonorecord" are very broad. They cover "all of the material objects in which copyrightable works are capable of being fixed," **H.R. Rep. No. 94-1476, at 53 (1976)**, *reprinted in* 1976 U.S.C.C.A.N 5659, 5666.[1]

- Copies are "material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device," including the material object "in which the work is first fixed." **17 U.S.C. § 101**.

- Phonorecords are "material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device," including "the material object in which the sounds are first fixed." **17 U.S.C. § 101**.

There are countless ways that a work may be fixed in a copy or phonorecord and "it makes no difference what the form, manner, or medium of **fixation** may be." **H.R. Rep. No. 94-1476, at 52 (1976)**, *reprinted in* 1976 U.S.C.C.A.N. at 5666. For example, a work may be expressed in "words, numbers, notes, sounds, pictures, or any other graphic or symbolic indicia" and the author's expression may be fixed "in a physical object in written, printed, photographic, sculptural, punched, magnetic, or any other stable form." *Id.*

Most works are fixed by their very nature, such as an article printed on paper, a song recorded in a digital audio file, a sculpture rendered in bronze, a screenplay saved in a data file, or an audiovisual work captured on film. Nevertheless, some works of authorship may not satisfy the fixation requirement, such as an improvisational speech, sketch, dance, or other performance that is not recorded in a tangible medium of expression. Other works may be temporarily embodied in a tangible form, but may not be sufficiently permanent or stable to warrant copyright protection, such as "purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on a television,… or captured momentarily in the memory of a computer." **H.R. Rep. No. 94-1476, at 53 (1976)**, *reprinted in* 1976 U.S.C.C.A.N. at 5666 (internal quotations marks omitted).

The Office rarely encounters works that do not satisfy the fixation requirement because the Office requires **applicants** to submit copies or phonorecords that contain a visually or aurally perceptible copy of the work. However, the Office may communicate with the applicant or may refuse registration if the work or the medium of expression only exists for a transitory period

1 The provisions of the House Report cited or quoted throughout this Chapter are identical to the corresponding provisions set forth in **Senate Report No. 94-473 (1975)**.

of time, if the work or the medium is constantly changing, or if the medium does not allow the specific elements of the work to be perceived, reproduced, or otherwise communicated in a consistent and uniform manner.

306 The Human Authorship Requirement

The U.S. Copyright Office will register an original work of authorship, provided that the work was created by a human being.

The copyright law only protects "the fruits of intellectual labor" that "are founded in the creative powers of the mind." *Trade-Mark Cases*, 100 U.S. 82, 94 (1879). Because copyright law is limited to "original intellectual conceptions of the author," the Office will refuse to register a **claim** if it determines that a human being did not create the work. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884). For representative examples of works that do not satisfy this requirement, see Section **313.2** below.

307 Copyrightable Subject Matter

A work of authorship may be registered with the U.S. Copyright Office, provided that it constitutes **copyrightable** subject matter.

Section 102(a) of the Copyright Act states that the subject matter of copyright includes the following categories of works:

- **Literary works**.
- Musical works, including any accompanying words.
- Dramatic works, including any accompanying music.
- **Pantomimes** and **choreographic works**.
- Pictorial, graphic, and sculptural works.
- **Motion pictures** and other **audiovisual works**.
- **Sound recordings**.
- **Architectural works**.

Section 102(a) states that the subject matter of copyright also includes **derivative works, compilations**, and **collective works**. *See* **17 U.S.C. § 103(a)**; *see also* **17 U.S.C. § 101** (explaining that "[t]he term 'compilation' includes collective works"). These types of works are a subset of the categories set forth in **Section 102(a)**, rather than separate and distinct categories of works. In other words, derivative works, compilations, and collective works may be registered, provided that the work falls within one or more of the congressionally established categories of authorship under **Section 102(a)**. *See* **Registration of Claims to Copyright, 77 Fed. Reg. 37,605, 37,606 (June 22, 2012)**.

The categories of works set forth in **Section 102(a)** "do not necessarily exhaust the scope of 'original works of authorship' that the [Copyright Act] is intended to protect." **H.R. Rep. No. 94-1476, at 53 (1976)**, *reprinted in* 1976 U.S.C.C.A.N. at 5666. The statute "sets out the general area of copyrightable subject matter" with "sufficient flexibility to free the courts from rigid or outmoded concepts of the scope of particular categories." *Id.* The categories are also "overlapping in the sense that a work falling within one class may encompass works coming within some or all of the other categories." *Id.*

Congress gave federal courts the flexibility to interpret the scope of the existing subject matter categories, but only Congress has the authority to create entirely new categories of authorship. "If the federal courts do not have the 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**." **77 Fed. Reg. at 37,607**.

While the categories listed in **Section 102(a)** are "very broad … there are unquestionably other areas of existing subject matter that [the Copyright Act] does not propose to protect…." **H.R. Rep. No. 94-1476, at 52 (1976)**, *reprinted in* 1976 U.S.C.C.A.N. at 5665. If the Office determines that a work does not fall within the categories of copyrightable subject matter, the Office will refuse to register the **claim**. For representative examples of works that do not satisfy this requirement, see Sections **313.3** and **313.6(C)** below.

308 The Originality Requirement

Originality is "the bedrock principle of copyright" and "the very premise of copyright law." *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 347 (1991) (citation omitted).

"To qualify for copyright protection, a work must be original to the author," which means that the work must be "independently created by the author" and it must possess "at least some minimal degree of creativity." *Id.* at 345 (citations omitted).

These requirements are discussed in Sections **308.1** and **308.2** below.

308.1 Independent Creation

The term "independent creation" means that the author created the work without copying from other works. *See Feist,* 499 U.S. at 345.

The copyright law protects "those components of a work that are original to the author," but "originality" does not require "novelty." *Id.* at 345, 348. A work may satisfy the independent creation requirement "even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying." *Id.* at 345. For example, if two authors created works that are similar or even identical, each work could be registered provided that the authors did not copy expression from each other.

As a general rule, the Office will accept the **applicant's** representation that the work was independently created by the author(s) named in the application, unless that statement is implausible or is contradicted by information provided elsewhere in the registration materials or in the Office's records or by information that is known to the **registration specialist**. If the specialist

determines that the work was not independently created, he or she may communicate with the applicant or may refuse to register the **claim**.

For representative examples of works that do not satisfy the independent creation requirement, see Section **313.4(A)** below.

308.2 Creativity

A work of authorship must possess "some minimal degree of creativity" to sustain a copyright **claim**. *Feist*, 499 U.S. at 358, 362 (citation omitted).

"[T]he requisite level of creativity is extremely low." Even a "slight amount" of creative expression will suffice. "The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious it might be.'" *Id*. at 346 (citation omitted).

An author's expression does not need to "be presented in an innovative or surprising way," but it "cannot be so mechanical or routine as to require no creativity whatsoever." A work that it is "entirely typical," "garden-variety," or "devoid of even the slightest traces of creativity" does not satisfy the originality requirement. *Feist*, 499 U.S. at 362. "[T]here is nothing remotely creative" about a work that merely reflects "an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course." *Id*. at 363. Likewise, a work "does not possess the minimal creative spark required by the Copyright Act" if the author's expression is "obvious" or "practically inevitable." *Id*. at 363.

Although the creativity standard is low, it is not limitless. *Id*. at 362. "There remains a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent. Such works are incapable of sustaining a valid copyright." *Id*. at 359 (citations omitted).

If the Office determines that a work possesses sufficient creativity, it will register the claim and issue a **certificate of registration**. Conversely, if the Office determines that the work does not possess some minimal degree of creativity, it will refuse registration.

For more information on works that do not satisfy the creativity requirement, see Sections **313.4(A)** through **313.4(K)** below.

309 Examining a Work for Copyrightable Authorship

As discussed in Section **302**, the U.S. Copyright Office will examine a work of authorship to determine if "the material deposited constitutes copyrightable subject matter" and if "the other legal and formal requirements have been met." **17 U.S.C. § 410(a)**. In determining whether a work is copyrightable, the **registration specialist** will consider (i) the application, (ii) the **deposit copy(ies)**, (iii) whether the correct the **filing fee** was submitted, as well as (iv) any communications between the **applicant** and the Office relating to the registration of the **claim** or any other material that has been submitted to the Office. Together, these items are referred to as the "**registration materials**."

As discussed in Sections **304** through **308**, a work may be copyrightable (i) if it is eligible for copyright protection in the United States, (ii) if the work has been **fixed** in a tangible medium of expression, (iii) if the work was created by a human author, (iv) if the work constitutes copy-

rightable subject matter, and (v) if the work contains at least a minimum amount of creative authorship that is original to the author.

When examining a claim to copyright, the registration specialist will use objective criteria to determine whether the work satisfies these requirements by reviewing the information provided in the application and by examining the deposit copy(ies), including its individual elements as well as the work as a whole. The specific criteria that the specialist will consider when examining a **derivative work**, a **compilation**, or a **collective work** are discussed in Sections **311** and **312**. The specific criteria that the specialist will consider when examining a **literary work**, a work of the performing arts, or a work of the visual arts are discussed in **Chapters 700**, **800**, and **900**.

309.1 Prior Works and Prior Registrations

As a general rule, the **registration specialist** will not search the U.S. Copyright Office's records to determine if the work has been registered before, unless there is conflicting information in the registration materials or other sources of information that are known by the Office or the general public. The specialist will not compare the **deposit copy(ies)** with other works that have been previously registered with the Office. Likewise, the specialist generally will not compare the deposit copy(ies) with other works to determine whether the **applicant** is attempting to register a work that is substantially similar to another work of authorship, unless the applicant appears to be asserting a **claim** in a work that is unusually similar to another work of authorship that is known to the specialist.

309.2 Facts Stated in the Application

The U.S. Copyright Office generally will accept the facts stated in the application and other registration materials, unless they are implausible or conflict with information in the registration materials, the Office's records, or other sources of information that are known by the Office or the general public. Knowingly making a false representation of a material fact in an application for copyright registration, or in any written statement filed in connection with an application, is a crime that is punishable under **17 U.S.C. § 506(e)**.

Ordinarily, the Office will not conduct its own factual investigation to confirm the truth of the statements made in the application. However, the Office may take administrative notice of facts or matters that are known by the Office or the general public, and may communicate with the **applicant** if the application appears to contain inaccurate or erroneous information.

309.3 No Precedential Value

The determination of copyrightability will be made on a case-by-case basis. The fact that the U.S. Copyright Office registered a particular work does not necessarily mean that the Office will register similar types of works or works that fall within the same category. A decision to register a particular work has no precedential value and is not binding upon the Office when it examines any other application.

310 Factors That Will Not Be Considered in the Examination of Originality

As a general rule, the U.S. Copyright Office will not consider factors that have no bearing on whether the originality requirement has been met. Examples of such factors are discussed in Sections 310.1 through 310.10 below.

310.1 Novelty or Ingenuity

The U.S. Copyright Office will examine each work in isolation to determine whether it satisfies the originality requirement. The fact that a work may be novel, distinctive, innovative, or even unique is irrelevant to this analysis. *See* **H.R. Rep. No. 94-1476, at 51 (1976)**, *reprinted in* 1976 U.S.C.C.A.N. at 5664 (stating "the standard of originality established by the courts … does not include requirements of novelty [or] ingenuity" and that Congress did not intend "to enlarge the standard of copyright protection" to impose these requirements).

As discussed in Section 308 "originality requires independent creation plus a modicum of creativity." *Feist*, 499 U.S. at 346. The author's expression does not need to be novel, and it does not need to "be presented in an innovative or surprising way." *Id*. at 362; *see also L. Batlin & Son v. Snyder*, 536 F.2d 486, 490 (2d. Cir. 1976) ("Originality is … distinguished from novelty; there must be independent creation, but it need not be invention in the sense of striking uniqueness, ingeniousness, or novelty"). A work of authorship may be original, even though it is neither new nor inventive or even if "it closely resembles other works." *Feist*, 499 U.S. at 345 (explaining that "[o]riginality does not signify novelty"). Conversely, the fact that a work is new, innovative, or even unique does not necessarily mean that it contains a sufficient amount of creative expression to satisfy the originality requirement.

310.2 Aesthetic Value, Artistic Merit, and Intrinsic Quality

In determining whether a work contains a sufficient amount of original authorship, the U.S. Copyright Office does not consider the aesthetic value, artistic merit, or intrinsic quality of a work. **H.R. Rep. No. 94-1476, at 51 (1976)**, *reprinted in* 1976 U.S.C.C.A.N. at 5664. For example, the Office will not look for any particular style of creative expression. Likewise, the Office will not consider whether a work is visually appealing or written in elegant prose.

As the Supreme Court noted, "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." *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903). The legislative history for the Copyright Act recognizes that "the standard of originality established by the courts … does not include requirements of … esthetic merit" and expressly states that Congress did not intend "to enlarge the standard of copyright protection" to impose this requirement. *See* **H.R. Rep. No. 94-1476, at 51 (1976)**, *reprinted in* 1976 U.S.C.C.A.N. at 5664.

For the same reasons, the Office will not consider the truth or falsity of the facts set forth in a work of authorship. Nor will the Office consider the soundness or the unsoundness of the views espoused in the work. *See Belcher v. Tarbox*, 486 F.2d 1087, 1088 (9th Cir. 1973) ("The gravity and immensity of the problems, theological, philosophical, economic and scientific, that would confront a court if this view were adopted are staggering to contemplate. It is surely not a task lightly to be assumed, and we decline the invitation to assume it.") (footnote omitted).

310.3 Symbolic Meaning and Impression

When the U.S. Copyright Office examines a work of authorship, it determines whether the work "possess[es] the minimal creative spark required by the Copyright Act and the Constitution." *Feist*, 499 U.S. at 363. The symbolic meaning or impression of a work is irrelevant to this determination.

The Office will use objective criteria to determine whether a work constitutes **copyrightable** subject matter and satisfies the originality requirement. In making this determination, the Office will consider the expression that is **fixed** in the work itself and is perceptible in the **deposit copy(ies)**. Specifically, the Office will focus only on the actual appearance or sound of the work that has been submitted for registration, but will not consider any meaning or significance that the work may evoke. The fact that creative thought may take place in the mind of the person who encounters a work has no bearing on the issue of originality. *See* **17 U.S.C. § 102**.

310.4 Look and Feel

The U.S. Copyright Office will not consider the so-called "look and feel" of a work. Invoking a work's "feel" is not a viable substitute for an objective analysis of the work's **fixed** and creative elements. *See 4 Melville & David Nimmer, Nimmer* on Copyright §13.03[A][1][c] (2013) (criticizing the use of "feel" as a "wholly amorphous referent" that "merely invites an abdication of analysis").

310.5 The Author's Inspiration and Intent

When examining a work for original authorship, the U.S. Copyright Office will not consider the author's inspiration for the work, creative intent, or intended meaning. Instead, the Office will focus solely on the appearance or sound of the work that has been submitted for registration to determine whether it is original and creative within the meaning of the statute and the relevant case law. The fact that creative thought may take place in the mind of the person who created a work (or a person viewing or listening to the work) has no bearing on the issue of originality unless the work objectively demonstrates original authorship. Mental processes do not themselves provide an objective basis for evaluating creativity. *See* **17 U.S.C. § 102(b)**.

310.6 The Author's Skill and Experience

The U.S. Copyright Office will not consider the author's creative skill and experience when evaluating a work for **copyrightable** authorship, because the author's personal or professional history is irrelevant to the determination of copyrightability. Instead, the Office will focus solely on the appearance or sound of the work that has been submitted for registration to determine whether it satisfies the originality requirement. *See L. Batlin & Son*, 536 F.2d at 491 (finding that "the requirement of originality [cannot] be satisfied simply by the demonstration of 'physical skill' or 'special training'").

310.7 The Time, Effort, or Expense Required to Create the Work

When examining a work for original authorship, the U.S. Copyright Office will focus on the appearance or sound of the work that the author created but will not consider the amount of time, effort, or expense required to create the work. These issues have no bearing on whether a

work possesses the minimum creative spark required by the Copyright Act and the Constitution. *See, e.g., Feist*, 499 U.S. at 352-354, 364 (rejecting the so-called "sweat of the brow" doctrine that provided copyright protection solely as a "reward for the hard work" of creating a work). As Justice O'Connor observed, "copyright rewards originality, not effort" and "[w]ithout a doubt, the 'sweat of the brow' doctrine flouted basic copyright principles." *Id*. at 352, 354, 364.

310.8 Design Alternatives

When examining a work for original authorship, the U.S. Copyright Office will focus on the appearance or sound of the work that has been submitted for registration, including its individual elements and the work as a whole, to determine whether it contains a sufficient amount of original and creative authorship.

As a general rule, the Office will not consider possible design alternatives that the author may have considered when he or she created the work. Likewise, the Office will not consider potential variations in the use of the work, such as the fact that a work could be presented in a different color, in a different size, or with a different orientation.

The creative process often requires many choices involving the size, coloring, orientation, proportion, configuration, perspective, or other constituent elements of the work. These types of choices are present in every work of authorship. It is not the variety of choices available to the author that must be evaluated, but the actual work that the author created.

310.9 Material Composition of the Work

As a general rule, the materials used to create a work have no bearing on the originality analysis. For example, the U.S. Copyright Office will not consider the fact that a jewelry design was constructed with precious metals or gemstones, or the fact that a silk screen was printed on a particular paper stock.

310.10 Commercial Appeal or Success

The U.S. Copyright Office will not consider the marketability or commercial success of the work, because these issues are irrelevant to the originality analysis. "Works may experience commercial success even without originality and works with originality may enjoy none whatsoever." *Paul Morelli Design, Inc. v. Tiffany & Co.*, 200 F. Supp. 2d 482, 488 (E.D. Pa. 2002).

311 Derivative Works

This Section discusses the U.S. Copyright Office's practices and procedures for evaluating the copyrightability of a **derivative work**.

For a definition and general discussion of derivative works, see **Chapter 500**, Section 507. For specific instructions on how to prepare an application to register this type of work, see **Chapter 600**, Sections 613.6, 617.5, 618.5, 620.7, and 621.

311.1 Copyrightable Subject Matter

A **derivative work** may be registered with the U.S. Copyright Office, provided that it constitutes **copyrightable** subject matter.

As discussed in Section **307** above, derivative works are a subset of the subject matter categories, rather than a separate and distinct category of work. In other words, the new material that the author contributed to the derivative work must fall "within one or more of the categories listed in section 102 [of the Copyright Act]." **H.R. Rep. No. 94-1476, at 57 (1976)**, *reprinted in* 1976 U.S.C.C.A.N. at 5670. If the new material does not fall within one or more of the congressionally established categories of authorship, the **registration specialist** may communicate with the **applicant** if the authorship is questionable or may refuse registration. For example, the Office may register a drawing of a dress or a photograph of a garden, but it cannot register a "revised dress design" or a "genetically modified plant," because clothing and plants do not constitute copyrightable subject matter under **Section 102(a)** of the Copyright Act. *Cf.* **Registration of Claims to Copyright, 77 Fed. Reg. 37,605, 37,606 (June 22, 2012)**.

In addition, the preexisting work that has been recast, transformed, or adapted, "must come within the general subject matter of copyright set forth in section 102, regardless of whether it is or was ever copyrighted." **H.R. Rep. No. 94-1476, at 57 (1976)**, *reprinted in* 1976 U.S.C.C.A.N. at 5670. In other words, the preexisting work must qualify as a **literary work**; a musical work; a dramatic work; a **pantomime** or **choreographic work**; a **pictorial, graphic or sculptural work**; a **motion picture** or **audiovisual work**; a **sound recording**; and/or an **architectural work**. For example, a ballet based on an epic poem would be considered a derivative work, because a poem is a type of literary work. By contrast, a photograph of a lake or a sculpture of a mountain would not be considered a derivative work, because lakes and mountains do not constitute copyrightable subject matter.

The fact that the author incorporated uncopyrightable elements of a preexisting work into his or her work does not necessarily mean that the author's expression qualifies as a derivative work. For example, merely incorporating a word, letter, number, or common geometric shape from one or more preexisting works does not constitute derivative authorship. Instead, the author of the derivative work must recast, transform, or adapt some of the copyrightable portions of a preexisting work. *See* **H.R. Rep. No. 94-1476, at 57 (1976)**, *reprinted in* 1976 U.S.C.C.A.N. at 5670 (explaining that a derivative work "requires a process of recasting, transforming, or adapting 'one or more preexisting works'" and that "the 'preexisting work' must come within the general subject matter of copyright" whereas "[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.").

311.2 The Originality Requirement for Derivative Works

Creating a **derivative work** requires "a process of recasting, transforming, or adapting 'one or more preexisting works.'" **H.R. Rep. No. 94-1476, at 57 (1976)**, *reprinted in* 1976 U.S.C.C.A.N. at 5670. Thus, derivative works contain two distinct forms of authorship:

- The authorship in the preexisting work(s) that has been recast, transformed, or adapted within the derivative work; and
- The new authorship involved in recasting, transforming, or adapting those preexisting work(s).

The new authorship that the author contributed to the derivative work may be registered, provided that it contains a sufficient amount of original expression, meaning that the derivative work must be independently created and it must possess more than a modicum of creativity. *See Waldman Publishing Corp. v. Landoll, Inc.,* 43 F.3d 775, 782 (2d Cir. 1994).

As discussed in Section **308.1**, independent creation means that the author(s) named in the application created the new or revised material that the **applicant** intends to register, "and this in turn means that the work must not consist of actual copying." *L. Batlin & Son*, 536 F.2d at 490 (citation omitted).

The amount of creativity required for a derivative work is the same as that required for a copyright in any other work. "All that is needed to satisfy both the Constitution and the statute is that the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own.'" *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102-03 (2d Cir. 1951) (citing *Chamberlin v. Uris Sales Corp.*, 150 F.2d 512, 513 (2d. Cir. 1945)). Thus, "the key inquiry is whether there is sufficient nontrivial expressive variation in the derivative work to make it distinguishable from the [preexisting] work in some meaningful way." *Schrock v. Learning Curve International, Inc.*, 586 F.3d 513, 521 (7th Cir. 2009).

"While the quantum of originality that is required may be modest indeed," courts have recognized that derivative works "[l]acking even a modest degree of originality. . . are not copyrightable." *L Batlin & Son*, 536 F.2d at 490; *Durham Industries, Inc. v. Tomy Corp.,* 630 F.2d 905, 911 (2d Cir. 1980). Miniscule variations do not satisfy this requirement, such as merely changing the size of the preexisting work. Merely recasting a work from one medium to another alone does not support a **claim** in derivative authorship. *See L. Batlin & Son*, 536 F.2d at 491. "Nor can the requirement of originality be satisfied simply by the demonstration of 'physical skill' or 'special training.'" *Id.*

A registration for a derivative work only covers the new authorship that the author contributed to that work. It does not cover the authorship in the preexisting work(s) that has been recast, transformed, or adapted by the author of the derivative work. **H.R. Rep. No. 94-1476, at 57 (1976)**, *reprinted in* 1976 U.S.C.C.A.N. at 5670.

Likewise, a registration for a derivative work does not cover any previously **published** material, previously registered material, or **public domain** material that appears in the derivative work. Nor does it cover any material that is not owned by the **copyright claimant**. *See* **17 U.S.C. § 103(b)** (stating that the copyright in a derivative work is "independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material"). If a derivative work contains an appreciable amount of previously published material, previously registered material, public domain material, or third party material, the **applicant** should exclude that material from the claim using the procedure described in **Chapter 600**, Section 621. For additional information concerning the scope of the copyright in a derivative work, see **Chapter 500**, Section 507.2.

312 Compilations and Collective Works

This Section discusses the U.S. Copyright Office's general practices and procedures for evaluating the copyrightability of **compilations** and **collective works**.

For a definition and general discussion of these types of works, see **Chapter 500**, Sections 508 and 509. For specific instructions on how to prepare an application to register a compilation, see **Chapter 600**, Sections 613.7, 617.5, 618.6, 620.7, and 621.8(C). For specific instructions on how to prepare an application to register a collective work, see **Chapter 600**, Sections 610.4, 613.8, 618.7, 620.8, and 621.8(D)

312.1 Copyrightable Subject Matter

A **compilation** or a **collective work** may be registered with the U.S. Copyright Office, provided that it constitutes **copyrightable** subject matter.

As discussed in Section **307**, compilations and collective works are a subset of the subject matter categories set forth in **Section 102(a)** of the Copyright Act, rather than separate and distinct categories of works. *See* **Registration of Claims to Copyright, 77 Fed. Reg. 37,605, 37,606 (June 22, 2012)**. Thus, a compilation or a collective work must qualify as a **literary work**; a musical work; a dramatic work; a **pantomime** or **choreographic work**; a **pictorial, graphic or sculptural work**; a **motion picture** or **audiovisual work**; a **sound recording**; and/or an **architectural work**. *See id.* If the authorship involved in creating the compilation or collective work as a whole (i.e., the author's selection, coordination, and/or arrangement) does not fall within one or more of the congressionally established categories of authorship, the **registration specialist** may communicate with the **applicant** if the authorship appears questionable or may refuse registration. *Id.*

Examples:

- The Office may register a work comprised of rocks that are selected, coordinated, arranged, and **fixed** in such a way as to result in a sculptural work. Likewise, the Office may register a photograph of a rock, a drawing of a handtool, or a written expression of an idea. However, the Office cannot register a mere "compilation of ideas," a mere "selection and arrangement of handtools," or a mere "compilation of rocks," because ideas, handtools, and rocks do not constitute copyrightable subject matter under **Section 102(a)** of the Copyright Act.

- The Office may register a photograph of food if the photographer exercised some minimal level of creativity in taking the picture. However, the Office cannot register a "compilation of food" based on a selection, coordination, and/or arrangement of items on a plate, because food does not constitute copyrightable subject matter under **Section 102(a)** of the Copyright Act. Although a sculptural depiction of a plate of food may be copyrightable, that would not prevent actual food from being arranged in the same way. *See* **17 U.S.C. § 113(b)**.

- The Office may register a **claim** in a compilation containing the names of the author's fifty favorite restaurants. While a restaurant or the name of a restaurant does not constitute copyrightable subject matter under **Section 102(a)** of the Act, a list of restaurant names may constitute a literary work, which is one of the congressionally established categories of authorship.

See **77 Fed. Reg. at 37,606**.

312.2 The Originality Requirement for Compilations

A **compilation** may contain several distinct forms of authorship:

SELECTION • authorship involved in choosing the material or data that will be included in the compilation;

COORDINATION • authorship involved in classifying, categorizing, ordering, or grouping the material or data; and/or

ARRANGEMENT • authorship involved in organizing or moving the order, position, or placement of material or data within the compilation as a whole.

See Feist, 499 U.S. at 348.

In determining whether a compilation satisfies the originality requirement, the **registration specialist** should focus on the manner in which the materials or data "have been selected, coordinated, and arranged" and "the principal focus should be on whether the selection, coordination, and arrangement are sufficiently original to merit protection." *Id*. at 358.

The authorship involved in selecting, coordinating, and arranging the preexisting material or data must be objectively revealed in the **deposit copy(ies)**. *See id.* ("Originality requires only that the author make the selection or arrangement independently…and *that it display* some minimal level of creativity") (emphasis added). For instance, a compilation of statistics is not **copyrightable** if the author's selection, coordination, or arrangement of data is not evident in the **claim**.

While "[t]he originality requirement is not particularly stringent," the Office cannot register a compilation "in which the selection, coordination, and arrangement are not sufficiently original to trigger copyright protection." *Id*. The preexisting material or data do not need to "be presented in an innovative or surprising way." *See id.* at 362. The Office may register the claim if the author's selection possesses some minimal degree of creativity, even if the coordination and/or arrangement do not (or *vice versa*). However, the more creative the selection, coordination, and/or arrangement, the more likely it is that the author's compilation will be registered. For example, the Office generally will not register a compilation consisting of all the elements from a particular set of data, because the selection is standard or obvious. Likewise, the Office generally will not register a compilation containing only two or three elements, because the selection is necessarily *de minimis*. *See* **H.R. REP. NO. 94-1476, at 122 (1976)**, *reprinted in* U.S.C.C.A.N. at 5737 (stating that a work does not qualify as a **collective work** "where relatively few separate elements have been brought together," as in the case of "a composition consisting of words and music, a work published with illustrations or front matter, or three one-act plays").

In determining whether the author's compilation is sufficiently original, the U.S. Copyright Office may consider the following factors:

- What type of material or data did the author compile?
- How is the material or data presented?
- Was the selection, coordination, and/or arrangement made from a large or diverse pool of material or data?

- Was the coordination or arrangement standard?
- Is the selection exhaustive (*e.g.*, a parts catalog containing standard information for all of the parts sold by a particular company)?
- Is the coordination or arrangement obvious (*e.g.*, is the information listed in alphabetical, numerical, or chronological order)?

The statute also provides that preexisting material or data "must be selected, coordinated, or arranged 'in such a way' as to render the work as a whole original. This implies that some 'ways' will trigger copyright, but that others will not." *Feist*, 499 U.S. at 358 (citing **117 U.S.C. § 101** definition of "compilation").

Examples:

- Generally, a selection consisting of less than four items will be scrutinized for sufficient authorship.
- A selection, coordination, and/or arrangement that is mechanical or routine, such as an alphabetical list of items added to a catalog within the past twelve months, a symmetrical arrangement of stones on jewelry, arranging geometric shapes in a standard or symmetrical manner, arranging notes in standard scales or in standard melodic or harmonic intervals, or a musical work consisting solely of a musical scale(s).
- A selection, coordination, and/or arrangement that is commonplace such that it has come to be expected as a matter of course.
- A compilation that contains an obvious selection, coordination, and/or arrangement of material, such as a complete list of stories written by Zane Grey between 1930 and 1939, a complete collection of Arthur Conan Doyle's Sherlock Holmes stories, or a collection of a feature writer's contributions to a particular newspaper over a period of six months arranged in chronological order.
- A selection that is dictated by law, such as a law requiring a telephone company to publish a directory containing the names, addresses, and telephone numbers of its subscribers.
- A selection, coordination, and/or arrangement of data that is practically inevitable, such as a standard organizational chart.
- Mailing or subscriber lists that contain standard information about a predetermined group of people organized in an obvious manner, such as an alphabetical list of all the names, telephone numbers, and email addresses for the members of the graduating class of a particular college or university.
- A compilation that contains an exhaustive selection of information where the information is presented in sequential order, such as a genealogy containing a comprehensive selection of public records arranged in alphabetical or chronological order.

312.3 The Originality Requirement for Collective Works

A **collective work** "is a species of 'compilation'" that "by its nature, must involve the selection, assembly, and arrangement of 'a number of contributions.'" **H.R. Rep. No. 94-1476, at 122 (1976)**, *reprinted in* 1976 U.S.C.C.A.N. at 5737 (discussing **17 U.S.C. § 101**'s definitions of "compilation" and "collective work").

Because a collective work is a type of compilation, the U.S. Copyright Office will apply the criteria set forth in Section **312.2** to determine whether the author's selection, coordination, and/or arrangement satisfies the originality requirement. When examining a particular contribution that appears within a collective work, the Office will apply the criteria set forth in Section **309**.

313 Uncopyrightable Material

The U.S. Copyright Office has no authority to register works that are not protected by copyright law. Some of the more common types of uncopyrightable material are discussed in Sections **313.1** through **313.6** below.

Although uncopyrightable material, by definition, is not eligible for copyright protection, the Office may register a work that contains uncopyrightable material, provided that the work as a whole contains other material that qualifies as an original work of authorship (*e.g.*, a selection, coordination, and/or arrangement of uncopyrightable elements where the resulting work as a whole constitutes an original work of authorship).

313.1 Works That Have Not Been Fixed

As discussed in Section **305**, a work of authorship may be registered, provided that it has been **fixed** in a tangible medium of expression. *See* **17 U.S.C. § 102(a)**. A work that has not been fixed is not protected by the Copyright Act and cannot be registered with the U.S. Copyright Office, although it might be eligible for protection under state law.

Examples:

- Choreography that has never been filmed or notated.
- An extemporaneous speech that has not been filmed or recorded.
- A work communicated solely through conversation or a live broadcast that has not been filmed, recorded, written, or transcribed.
- A dramatic sketch or musical composition improvised or developed from memory that has not been filmed, recorded, or transcribed.

See **H.R. Rep. No. 94-1476, at 52, 131 (1976)**, *reprinted in* 1976 U.S.C.C.A.N. at 5747.

313.2 Works That Lack Human Authorship

As discussed in Section **306**, the Copyright Act protects "original works of *authorship*." **17 U.S.C. § 102(a)** (emphasis added). To qualify as a work of "authorship" a work must be created by a

human being. *See Burrow-Giles Lithographic Co.*, 111 U.S. at 58. Works that do not satisfy this requirement are not **copyrightable**.

The Office will not register works produced by nature, animals, or plants. Likewise, the Office cannot register a work purportedly created by divine or supernatural beings, although the Office may register a work where the application or the **deposit copy(ies)** state that the work was inspired by a divine spirit.

Examples:

- A photograph taken by a monkey.
- A mural painted by an elephant.
- A claim based on the appearance of actual animal skin.
- A claim based on driftwood that has been shaped and smoothed by the ocean.
- A claim based on cut marks, defects, and other qualities found in natural stone.
- An application for a song naming the Holy Spirit as the author of the work.

Similarly, 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.

Examples:

- Reducing or enlarging the size of a preexisting work of authorship.
- Making changes to a preexisting work of authorship that are dictated by manufacturing or materials requirements.
- Converting a work from analog to digital format, such as transferring a **motion picture** from VHS to DVD.
- Declicking or reducing the noise in a preexisting **sound recording** or converting a sound recording from monaural to stereo sound.
- Transposing a song from B major to C major.
- Medical imaging produced by x-rays, ultrasounds, magnetic resonance imaging, or other diagnostic equipment.
- A claim based on a mechanical weaving process that randomly produces irregular shapes in the fabric without any discernible pattern.

313.3 Works That Do Not Constitute Copyrightable Subject Matter

As discussed in Section **307** above, a work of authorship may be registered, provided that it falls within one or more of the categories of works set forth in **Section 102(a)** of the Copyright Act.

In other words, a work may be eligible for copyright protection if it qualifies as a **literary work**; a musical work; a dramatic work; a **pantomime**; a **choreographic work**; a **pictorial, graphic, or sculptural work**; a **motion picture** or other **audiovisual work**; a **sound recording**; or an **architectural work**. Works that do not fall within the existing categories of **copyrightable** subject matter are not copyrightable and cannot be registered with the U.S. Copyright Office. *See* **Registration of Claims to Copyright, 77 Fed. Reg. 37,605, 37,607 (June 22, 2012)** ("Congress did not delegate authority to the courts [or the Copyright Office] to create new categories of authorship. Congress reserved this option for itself.").

313.3(A) Ideas, Procedures, Processes, Systems, Methods of Operation, Concepts, Principles, or Discoveries

Section 102(b) of the Copyright Act expressly excludes copyright protection for "any 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." **17 U.S.C. § 102(b)**; *see also* **37 C.F.R. § 202.1(b).** As such, any work or portion of a work that is an idea, procedure, process, system, method of operation, concept, principle, or discovery does not constitute **copyrightable** subject matter and cannot be registered.

Examples:

- The idea or concept for a work of authorship.
- The idea for a character.
- Ideas, procedures, processes, or methods for doing, making, or building things.
- Scientific or technical methods or discoveries.
- Business operations or procedures.
- Mathematical principles, formulas, algorithms, or equations.
- DNA sequences and other genetic, biological, or chemical substances or compounds, regardless of whether they are man-made or produced by nature.
- An extrapolation or application of an idea or system that always produces substantially the same result, such as a computation of interest based upon a particular rate.

The Office may register a literary, musical, graphic, or artistic description, explanation, or illustration of an idea, procedure, process, system, method of operation, concept, principle, or discovery, provided that the work contains a sufficient amount of original authorship. *See* **H.R. Rep. No. 94-1476, at 56 (1976)**, *reprinted in* 1976 U.S.C.C.A.N. at 5669. However, the registration would be limited to the copyrightable literary, musical, graphic, or artistic aspects of the work because copyright law does not give copyright owners any **exclusive rights** in the ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries described in their works. As such, copyright owners do not have the right to prevent others from using the ideas, concepts, principles, or discoveries or from implementing the procedures, processes, systems, or methods of operation described in such works. *See Feist*, 499 U.S. at 344-45 (explaining that "[t]he most fundamental axiom of copyright law is that 'no author may copyright his

ideas or the facts he narrates.'" (quoting *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 556 (1985)).

313.3(B) Merger of Idea and Expression

In some cases, there may be only one way or only a limited number of ways to express a particular idea, procedure, process, system, method of operation, concept, principle, or discovery. If the U.S. Copyright Office determines that extending copyright protection to the author's expression would effectively accord protection to the idea, procedure, process, system, method of operation, concept, principle, or discovery itself, the **registration specialist** may communicate with the **applicant** or may refuse to register the **claim**.

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).

313.3(C) Facts

Facts are not **copyrightable** and cannot be registered with the U.S. Copyright Office. "No one may **claim** originality as to facts … because facts do not owe their origin to an act of authorship." *Feist*, 499 U.S. at 347 (internal citation omitted). A person who finds and records a particular fact does not create that fact; he or she merely discovers its existence. As a result, facts "are never original" and **Section 102(b)** of the Copyright Act "is universally understood to prohibit any copyright in facts." *Id.* at 356. "[This] is true of all facts—scientific, historical, biographical, and news of the day." *Id.* at 348.

For the same reason, theories, predictions, or conclusions that are asserted to be facts are uncopyrightable, even if the assertion of fact is erroneous or incorrect. *See, e.g., Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 978-79 (2d Cir. 1980); *Nash v. CBS, Inc.*, 899 F.2d 1537, 1541 (7th Cir. 1990).

Although facts are not copyrightable, a work of authorship that contains factual information may be registered, provided that the work contains a sufficient amount of original authorship. For example, a newspaper may be registered, but the registration does not cover "[t]he news element—the information respecting current events contained in the [publication]," because the news of the day "is not the creation of the writer, but is a report of matter that ordinarily are *publici juris*." *International News Service v. Associated Press,* 248 U.S. 215, 234 (1918) *abrogated on other grounds by Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 (1938). Likewise, "a directory that contains absolutely no protectable written expression, only facts," may be protected by copyright only "if it features an original selection or arrangement." *Feist*, 499 U.S. at 348. The copyright in such works only protects the **compilation** expression that the author contributed to the work. "No matter how original the format … the facts themselves do not become original through association." *Id.* at 349.

313.3(D) Typeface and Mere Variations of Typographic Ornamentation

The copyright law does not protect typeface or mere variations of typographic ornamentation or lettering. **17 U.S.C. § 102(b); 37 C.F.R. § 202.1(a), (e)**.

A typeface is a set of letters, numbers, or other symbolic characters with repeating design elements that are consistently applied in a notational system that is intended to be used in composing text or other combinations of characters. **H.R. Rep. No. 94-1476, at 55 (1976)**, *reprinted in* 1976 U.S.C.C.A.N. at 5668. Typeface includes typefonts, letterforms, and the like. **Registrability of Computer Programs that Generate Typefaces, 57 Fed. Reg. 6,201, 6,202 (Feb. 21, 1992).**

The U.S. Copyright Office cannot register a **claim** to copyright in typeface or mere variations of typographic ornamentation or lettering, regardless of whether the typeface is commonly used or truly unique. Likewise, the Office cannot register a simple combination of a few typefonts, letterforms, or typeface designs with minor linear or spatial variations. In *Eltra Corp. v. Ringer*, 579 F.2d 294 (4th Cir. 1978) the Office refused to register a typeface design under the 1909 Act. Both the District Court and the Court of Appeals affirmed the Office's decision, noting that "typeface has never been considered entitled to copyright under the provisions of [the 1909 Act]." 579 F.2d at 298. The Fourth Circuit noted that many parties have asked "Congress to amend the law in order to provide copyright protection to typeface" and "[j]ust as consistently Congress has refused to grant the protection." *Id*. Congress addressed this issue when it drafted the 1976 Act and concluded that typeface is not **copyrightable**. The House Report expressly states: "The Committee does not regard the design of typeface, as thus defined, to be a copyrightable 'pictorial, graphic, or sculptural work' within the meaning of this bill. . . ." **H.R. Rep. No. 94-1476, at 55 (1976)**, *reprinted in* 1976 U.S.C.C.A.N. at 5668-69.

For the same reasons, the Office cannot register a claim that is based solely on calligraphy because calligraphy is a stylized form of handwriting that is a mere variation of typographic ornamentation. Although calligraphy in itself is not copyrightable, a **literary work**, a **pictorial work**, or a **graphic work** that contains a sufficient amount of original authorship may be registered notwithstanding the fact that it is executed in calligraphic form.

As a general rule, the mere arrangement of type on a page or screen is not copyrightable. *See* Section **313.3(E)**. However, if the arrangement produces an abstract or representational image, such as an advertisement that uses letters to create a representation of a person, the Office may register the claim provided that the resulting image contains a sufficient amount of pictorial expression.

The Office may register **computer programs** that generate typeface(s) provided that they contain a sufficient amount of literary authorship. However, the registration does not extend to any typeface or mere variations of typographic ornamentation or lettering that may be generated by the program. *See* **Registrability of Computer Programs that Generate Typeface, 57 Fed. Reg. at 6202**. For a discussion of computer programs that generate typeface, see **Chapter 700**, Section 723.

313.3(E) Format and Layout

As a general rule, the U.S. Copyright Office does not accept vague **claims** of "format" and/or "layout." The general layout or format of a book, a page, a slide presentation, a website, a webpage, a poster, a form, or the like, is not **copyrightable** because it is a template of expression. These terms should be avoided and, if used, will be questioned by the **registration specialist**.

Copyright protection may be available for the selection, coordination, and/or arrangement of specific content, such as a **compilation** of artwork or a compilation of text, provided that the content is arranged in a sufficiently creative manner. However, the claim would be limited to the selection, coordination, and/or arrangement of that specific content, and it would not apply to the format and layout itself.

A standard or common selection, coordination, and/or arrangement of specific content or simple variations thereof will not support a claim of compilation authorship and cannot be registered with the Office. If the content that appears in the work is copyrightable, but the selection, coordination, and/or arrangement of that content is not, the claim should be limited to the copyrightable content that the author contributed to the work (*e.g.*, text, artwork, etc.) and the compilation authorship should not be included in the claim.

For a general discussion of format and layout, see **Chapter 900**, Section 906.5.

313.4 Works That Do Not Satisfy the Originality Requirement

As discussed in Section **308**, the Copyright Act protects "*original* works of authorship." **17 U.S.C. § 102(a)** (emphasis added). To qualify as an "original" work of authorship, the work must be independently created and must contain some minimal amount of creativity. The U.S. Copyright Office will not register works that do not satisfy these requirements.

313.4(A) Mere Copies

A work that is a mere copy of another work of authorship is not **copyrightable**. The Office cannot register a work that has been merely copied from another work of authorship without any additional original authorship. *See L. Batlin & Son*, 536 F.2d at 490 ("one who has slavishly or mechanically copied from others may not claim to be an author"); *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191, 195 (S.D.N.Y. 1999) ("exact photographic copies of public domain works of art would not be copyrightable under United States law because they are not original").

As a general rule, the **registration specialist** will not search the Office's records or conduct independent research to determine whether the work was created by the author(s) named in the application because the existence of similar or identical works will not preclude a claim in a work that was independently created. However, if the **applicant** asserts a claim in a work that is unusually similar to another work of authorship that is known to the specialist, he or she may communicate with the applicant. If the specialist determines that the author copied or incorporated another work of authorship, he or she may ask the applicant to exclude the preexisting work from the claim or may refuse registration if the author did not contribute a sufficient amount of additional original authorship to the work.

Examples:

- An exact reproduction of the *Mona Lisa* that cannot be distinguished from the original.
- A photocopy or scan of a photograph.
- Photocopying, scanning, or digitizing a **literary work**.

- Dubbing a **sound recording** from a preexisting recording.
- A toy model that is an exact replica of an automobile, airplane, train, or other useful article where no creative expression has been added to the existing design.

313.4(B) *De Minimis* Authorship

The term "*de minimis*" comes from the legal principle "*de minimis non curat lex*," which means "the law does not take notice of very small or trifling matters." As the Supreme Court stated, "copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity." *Feist*, 499 U.S. at 363. Works that contain no expression or only a *de minimis* amount of original expression are not **copyrightable** and cannot be registered with the U.S. Copyright Office.

Examples:

Literary Works:

- Substituting the pronouns "she" and "her" for "he" and "his" in a preexisting work of authorship.
- Combining a coined term with a few short phrases that define the term.
- A Venn diagram consisting of three overlapping circles containing the names of various personality disorders and a few words and short phrases that describe the symptoms of each condition.
- A standard form contract for a real estate transaction requesting factual information from the buyer and containing standard legal language for the release of the seller's interest in the property.
- Editing that merely consists of spelling and grammatical corrections.

Works of the Performing Arts:

- A synopsis consisting of a single sentence.
- A musical phrase consisting of three notes.
- A **sound recording** consisting of a single tone.

Works of the Visual Arts:

- Solitaire rings, simple diamond stud earrings, simple hoop earrings, and other jewelry designs that contain only a trivial amount of authorship.
- Touching-up an aged or damaged photograph in order to restore it to its original condition, without adding an appreciable amount of authorship to the original image.

- A **public domain** photograph of Winston Churchill combined with the word "Commitment" and the quotation "Never, never, never give up."
- An outline map of South Carolina with a blue heart in the center of the design featuring the white crescent moon and white palmetto tree from the state flag.

Specific categories of **literary works, works of the performing arts**, and **works of the visual arts** that contain a *de minimis* amount of authorship are discussed in **Chapters 700**, **800**, and **900**.

313.4(C) Words and Short Phrases

Words and short phrases, such as names, titles, and slogans, are not **copyrightable** because they contain a *de minimis* amount of authorship. *See* **37 C.F.R. § 202.1(a)**. The U.S. Copyright Office cannot register individual words or brief combinations of words, even if the word or short phrase is novel or distinctive or lends itself to a play on words. *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").

Examples:

- The name of an individual (including pseudonyms, pen names, or stage names).
- The name of a business or organization.
- The name of a band or performing group.
- The name of a product or service.
- A domain name or URL (*e.g.*, www.copyright.gov).
- The title or subtitle of a work of authorship.
- The name of a character.
- Catchwords, catchphrases, mottoes, slogans, or other short expressions.

For the same reasons, short musical phrases consisting of only a few musical notes standing alone are not copyrightable and cannot be registered with the U.S. Copyright Office, even if the phrase is novel or distinctive. *See* **37 C.F.R. § 202.1(a)**.

Examples:

- Clock chimes.
- "Mi do re sol, sol re mi do."
- A trademark consisting of three musical notes.

Similarly, individual numbers, letters, sounds, and short phrases consisting of such elements are not copyrightable, because they do not contain sufficient creative authorship. *Id.*

The Office maintains various databases, indexes, catalogs, and other records that contain titles of works that have been registered with the Office. These titles are part of the public record, but the titles themselves are not subject to copyright protection.

313.4(D) Works Consisting Entirely of Information That Is Common Property

The U.S. Copyright Office cannot register works consisting entirely of information that is common property because such works contain no original authorship. **37 C.F.R. § 202.1(d)**. Examples of common property include, without limitation, standard calendars, schedules of sporting events, and lists or tables taken from public documents or other common sources. *Id*. For the same reasons, the Office cannot register a **claim** in common sayings, diatonic and chromatic musical scales, or common chord progressions that merely consist of standard harmonies or common musical phrases.

313.4(E) Measuring and Computing Devices

The U.S. Copyright Office cannot register devices that are designed for computing or measuring or other useful articles in and of themselves. *See* **37 C.F.R. § 202.1(d)**. Examples of such devices include, without limitation, height and weight charts, tape measures and rulers, calculators, scales, and thermometers.

Although measuring and computing devices are not **copyrightable**, the Office may register pictorial, graphic, or sculptural features that have been applied to a device, but only if those features are separablefrom the article. For example, a drawing that appears on the surface of a height and weight chart or a fanciful graphic that appears on the surface of a thermometer may be registered if the pictorial or graphic feature can be perceived as a two-dimensional "work of art separate from the useful article" and would qualify as a protectable pictorial or graphic work "if it were imagined separately from the useful article into which it is incorporated." *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1007 (2017).

For a general discussion of useful articles, see **Chapter 900**, Section 924.

313.4(F) Mere Listing of Ingredients or Contents

A mere listing of ingredients or contents is not **copyrightable** and cannot be registered with the U.S. Copyright Office. **37 C.F.R. § 202.1(a)**.

Examples:

- A list of ingredients for a recipe.
- A list of components for a formula, compound, prescription, or the like.
- A list of musical tracks contained in a compact disc.
- A product label that merely lists the ingredients for the product, merely describes the product, or merely describes the contents of the product packaging.

The Office may register a work that explains how to perform a particular activity, such as a cookbook or user manual, provided that the work contains a sufficient amount of text, photographs, artwork, or other copyrightable expression. However, the registration does not extend to any list of ingredients or contents that may be included in the work. *See Publications International v. Meredith Corp.*, 88 F.3d 473, 480 (7th Cir. 1996) ("We do not view the functional listing of ingredients as original within the meaning of the Copyright Act."); *see also* **Policy Decision on Copyrightability of Digitized Typefaces, 53 Fed. Reg. 38,110, 38,112 (Sept. 29, 1988)** (explaining that "the explanation and illustration of recipes is copyrightable even though the end result—the food product—is not").

313.4(G) Blank Forms

Blank forms that are designed for recording information and do not in themselves convey information are not **copyrightable**. **37 C.F.R. § 202.1(c)**. Likewise, the copyright law does not protect the ideas or principles behind a blank form, the systems or methods implemented by a form, or any functional layout, coloring, or design that facilitates the use of a form. *See Baker v. Selden*, 101 U.S. 99 (1879).

Blank forms typically contain empty fields or lined spaces, as well as words or short phrases that identify the content that should be recorded in each field or space. Examples include, without limitation, time cards, graph paper, account books, diaries, bank checks, scorecards, address books, report forms, order forms, and the like. **37 C.F.R. § 202.1(c)**.

As a general rule, the Office will register a work of authorship that contains an appreciable amount of written or artistic expression, even if it contains a blank form that is designed for recording information. For example, bank checks may be registered if they contain sufficient pictorial authorship that decorates the form. Likewise, contracts, insurance policies, and other textual documents with "fill-in" spaces may be registered if they contain a sufficient amount of expressive, literary authorship that is not standard or functional. However, the mere inclusion of a large number of terms on a blank form may not satisfy the originality requirement if those terms are part of a system for recording information, such as a medical diagnostic form. *See* **17 U.S.C. § 102(b)**.

When examining these types of works, the Office applies "a standard consistent with that applied to all works submitted for registration: does the work evidence an appreciable quantum of original, creative expression?" *See* **Registration of Claims to Copyright: Notice of Termination of Inquiry Regarding Blank Forms, 45 Fed. Reg. 63,297 (Sept. 24, 1980)**. In applying this standard, the Office focuses on the textual or pictorial expression that the author contributed to the work. In other words, does the form qualify as a literary work, a pictorial work, or a work that contains an original combination of literary and pictorial expression? If so, the Office will register the **claim**. In all cases, the registration covers only the original textual or pictorial expression that the author contributed to the work, but does not cover the blank form or other uncopyrightable elements that the form may contain.

The Office cannot register the empty fields or lined spaces in a blank form. Likewise, the Office cannot register the words, short phrases, or other *de minimis* text that appears in the headings for a blank form, even if the **applicant** attempts to register the work as a **compilation** of uncopyrightable material. As discussed in Section **307**, a compilation is a subset of the subject matter categories listed in **Section 102(a)** of the Copyright Act, rather than a separate and distinct category of authorship. In other words, a compilation may be registered, provided that the work

as a whole falls within one or more of the congressionally established categories of authorship. A blank form that merely contains words, short phrases, or a *de minimis* amount of text does not satisfy this requirement because it does not qualify as a literary work, a pictorial work, a graphic work, or any of the other categories of works listed in **Section 102(a)**. Cf. **Registration of Claims to Copyright, 77 Fed. Reg. 37,605, 37,607 (June 22, 2012)**.

If a blank form poses an extensive number of questions or contains an exhaustive checklist of information, the **registration specialist** may communicate with the applicant or may refuse registration if it appears that the applicant is asserting a claim in the ideas, principles, systems, or methods implemented by the form.

313.4(H) Characters

Although the copyright law does not protect the name or the general idea for a character, a work that depicts or describes a particular character may be registered if it contains a sufficient amount of original authorship.

A registration for a visual art work, a **literary work**, or a work of the performing arts that depicts or describes a character covers the expression set forth in the **deposit copy(ies)**, but it does not cover the character *per se*. In other words, the copyright in the registered work protects the author's expression of the character, but it does not protect the mere concept of the character. The copyright in the character itself is limited to the artistic rendition of the character in visual form or the literary delineation of the character's specific attributes in textual form. (The trademark law may provide additional protection for the character's name or other attributes if the character is sufficiently distinctive and is used to identify the source of the trademark owner's goods or services.)

For a further discussion of characters, see **Chapter 800**, Section 804.2(B) and **Chapter 900**, Section 911.

313.4(I) *Scènes à Faire*

The copyright law does not protect stock characters, settings, or events that are common to a particular subject matter or medium because they are commonplace and lack originality. For example, the copyright for a work about the Hindenburg would not cover elements that are "indispensable, or at least standard, in the treatment of" that topic, such as scenes that take place in a German beer hall or characters who utter common greetings of the period. *See Hoehling*, 618 F.2d at 979. The copyright for a work about a police station in an urban slum would not cover elements that necessarily result from the choice of that setting, such as scenes depicting drunks, prostitutes, vermin, and derelict cars, or stock themes commonly linked to the genre of police fiction, such as foot chases or the "familiar figure of the Irish cop." *See Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir. 1986). Likewise, the fact "[t]hat treasure might be hidden in a cave inhabited by snakes, that fire might be used to repel the snake, that birds might frighten an intruder in the jungle, and that a weary traveler might seek solace in a tavern … [are] simply too general to be protectable." *See Zambito v. Paramount Pictures Corp.*, 613 F. Supp. 1107, 1112 (E.D.N.Y 1985).

While *scènes à faire* cannot be registered by themselves, a work of authorship that contains standard expressions or stock characters, settings, or events may be registered provided that the work as a whole contains a sufficient amount of original expression.

313.4(J) Familiar Symbols and Designs

Familiar symbols and designs are not **copyrightable** and cannot be registered with the U.S. Copyright Office, either in two-dimensional or three-dimensional form. **37 C.F.R. § 202.1(a)**. Likewise, the Office cannot register a work consisting of a simple combination of a few familiar symbols or designs with minor linear or spatial variations, either in two-dimensional or three-dimensional form.

Examples of familiar symbols and designs include, without limitation:

- Letters.
- Punctuation.
- Symbols typically found on a keyboard, such as asterisks, ampersands, and the like.
- Abbreviations.
- Musical notes and symbols.
- Numbers.
- Mathematical symbols.
- Currency symbols.
- Arrows and other directional or navigational symbols.
- Common representational symbols, such as a spade, club, heart, diamond, star, yin yang, fleur de lys, or the like.
- Common patterns, such as standard chevron, polka dot, checkerboard, or houndstooth designs.
- Well-known and commonly used symbols that contain a *de minimis* amount of expression or that are in the **public domain**, such as the peace symbol, gender symbols (♀ ♂), the symbols for "play, pause, stop, forward, back," simple emoticons such as the typical smiley face (☺), or the like.
- Standard industry designs, such as the caduceus, the barber pole, food labeling symbols, hazard warning symbols, or the like.
- Familiar religious symbols such as crosses, stars, crescents, and the like.
- Common architecture moldings, such as the volute used to decorate Ionic and Corinthian columns.

While familiar symbols and designs cannot be registered by themselves, a work of authorship that incorporates one or more of these elements into a larger design may be registered if the work as a whole contains a sufficient amount of creative expression.

For additional information concerning familiar symbols and designs, see **Chapter 900**, Section 906.2.

313.4(K) Mere Variations of Coloring

Color is one of the basic building blocks for pictorial, graphic, and sculptural works. The U.S. Copyright Office may register an original combination or arrangement of colors if it results in a pictorial, graphic, or sculptural work that qualifies as an original work of authorship. *See* **Copyright Registration for Colorized Versions of Black and White Motion Pictures, 52 Fed. Reg. 23,443, 23,445 (June 22, 1987)**.

The Office cannot register a **claim** to copyright in color in and of itself or a system for matching pairs and sets of colors. *See* **17 U.S.C. § 102(b).** Likewise, the Office cannot register mere variations in coloring, regardless of whether the variations are made by hand, by computer, or any other process. **37 C.F.R. § 202.1(a).** If the author merely added or changed a few colors that appear in a preexisting work of authorship or merely added, changed, or combined expected or familiar sets or pairs of colors, the Office may communicate with the applicant or may refuse to register the claim. Similarly, the Office may communicate or refuse registration for a compilation of colors if the colors merely enhance the visual display of a chart, table, graph, device, or other article.

Examples:

- Creating a new version of a fabric design where the colors red and blue are substituted for the colors yellow and green.
- Producing three greeting cards containing the same visual and textual content where the only difference is that each card is printed in a different color.
- Making a few minor changes in a preexisting work of authorship, such as simple tone-overs or color overlays.
- Using color as a simple form of typographic ornamentation.
- Using color to enhance sonar imaging or x-rays, sonograms, echocardiograms, magnetic resonance imaging, or the like.
- Removing all the color from a preexisting work of authorship.

For additional information concerning color, see **Chapter 900**, Section 906.3.

313.5 Specific Types of Works That May Contain Uncopyrightable Material

The U.S. Copyright Office has adopted policies regarding the copyrightability of specific types of **literary works, works of the performing arts**, and **works of the visual arts**.

For information concerning literary works that may be or may contain uncopyrightable material, see Chapter 700, Sections 707.1 (Numbers), 707.2 (Research), and 707.3 (Book Design).

For information concerning works of the performing arts that may be or may contain uncopyrightable material, see Chapter 800:

- Common property musical scales and arpeggios (Section 802.5(A)).
- **Sound recordings fixed** prior to February 15, 1972 (Section 803.5(D)).
- Social dances, simple routines, and other uncopyrightable movements (Sections 805.5(B) and 806.5(B)).

For information concerning works of the visual arts that may be or may contain uncopyrightable material, see Chapter 900:

- Geometric figures and shapes (Section 906.1).
- Bridges, canals, dams, tents, mobile homes, and other uncopyrightable structures (Section 923.2).
- Interior design and landscape design (Section 923.2).
- **Useful articles** (Section 924).

313.6 Other Types of Works That Cannot Be Registered with the U.S. Copyright Office

313.6(A) Foreign Works That Are Not Eligible for Copyright Protection in the United States

As discussed in Section 304, a work of authorship may be registered, provided that it is eligible for copyright protection in the United States under **Sections 104(a)** or **104(b)** of the Copyright Act. Works that do not satisfy these requirements are not protected by U.S. copyright law and cannot be registered with the U.S. Copyright Office. For more information concerning these requirements, see Chapter 2000, Section 2003.

313.6(B) Unlawful Use of Preexisting Material in a Derivative Work, a Compilation, or a Collective Work

Some **derivative works**, **compilations**, and **collective works** cannot be registered with the U.S. Copyright Office. **Section 103(a)** of the statute states that copyright protection for a compilation or derivative 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)**. This provision also applies to collective works because "the term 'compilation' includes collective works." **17 U.S.C. § 101** (definition of compilation).

Section 103(a) is intended to prevent "an infringer from benefiting, through copyright protection, from committing an unlawful act." **H.R. Rep. No. 941476, at 57 (1976)**, *reprinted in* 1976

U.S.C.C.A.N. at 5671. At the same time, it allows the author of a derivative work, a compilation, or a collective work to **claim** copyright in "those parts of the work that do not [unlawfully] employ the preexisting work." *Id*.

Ordinarily, the Office will not examine the preexisting material that appears in a derivative work, a compilation, or a collective work to determine whether that material is protected by copyright or whether it has been used in a lawful manner. However, the **registration specialist** may communicate with the **applicant** if the preexisting material has not been excluded from the claim and it is reasonably clear that the **claimant** may not own the copyright in that material, such as a mix tape containing a compilation of well-known **sound recordings**. The Office also may question derivative claims that appear to be unlawful and that are inseparable or intertwined with an underlying work, such as stage directions for a dramatic work.

The Office may register a derivative work, a compilation, or a collective work that contains preexisting **copyrightable** material, provided that the author's contribution to that work can be separated from the preexisting material. For example, an anthology of poetry may be registered as a collective work, even if the author accidentally included one poem that was unauthorized, because that poem could be severed from the anthology without affecting the lawful aspects of the collective work as a whole. By contrast, the Office may refuse registration if the preexisting material is inseparably intertwined with the compilation or the derivative work, such as an unauthorized **translation** of a novel or an unauthorized arrangement of a song. *See* **H.R. Rep. No. 941476, at 5758 (1976)**, *reprinted in* 1976 U.S.C.C.A.N. at 5671.

313.6(C) Government Works

313.6(C)(1) U.S. Government Works

Copyright protection under the Copyright Act is not available for "any work of the United States Government," regardless of whether it is **published** or **unpublished**. **17 U.S.C. § 105**; *see also* **H.R. Rep. No. 94-1476, at 58 (1976)**, *reprinted in* 1976 U.S.C.C.A.N. at 5672. This includes legislation enacted by Congress, decisions issued by the federal judiciary, regulations issued by a federal agency, or any other work prepared by an officer or employee of the U.S. federal government while acting within the course of his or her official duties. It also includes works prepared by an officer or employee of the government of the District of Columbia, the Commonwealth of Puerto Rico, or the organized territories under the jurisdiction of the federal government.

If an **applicant** states that the U.S. government or any of its agencies, officers, or employees created the work while acting within the scope of their employment, the **registration specialist** may communicate with the applicant and may refuse registration, even if the **claimant** is a nongovernmental entity.

There are several exceptions to these rules:

- Although works prepared by officers or employees of the U.S. government within the scope of their employment are not **copyrightable**, the federal government may receive and hold "copyrights transferred to it by assignment, bequest, or otherwise." **17 U.S.C. § 105**. For example, a U.S. government agency may register a website created by a government contractor, provided that the contractor did not create the website for the agency as a **work made for hire** and provided that the contractor transferred the copyright in that work to that agency.

- Works prepared by officers or employees of the U.S. Postal Service, the Corporation for Public Broadcasting, the Public Broadcasting Services, or National Public Radio are not considered works of the U.S. government. *See* **H.R. Rep. No. 94-1476, at 59 (1976)**, *reprinted in* 1976 U.S.C.C.A.N. at 5674 (expressly exempting the U.S. Postal Service).

- Works prepared by officers or employees of the Smithsonian Institution are not considered works of the U.S. government if the author-employee was paid from the Smithsonian trust fund.

- The U.S. Secretary of Commerce may secure copyright for a limited term not to exceed five years in any standard reference data prepared or disseminated by the National Technical Information Service. *See* 15 U.S.C. §290e; **H.R. Rep. No. 94-1476, at 59-60 (1976)**, *reprinted in* 1976 U.S.C.C.A.N. at 5673.

- A work prepared by an officer or employee of the U.S. government may be registered if the work was prepared at that person's own volition and outside his or her official duties, even if the subject matter focuses on the author's work for the government. *See* **H.R. Rep. No. 94-1476, at 58 (1976)**, *reprinted in* 1976 U.S.C.C.A.N. at 5671.

313.6(C)(2) Government Edicts

As a matter of longstanding public policy, the U.S. Copyright Office will not register a government edict that has been issued by any state, local, or territorial government, including legislative enactments, judicial decisions, administrative rulings, public ordinances, or similar types of official legal materials. Likewise, the Office will not register a government edict issued by any foreign government or any **translation** prepared by a government employee acting within the course of his or her official duties. *See Banks v. Manchester*, 128 U.S. 244, 253 (1888) ("there has always been a judicial consensus, from the time of the decision in the case of *Wheaton v. Peters*, 8 Pet. 591, that no copyright could under the statutes passed by Congress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duties"); *Howell v. Miller*, 91 F. 129, 137 (6th Cir. 1898) (Harlan, J.) ("no one can obtain the exclusive right to publish the laws of a state in a book prepared by him").

There is a limited exception to this rule. **Section 104(b)(5)** of the Act states that works first **published** by the United Nations or any of its specialized agencies, or first published by the Organization of American States are eligible for copyright protection in the United States. *See* **17 U.S.C. § 104(b)(5)**.

A work that does not constitute a government edict may be registered, even if it was prepared by an officer or employee of a state, local, territorial, or foreign government while acting within the course of his or her official duties. For example, the Office may register a tourist magazine written and published by Arizona's department of tourism or a map created and published by the public transit authority for the city of Detroit. Likewise, the Office may register annotations that summarize or comment upon legal materials issued by a federal, state, local, or foreign government, unless the annotations themselves have the force of law. *See* **Chapter 700**, Section 717.1.

313.6(D) Works in the Public Domain

Works that are in the **public domain** in the United States cannot be registered with the U.S. Copyright Office. A copyrighted work enters the public domain in the United States when "its full copyright term has expired." *Golan v. Holder*, 565 U.S. 302, 307 (2012). Works that do not comply with certain statutory formalities may also be in the public domain, such as U.S. works published without a **copyright notice** on or before March 1, 1989, or U.S. works published or registered on or before December 31, 1963 that were not renewed in a timely manner. Likewise, works that are not **copyrightable** are in the public domain, such as works that have not been **fixed** in a tangible medium of expression or works that merely contain a *de minimis* amount of authorship.

A **derivative work**, **compilation**, or **collective work** that contains public domain material may be registered, provided that the new work contains a sufficient amount of original authorship. The copyright in such works covers the compilation authorship or the new material that the author contributed to the derivative work, the compilation, or the collective work, but it "is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the [public domain] material." **17 U.S.C. § 103(b)**.

314 Use of Protected Names, Characters, Slogans, Symbols, Seals, Emblems, and Insignia

Occasionally, the U.S. Copyright Office receives works that contain names, characters, slogans, symbols, seals, emblems, or insignia that may be restricted by federal law, such as "Olympic," "Smokey Bear," "Woodsy Owl," "Give a Hoot, Don't Pollute," the 4-H Club Emblem, or the sign of the Red Cross. *See, e.g.*, 18 U.S.C. §§ 700-716; 36 U.S.C. § 220506.

If the work contains a sufficient amount of original authorship and if the federally protected material has been excluded from the **claim**, the **registration specialist** may register the claim without communicating with the **applicant**. By contrast, if the specialist is aware that the work contains federally protected material that has not been excluded from the claim, the specialist may notify the applicant that the material appears to be restricted and may ask the applicant whether that material has been used in a lawful manner.

315 Obscenity

Pornographic works may be registered with the U.S. Copyright Office, provided that they contain a sufficient amount of original authorship.

As a general rule, a **registration specialist** will not examine a work or authorship to determine whether it contains material that might be considered obscene. *See Mitchell Brothers Film Group v. Cinema Adult Theater*, 604 F.2d 852, 858 (5th Cir. 1979) (concluding that the 1909 Act protects "all creative works, obscene or non-obscene, that otherwise meet the requirements of the [statute]" and that there is "no explicit or implicit bar to the copyrighting of obscene materials"). However, if a work contains material that appears to fall within the scope of the Child Protection Act, the specialist will refer the work to the Associate Register of Copyrights and Director of Registration Policy & Practice. If the Associate Register determines that the work clearly falls within the scope of Title 18, sections 2251-2255, and if the **Register of Copyrights** concurs, the application, **deposit copy(ies),** and any other materials that have been submitted to the Office will be referred

to the U.S. Department of Justice. *See* **Operating Guidelines Regarding the Child Protection Act; Public Availability, 52 Fed. Reg. 10,177 (Mar. 30, 1987)**.

316 Classified Material

If the U.S. Copyright Office is aware that the **deposit copy(ies)** contain information that has been classified by the U.S. government, the **registration specialist** will refer the work to the Associate Register of Copyrights and Director of Registration Policy & Practice. The material should be held or disposed of in accordance with instructions from the Associate Register, and the examination or other processing of the material by the Office should be suspended until the matter has been resolved.