United States Copyright Office
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October 26, 2011

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RE: RAPTOR BATTERY 2
Correspondence ID: 1-1HIFB9

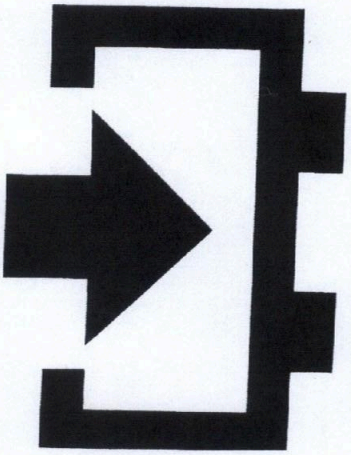
Dear Ms. Rittenhouse:

I am writing on behalf of the Copyright Office Review Board ("Board") in response to your letter dated June 26, 2009, in which you requested a second reconsideration of the Copyright Office's refusal to register a two-dimensional design entitled *Raptor Battery 2* (the "Work"). The Board has carefully examined the application, deposit, and related correspondence, and affirms the denial of the registration of the Work.

I. DESCRIPTION OF THE WORK

The Work is a two-dimensional design composed of an incomplete rectangle, two smaller rectangles attached to the larger rectangle, and an arrow pointing inward to the side of the larger rectangle showing the two solid, attached, smaller rectangles.

The Work is depicted as shown.



II. ADMINISTRATIVE RECORD

A. Initial submission

On March 14, 2008, you submitted to the Copyright Office your client Cummins, Inc.'s application to register the Work, along with the required deposit and fee. On August 27, 2008, a Registration Specialist ("Specialist") refused to register the Work because it lacked sufficient authorship necessary to support a copyright claim. Letter from Copyright Office to IPHorgan, Ltd. of 8/27/2008, at 1. The Specialist noted that works of visual art must "contain a minimum amount of pictorial, graphic or sculptural authorship," and, citing 37 C.F.R. § 202.1, stated that "[c]opyright does not protect familiar symbols or designs; basic geometric shapes ...." *Id.* The Specialist also stated that, under Section 102(b) of Title 17, copyright does not extend to any idea, concept, system, or process that may be embodied in a work. The Specialist cited the Supreme Court's decisions in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903), and *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340 (1991), for the proposition that neither the aesthetic appeal or commercial value of a work, nor the amount of time and effort expended to create a work, are considered when analyzing whether a work has sufficient creative authorship in a work. Letter from Copyright Office of 8/27/2008, at 1.

B. First request for reconsideration

On November 24, 2008, you submitted a first request for reconsideration to register this Work in which you asserted that the Work is sufficiently creative to warrant copyright protection. Letter from Rittenhouse to the Copyright Office of 11/24/2008, at 1. In your request, you noted that the standards for originality "do not require a great deal of original creative work," and that, to be copyrightable, a work need only have a "spark" of creativity. *Id.* You stated that a work must merely have a minimal degree of creativity, and you cited *Feist* for the standard for the existence of sufficient creativity in certain factual compilations. *Id.*

You also cited Section 101 of the Copyright Act for the definition of "compilation." You argued that the statutory definition includes three requirements for a work to be deemed an original work of authorship and a protectible compilation: (1) collection and assembly of preexisting materials that are, (2) selected, coordinated and arranged so that, (3) an original work of authorship is created. Letter from Rittenhouse of 11/24/2008, at 2. You further argued that the Work at issue here is not merely a familiar symbol or design. Instead, you claimed that the Work is "a *collection* and assemblage of shapes and symbols, including a partial frame design embellished with two rectangles on the solid side, and an arrow as the center piece so that the overall impression goes beyond being just a familiar symbol." *Id.* (emphasis in original). You also urged that the shapes – rectangles and arrow – were "selected, coordinated and arranged in a specific manner that required thought and judgment,

so that ... it results in an original work of authorship that is unique in its entirety." *Id.* You also claimed that the Work was both "developed independently" and "maintains that minimum level of creativity in the overall expression." *Id.*

In conclusion, you argued that the Work is a unique work of authorship and that the selection and arrangement of visual components, like facts, can be covered as compilations.

C. Registration Program's response to first request for reconsideration

On March 31, 2009, Attorney Advisor Virginia Giroux-Rollow responded to your first request for reconsideration on behalf of the Copyright Office's Registration Program. Ms. Giroux-Rollow stated that the Work at issue here "does not contain a sufficient amount of original and creative artistic or graphic authorship" to support registration. Letter from Giroux-Rollow to Rittenhouse of 3/31/2009, at 1.

Ms. Giroux-Rollow began by noting that copyrightable works must be original and independently created by the author *and* must "possess more than a de minimis quantum of creativity." *Id.* (citing *Feist*, 499 U.S. 340). She continued, stating that a protectible work of authorship requires more than a "trivial variation or arrangement of public domain or non-copyrightable elements." *Id.* (citing *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951)). Ms. Giroux-Rollow then stated that the Copyright Office reviews the elements of a work – alone or in combination – to determine if is protectible. *Id.* She also noted that, because the Office "does not make aesthetic judgments, the attractiveness of a design, its uniqueness, its visual effect or appearance, the time, effort, and expense it took to create or its commercial success in the marketplace are not factors during the examining process." *Id.* (emphasis in original). She thus explained that the correct inquiry is whether there is a sufficient amount of original and creative artistic or graphic authorship to support registration. *Id.*

Turning to the specific Work at issue here, Ms. Giroux-Rollow characterized the design as being "used as part of a display that monitors the power of a battery." *Id.* She found that this design, consisting of rectangles and an arrow (or any minor variations to such shapes), is made up of "common and familiar shapes, in the public domain, and, therefore, not copyrightable." *Id.* Thus, she held that the design was not sufficiently creative. Moreover, she noted that the combination and arrangement of these "few shapes" is insufficient to support a registration. *Id.* Ms. Giroux-Rollow found support for her position in 37 C.F.R. § 202.1, in *Compendium II, Copyright Office Practices*, Section 503.02(a) ("Compendium II"), and in several court cases. Specifically, she noted that courts have rejected copyright claims for designs consisting of the following: four angled lines forming an arrow with the word "arrow" written below; a label with the words "Forstmann 100% Virgin Wool" and three fleur-de-lis; a chinawear "gothic" pattern with simple variations and combinations of geometric shapes; a fabric design with two inch stripes with small grid

squares superimposed over the stripes; and an envelope with solid black stripes and a few words and lettering. Letter from Giroux-Rollow of 3/31/2009, at 2. Ms. Giroux-Rollow found that, even though a slight amount of originality is sufficient, the use of the few shapes in the Work at issue here did not meet this low threshold.

Additionally, Ms. Giroux-Rollow rejected the argument that the Work should be protected as a compilation. She found that designs are not registrable as compilations, but she recognized that the Office should view a work in its entirety. *Id.* Even looking at the Work as a whole, Ms. Giroux-Rollow found that it was unregistrable. *Id.* at 3. She found that, even though there may be different ways to arrange the shapes, the Work "simply do[es] not contain a sufficient amount of original and creative artistic or graphic authorship upon which to support a copyright registration." *Id.* Ms. Giroux-Rollow also distinguished *Key Publ'ns, Inc. v. Chinatown Today Publ'ns Enters., Inc.*, 945 F.2d 509 (2d Cir. 1991), upon which you relied, because it involved a literary compilation and included over 260 categories and 9,000 listings. Letter from Giroux-Rollow of 3/31/2009, at 3. She found that the Work at issue here does not include the same amount of selective judgment as in *Key*. *Id.* In summary, Ms. Giroux-Rollow refused registration of the Work.

D. Second request for reconsideration

In a letter dated June 26, 2009, you requested that the Office again reconsider its refusal to register the copyright claim in this Work. Letter from Rittenhouse to Copyright Office, Receiving & Processing Division, of 6/26/2009, at 1. You argued that Ms. Giroux-Rollow was incorrect to find that the Work RAPTOR BATTERY 2 does not represent a sufficient level of creativity and original authorship to support a copyright registration. *Id.*

You argue that, even if the Work is not registrable as a "compilation," the principles underlying compilation protection still apply to the Work because it combines various elements in an original manner, even if the individual elements would not, by themselves, warrant protection. *Id.* For support, you cite two cases in which courts found works to be copyrightable even though the individual elements of the designs were not protectable in themselves. You argue, first, that, in *Reader's Digest Ass'n, Inc. v. Conservative Digest, Inc.*, 821 F.2d 800 (D.C. Cir. 1987), the court found that a magazine cover design with ordinary lines, typefaces, and colors, was eligible for copyright protection because of the "distinctive arrangement and layout of those elements." Letter from Rittenhouse of 6/26/2009, at 1. You next cite *Roulo v. Russ Berrie & Co., Inc.*, 886 F.2d 931 (7th Cir. 1989), in which the court analyzed a greeting card design based on the combination of certain common elements in a particular arrangement or layout. Letter from Rittenhouse of 6/26/2009, at 2. You also argue, *Id.*., that several later cases affirmed the principles set forth in *Reader's Digest* and *Roulo*, including *Schiller & Schmidt, Inc. v. Nordisco Corp.*, 969 F.2d 410, 414 (7th Cir. 1992), and *Casa Editrice Bonechi, S.R.L. v. Irving Weisdorf & Co., Ltd.*, No. 95 Civ. 4008(AGS), 1998 WL 193246 (S.D.N.Y. Apr. 21, 1998). You state that

these cases "found that even if the individual elements were not protected or protectable, 'the distinctive arrangement and layout of those elements [in a book cover] is entitled to protection as a graphic work.'" Letter from Rittenhouse of 6/26/2009, at 2. Based on these cases, along with *Feist*'s emphasis [499 U.S. at 348] on selection and arrangement of elements, you argue that the Work at issue here resulted from "specific choices on selection and arrangement so as to create an entirely creative visual work." *Id.*

Additionally, you seek to distinguish the cases cited by Ms. Giroux-Rollow regarding protection of common shapes. Letter from Rittenhouse of 6/26/2009, at 2-3. You have argued that the design in the *John Muller* case involving angled lines forming an arrow was, as a whole, a common shape, not a new shape as depicted in the Work at issue here. *Id.* at 3. You have also claimed that the *Forstmann* wool label case is inapposite because the three fleur-de-lis designs in that case did not create a new design – it simply showed three of the same shape. *Id.* You thus argue that, because these cases did not discuss the creation of a new graphic or design, they do not support the Office's rejection of registration for the Work at issue here. *Id.*

Finally, you have stated that *Atari Games Corp. v. Oman*, 888 F.2d 878 (D.C. Cir. 1989) supports your position. *Id.* Specifically, you noted that *Atari* found that simple shapes, if combined in a distinctive manner requiring some ingenuity, can be protected by copyright law. You argue that this logic should be applied to analysis of the Work in question here, which work you claim combines shapes in a manner that "transcends to a creative work of authorship." *Id.*

III. DECISION AND ANALYSIS

A. Feist

After reviewing the application and arguments in favor of registering Applicant's Work, the Board affirms the decision of the Registration Program to refuse registration of the Work. The Board concludes that the Office is not able to register a copyright claim in the Work because it does not contain sufficient copyrightable authorship. While the Review Board does not dispute that the design at issue here was independently created by the author, the Supreme Court made clear in *Feist* that the concept of originality in the context of copyright law means not only that the work be independently created by the author but it must also possess at least some minimal degree of creativity. *Feist*, 499 U.S. at 345. In determining whether a particular work embodies a sufficient amount of creativity to sustain a copyright claim, the Board adheres to the standard set forth in *Feist*, which states that the "requisite level of creativity is extremely low; even a small amount will suffice." *Id.*

While this standard is broad, it is not limitless. Instead, *Feist* ruled that some works (such as a telephone directory at issue in that case) fail to meet the standard because, "[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity." *Id.* at 363. Accordingly, there can be no copyright in a work in which "the creative spark is utterly lacking or so trivial as to be nonexistent." *Id.* at 359; *see also* 37 C.F.R. § 202.10(a) ("In order to be acceptable as pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form."); *Nimmer* § 2.01(B) ("[T]here remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright.").

The Office has also recognized the modest, but existent, requisite level of creativity necessary to sustain a copyright claim. *Compendium II* states, "[w]orks that lack even a certain minimum amount of original authorship are not copyrightable." *Compendium II*, § 202.02(a). With respect to pictorial, graphic and sculptural works, a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." *Compendium* II, § 503.02(a)

B. Analysis of the work

The Work at issue here consists of a simplistic image consisting of three rectangular shapes with an arrow pointing towards the inner center of the overall design. Even if the design were intended to be symbolic, such intentions or meanings are not relevant to copyright protection. What is important is whether the resulting, overall expression contains copyrightable authorship.

We approach the analysis of any given work of authorship by judging it in its entirety, with analysis of the combination of the constituent elements of a work of authorship as well as the relationship of such elements to each other. The selection and arrangement of individual design elements that are *de minimis* in themselves, *i.e.*, they carry no copyright protection as such, within an overall design may be protected, depending on the use of such elements and whether the chosen elements are sufficient in quantity within the design as a whole. The Ninth Circuit said it well: "But it is not true that *any* combination of unprotectable elements automatically qualifies for copyright protection. Our case law suggests, and we hold today, that a combination of unprotectable elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship." *Satava v. Lowry,* 323 F.3d 805, 811 (9th Cir. 2003) (emphasis in original). The Ninth Circuit quoted *Feist* to bolster its explanation: "[T]he principal focus should be on whether the selection, coordination, and arrangement are sufficiently original to merit protection." 323 F.3d at 811 (citing *Feist*, 499 U.S. at 358). The focus, therefore, must be on the overall design that fairly may be said to be synonymous with the selection,

coordination, or arrangement of individual (possibly) trivial elements, brought together to form a more-than-trivial, copyrightable overall design.

The Board finds that this particular design, which is a combination of very few shapes to create a simplistic design, does not constitute original selection and arrangement necessary to sustain copyright protection under the standard set forth in *Feist*. The design is a commonplace box shape with an incoming arrow and two protruding rectangles attached to one side of the box. The image of the incoming arrow is common and nothing about the combination of these few, ordinary shapes transforms this image into a protectible design. Moreover, the title of the Work – *Raptor Battery 2* – indicates that this design is used in connection with a battery. When viewed in this light, the design appears to be a common battery-outline shape with the mere addition of an arrow.

The arguments in your June 26, 2009 second request for reconsideration do not undermine this finding. Although the Review Board accepts the general premise that certain combinations of otherwise unprotectible elements may be sufficiently creative to warrant copyright protection, the Work at issue here is merely a simplistic design that does not automatically establish sufficient creativity. Such a design does not rise to the level of creativity necessary to establish copyright protection. [*See, e.g.*, *Coach, Inc. v. Peters,* 386 F. Supp. 2d 495, 499 (S.D.N.Y. 2005), where the Court affirmed the conclusion of the Copyright Office that "not simply that the letter "C" is not copyrightable but that '[t]he elements embodied in this work, individually, **and in their particular combination and arrangement,** simply do not contain a sufficient amount of original and creative authorship to be copyrightable.'" (emphasis added)

The cases cited in the second request for reconsideration do not disturb this finding. While these cases recognize the general principle that a combination of certain unprotectible elements may result in copyrightable material, they do not support registration of the specific Work at issue here.

Although *Reader's Digest* held that a combination of otherwise unprotectible elements may be protected if combined in certain situations, the magazine cover at issue involved the placement of numerous elements resulting in an overall work of authorship. *Reader's Digest v. Conservative Digest. Inc.*. 821 F.2d 800 (D.C. Cir. 1987), involved a trade dress issue as well as a copyright count for a work with multiple print elements and colors combined with these textual elements, juxtaposed in an overall design that, according to the Court, resulted in a distinct arrangement and layout, constituting copyrightable authorship. Although the Review Board does, indeed, recognize that print elements may, in some instances, be considered part of graphic designs, this particular principle does not lend credence to your argument that the minimal design representing RAPTOR BATTERY 2 should be registered. The Review Board does not find the *Reader's Digest* case, with its stated conclusion that the "distinctive arrangement and layout" of "ordinary lines, typefaces,

and colors" [to be a] graphic work, *Reader's Digest*, 821 F.2d at 806, as explanatory or as helpful support for your argument that this very simple and elementary design of a battery, consisting of a tiny number of common and geometric shapes, is a copyrightable graphic. We do not see a convincing parallel between the litigated cover design of Reader's Digest and the design at issue here so that such parallel would argue for registration of the RAPTOR BATTERY 2 design.

Similarly, the *Roulo* case merely states the general proposition that certain combinations of common elements in a unique manner can be worthy of copyright protection. *Roulo*, 886 F.3d at 939-40. The *Roulo* decision, however, does not support registration of the Work at issue here. *Roulo* involved a greeting card design that incorporated several elements, including a specific striped border design, use of a particular size and cursive style, and color choices, among other things. *Id.* This extremely simplistic outline of a battery, with a single, straightforward arrow pointing to the inner (battery) space, is not similar to the Work held protectible in *Roulo.*

Your reliance on *Schiller & Schmidt* and *Casa Editrice Bonechi* is also misplaced. In *Schiller & Schmidt*, the plaintiff was found not to own the copyrights in photographs included in a catalog, but the Court noted that the catalog overall contained "original" material, *i.e.,* the layout of the photographs. This is simply an example of compilation authorship, but it does not involve common shapes or other unprotectible material having been coordinated or arranged. Additionally, in *Bonechi*, the court merely denied a motion to dismiss by stating that there was a "plausible argument" that a book cover design including the words "New York" in a rectangular band, combined with other elements – more elements than selected and arranged here – such as photographs of the Empire State Building, could be copyrightable. *See Casa Editrice Bonechi*, 1998 WL 193246, at *3.

The final case cited in your second request for reconsideration, *Atari Games Corp. v. Oman*, also fails to support registration of the Work at issue here. There, the court did not make a finding that the BREAKOUT video game was copryightable, but instead remanded the case to the district court with instructions to return the application to the Register for further consideration. The court did note that "simple shapes, when selected or combined in a distinctive manner indicating some ingenuity, have been accorded copyright protection both by the Register and in court." *Atari*, 888 F.2d at 883. The work at issue in *Atari* was deemed by the Court to be creative and, thus, consisting of a greater modicum of authorship than the Work at issue here. Again, this general *Atari* principle does not mandate that the design in the Work at issue here be registered; instead, it merely acknowledges a general proposition with which the Review Board agrees.

Finally, we do not agree with your attempt to distinguish some of the cases cited by Ms. Giroux-Rollow in her 3/31/2009 Letter. You specifically claim that the *New York Arrows* and *Forstmann Woolen* cases are not analogous because they involved designs

incorporating shapes that did not result in completely different designs, i.e., "not a new creation above and beyond its components." Letter from Rittenhouse of 6/26/2009, at 2-3. These cases, however, did present an overall design beyond the individual component parts. The *Forstmann Woolen* case incorporated three common shapes (fleur de lis) into a single design and the *New York Arrows* case also includes a series of lines to form a different shape, an arrow. Even so, the final decisions in these cases demonstrated that the designs were not copyrightable.

IV. CONCLUSION

Using the guidance given by *Feist* and the case law that has come after it, the Review Board concludes that the *Raptor Battery 2* design does not exhibit the "minimal levels of creativity" necessary for registration. For the reasons stated above, the Copyright Office Review Board affirms that the Work cannot be registered because of its insufficient creativity. This decision constitutes final agency action.

Sincerely,

/s/

Nanette Petruzzelli
Associate Register,
Registration Program
for the Review Board
United States Copyright Office