United States Copyright Office
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August 21, 2013

Rozovics Law Firm, LLC
Attn: Brie Crawford
Historic Pierson Building
263 King Street
Crystal Lake, IL 60014

Re: Follow the Action
Correspondence ID: 1-EJCWGD

Dear Ms. Crawford:

The Review Board of the United States Copyright Office (the "Board") is in receipt of your second request for reconsideration of the Registration Program's refusal to register the work entitled: *Follow the Action*. You submitted this request on behalf of your client, RMKT Concepts, LLC, on April 15, 2013.

The Board has examined the application, the deposit copies, and all of the correspondence in this case. After careful consideration of the arguments in your second request for reconsideration, the Board affirms the Registration Program's denial of registration of this copyright claim. The Board's reasoning is set forth below. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action on this matter.

I. DESCRIPTION OF THE WORK

Follow the Action (the "Work") consists of the short phrase "Follow the action" arranged so that the words "Follow" and "the" are located above the larger "action." A graphic consisting of a yellow arrow shape (pointed down and to the left) and an orange arrow shape (pointed up and to the right) is positioned between the words "Follow" and "the." The below image is a photographic reproduction of the Work from the deposit materials:



II. ADMINISTRATIVE RECORD

On June 22, 2012, the United States Copyright Office (the "Office") issued a letter notifying RMKT Concepts, LLC (the "Applicant") that it had refused registration of the above mentioned Work. *Letter from Registration Specialist, Janet E. Alger, to Mathew Perrone, Jr.* (June 22, 2012). In its letter, the Office stated that it could not register the Work because it "represents less than the required minimum amount of original authorship on which to base a claim." *Id.*

In a letter dated September 19, 2012, you requested that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusal to register the Work. *Letter from Brie Crawford to Copyright RAC Division* (September 19, 2012) ("First Request"). Your letter set forth your reasons as to why the Office improperly refused registration. *Id.* Upon reviewing the Work in light of the points raised in your letter, the Office concluded that the Work "does not contain a sufficient amount of original and creative artistic or graphic authorship" and again refused registration. *Letter from Attorney-Advisor, Stephanie Mason, to Brie Crawford* (January 17, 2013).

Finally, in a letter dated April 15, 2013, you requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Work. *Letter from Brie Crawford to Copyright R&P Division* (date) ("Second Request"). In arguing that the Office improperly refused registration, you claim the Work includes at least the minimum amount of creativity required to support registration under the standard for originality set forth in *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). *Second Request* at 1-2. In support of this argument, you claim that the Applicant's careful selection and arrangement of the Work's constituent elements possess sufficient creative authorship to warrant registration under the Copyright Act. Specifically, you assert that "the author had to use creativity and ingenuity to create a unique logo with the shape, appearance, and flow to work in conjunction with the slogan" and that "the [author of the Work] had to use much creativity and imagination to design a logo with features that would secondarily enhance the overall effect of the slogan and that common shapes or elements in the public domain would not suffice." *Id.* at 5.

In addition to *Feist*, your argument references several cases in support of the general principle that, to be sufficiently creative to warrant copyright protection, a work need only possess a "modicum of creativity." *Id.* at 1-6. (referencing *Bouchat v. Baltimore Ravens, Inc.*, 241 F.3d 3350, 356 (4th Cir. 2000); *John Muller & Co. v. NY Arrows Soccer Team Inc.*, 802 F.2d 989 (8th Cir. 1986); and, *Kitchens of Sara Lee v. Nifty Foods Corp.*, 266 F.2d 541 (2d Cir. 1959), among other cases).

III. DECISION

A. *The Legal Framework*

All copyrightable works must qualify as "original works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a). As used with respect to copyright, the term "original" consists of two components: independent creation and sufficient creativity. *See Feist*, 499 U.S. at 345. First, the work must have been independently created by the author, *i.e.*, not copied from another work. *Id.* Second, the work must possess sufficient creativity. *Id.* While only a modicum of creativity is necessary to establish the requisite level, the Supreme Court has ruled that some

works (such as the telephone directory at issue in *Feist*) fail to meet this threshold. *Id.* The Court observed that "[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. It further found that 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.

The Office's regulations implement the long-standing requirements of originality and creativity set forth in the law and, subsequently, the *Feist* decision. *See* 37 C.F.R. § 202.1(a) (prohibiting registration of "[w]ords and short phrases such as names, titles, slogans; familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering, or coloring"); *see also* 37 C.F.R. § 202.10(a) (stating "[i]n order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form").

Of course, some combinations of common or standard design elements may contain sufficient creativity, with respect to how they are juxtaposed or arranged, to support a copyright. Nevertheless, not every combination or arrangement will be sufficient to meet this grade. *See Feist,* 499 U.S. at 358 (finding the Copyright Act "implies that some ways [of selecting, coordinating, or arranging uncopyrightable material] will trigger copyright, but that others will not"). Ultimately, the determination of copyrightability in the combination of standard design elements rests on whether the selection, coordination, or arrangement is done in such a way as to result in copyrightable authorship. *Id.*; *see also Atari Games Corp. v. Oman*, 888 F.2d 878 (D. D.C. 1989).

To be clear, the mere simplistic arrangement of non-protectable elements does not automatically establish the level of creativity necessary to warrant protection. For example, the Eighth Circuit upheld the Copyright Office's refusal to register a simple logo consisting of four angled lines which formed an arrow and the word "Arrows" in a cursive script below the arrow. *See John Muller & Co.*, 802 F.2d 989 (8th Cir. 1986). Likewise, the Ninth Circuit held that a glass sculpture of a jellyfish that consisted of elements including clear glass, an oblong shroud, bright colors, proportion, vertical orientation, and the stereotypical jellyfish form did not merit copyright protection. *See Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003). The court's language in *Satava* is particularly instructional:

> [i]t is true, of course, that a combination of unprotectable elements may qualify for copyright protection. 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.

Id. (internal citations omitted) (emphasis in original).

Finally, Copyright Office Registration Specialists (and the Board, as well) do not make aesthetic judgments in evaluating the copyrightability of particular works. They are not influenced by the attractiveness of a design, the espoused intentions of the author, the design's uniqueness, its visual effect or appearance, its symbolism, the time and effort it took to create, or its commercial

success in the marketplace. *See* 17 U.S.C. § 102(b); *see also Bleistein v. Donaldson*, 188 U.S. 239 (1903). The fact that a work consists of a unique or distinctive shape or style for purposes of aesthetic appeal does not automatically mean that the work, as a whole, constitutes a copyrightable "work of art."

B. *Analysis of the Work*

After carefully examining the Work, and applying the legal standards discussed above, the Board finds that *Follow the Action* fails to satisfy the requirement of creative authorship.

First, the Board has determined that none of the Work's constituent elements, considered individually, are sufficiently creative to warrant protection. As noted, 37 C.F.R § 202.1(a), identifies certain elements that are not copyrightable. These elements include: "[w]ords and short phrases such as names, titles, slogans; familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering, or coloring." *Id.* Here, the Applicant's Work consists of two quadrilaterals that resemble common arrow shapes, the colors yellow, orange, and black, and the short phrase "Follow the action" printed in an ordinary font. Consistent with the above regulations, neither the arrow shapes, the phrase "Follow the action," the font the Applicant used to create the word's lettering, nor the Work's simple color scheme are eligible for copyright protection. *See id.* (prohibiting the registration of basic symbols or designs); *see also Racenstein & Co., Inc. v. Wallace dba ABC Window Cleaning Supply*, 51 U.S.P.Q. 2d 1031 (S.D.N.Y. 1999) (indicating a word or short phrase, alone, generally cannot support a copyright claim); *see also Coach, Inc. v. Peters*, 386 F. Supp 2d 495, 498-99 (indicating mere variations in typographic ornamentation or lettering cannot support a copyright claim); *and see Boisson v. Banian, Ltd.*, 273 F.3d 262, 271 (2d Cir. 2001) (indicating mere coloration cannot support a copyright claim). Thus, we conclude that the Work's constituent elements do not qualify for registration under the Copyright Act.

Second, the Board finds that the Work, considered as a whole, fails to meet the creativity threshold set forth in *Feist*. 499 U.S at 359. As explained, the Board accepts the principle that combinations of unprotectable elements may be eligible for copyright registration. However, in order to be accepted, such combinations must contain some distinguishable variation in the selection, coordination, or arrangement of their elements that is not so obvious or minor that the "creative spark is utterly lacking or so trivial as to be nonexistent." *Id.*; *see also Atari Games,* 888 F.2d at 883 (finding a work should be viewed in its entirety, with individual noncopyrightable elements judged not separately, but in their overall interrelatedness within the work as a whole). Viewed as a whole, the Work consists of the simple arrangement of two adjacent arrow shapes within an obvious stacking of the phrase "Follow the action." The Work also incorporates three common colors and ordinary typography. This basic configuration of two familiar shapes, a phrase, and a simple color scheme is, at best, *de minimis*, and fails to meet the threshold for copyrightable authorship. *Feist,* 499 U.S at 359; *see also Atari Games,* 888 F.2d at 883. Accordingly, we conclude that the Work, as a whole, lacks the requisite "creative spark" necessary for registration. *Feist,* 499 U.S at 359.

Despite your assertions that "the author had to use creativity and ingenuity to create a unique logo with the shape, appearance, and flow to work in conjunction with the slogan" and that "the [author of the Work] had to use much creativity and imagination to design a logo with features that

would secondarily enhance the overall effect of the slogan" (*Second Request* at 5), the fact remains that the Work includes a basic combination of unprotectable shapes with unprotectable text that lacks a sufficient amount of creative authorship to warrant copyright protection.

In sum, the Board finds that the Applicant's selection and arrangement of the common elements that comprise the Work lack a sufficient level of creativity to make the Work registerable under the Copyright Act.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the work entitled: *Follow the Action.* This decision constitutes final agency action on this matter. 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

BY: _____
William J. Roberts, Jr.
Copyright Office Review Board