United States Copyright Office
Library of Congress · 101 Independence Avenue SE · Washington, DC 20559-6000 · www.copyright.gov

August 12, 2013

IP Horgan Ltd.
Attn: Carlynn Davis
1130 Lake Cook Road, Suite 240
Buffalo Grove, IL 60089

Re: Right Management & Radiance Device (ID: 1-BJA6C7)
Experis & Break-Through Device (ID: 1-BJA6GZ)

Dear Ms. Davis:

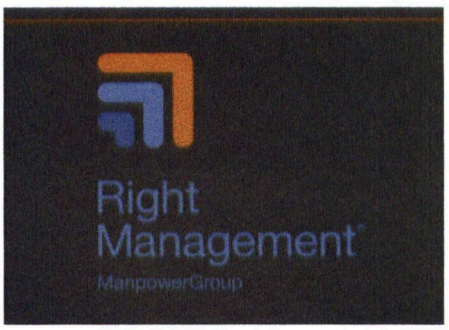
The Review Board of the United States Copyright Office (the "Board") is in receipt of your second requests for reconsideration of the Registration Program's refusals to register the works entitled: *Experis & Break-Through Device* and *Right Management & Radiance Device* (the "Works"). You submitted these requests on behalf of your client, RMC of Illinois, Inc. (the "Applicant"), on February 2, 2012. Administratively, your previous registration requests for the two Works were handled separately. However, because the issues associated with the Works are similar, for the purpose of second reconsideration, we will address both claims in this one letter. I apologize for the delay in the issuance of this determination. After periods of inaction, staff departures, and budgetary restrictions, the Register of Copyrights has appointed a new Board and we are proceeding with second appeals of registration refusals as expeditiously as possible.

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

I. DESCRIPTION OF THE WORKS

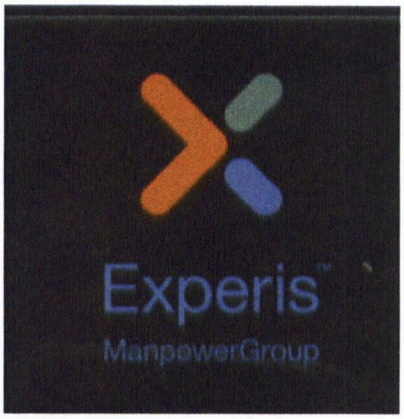
Right Management & Radiance Device is a logo that consists of three ninety-degree angle shapes. The largest shape has an orange hue, the second largest shape has a light-blue hue, and the smallest shape has a dark-blue hue. The shapes are stacked from left to right, so that the smallest appears on the bottom left, followed by the next largest, followed by the largest. The words "Right" and "Management" appear below the angle shapes.

The below image is a photographic reproduction of the Work from the deposit materials:



Experis & Break-Through Device is a logo that consists of three shapes arranged to resemble an "X" shape. The left side of the "X" is made up of an orange colored arrow shape (">"). The right side of the "X" is made up of two small rectangle shapes with rounded edges; one blue, one green. The word "Experis" appears below the "X" shape.

The below image is a photographic reproduction of the Work from the deposit materials:



II. ADMINISTRATIVE RECORD

On July 25, 2011, the Copyright Office (the "Office") issued a letter notifying you that it had refused registration of the work *Right Management & Radiance Device*. *Letter from Registration Specialist, Sandra Ware, to Carlynn Davis* (July 25, 2011). On August 10, 2011, the Copyright Office issued a letter notifying you that it had also refused registration of the work *Experis & Break-Through Device*. *Letter from Registration Specialist, Allan Runge, to Carlynn Davis* (August 10, 2011). In both letters, the Office indicated that it could not register the Works because they lack the authorship necessary to support a copyright claim. *Id.*

In letters dated August 8, 2011, and August 19, 2011, you requested that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusals to register the Works. *Letter from Carlynn Davis to Copyright RAC Division* (August 8, 2011); *Letter from Carlynn Davis to Copyright RAC Division* (August 19, 2011). Your letters set forth your reasons as to why the Office improperly refused registration. *Id.* Upon reviewing the Works in light of the points raised in your letters, the Office concluded that the Works do not contain "a sufficient amount of original and creative literary, artistic, or sculptural authorship upon which to support a copyright registration" and again refused registration. *Letter concerning "Right Management & Radiance Device" from Attorney-Advisor, Stephanie Mason, to Carlynn Davis* at 1 (December 12, 2011); *Letter concerning "Experis & Break-Through Device" from Attorney-Advisor, Stephanie Mason, to Carlynn Davis* at 1 (December 12, 2011).

Finally, in two letters dated February 1, 2012, you requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusals to register the Works. *Letter concerning "Right Management & Radiance Device"from Carlynn Davis to Copyright R&P Division* (May 3, 2011) ("Right Management Letter"); *Letter concerning "Experis & Break-Through Device" from Carlynn Davis to Copyright R&P Division* (May 3, 2011) ("Experis Letter"). In arguing that the Office improperly refused registration, you claim that each of the two Works, as a whole, 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). *Right Management Letter* at 1-3; *Experis Letter* at 1-3. In support of these arguments, you claim the Applicant carefully selected and combined the individual elements that comprise each Work to give the Works meaning that is not present when their elements are evaluated independently. *Id.* Regarding the *Right Management & Radiance Device*, you maintain "the device was designed in this way to communicate a strong upward momentum and a promise of positive growth from the inside out" and that "the design is unique and conveys a unique message." *Right Management Letter* at 2. Regarding the *Experis & Break-Through Device*, you maintain the design's out-reaching arms and starburst pattern were chosen to symbolize and evoke thoughts of accelerated growth." *Experis Letter* at 2.

In addition to *Feist*, your argument references several cases supporting the general principle that, in order to be sufficiently creative to warrant copyright protection, a work need only possess a "modicum of creativity." *Right Management Letter* at 1-4; *Experis Letter* at 1-4. You also reference several cases that demonstrate designs comprised of otherwise unprotectable elements are acceptable for copyright protection if the selection and arrangement of those elements satisfies the requisite level of creative authorship. *Right Management Letter* at 1-5; *Experis Letter* at 1-5.

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 unprotectable 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 Works*

After carefully examining the Works, and applying the legal standards discussed above, the Board finds that the Works fail 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 *Right Management & Radiance Device* logo consists of three right-angle shapes, the words "Right" and "Management" appearing in an ordinary font, and three colors. The *Experis & Break-Through Device* logo consists of three standard, geometric shapes, the word "Experis" appearing in an ordinary font, and three colors. Consistent with the above regulations, neither the shapes, the words, the font the Applicant used to create the words' lettering, nor the Works' simple color schemes 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 Works' constituent elements do not qualify for registration under the Copyright Act.

Second, the Board finds that each of the two Works, considered as a whole, fail 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 *Right Management & Radiance Device* is a logo that consists of three ordinary right-angle shapes (one orange, one light-blue, one dark-blue) stacked from left to right, so that the smallest appears on the bottom left, followed by the next largest, followed by the largest. The words "Right" and "Management" appear below the shapes. This basic arrangement of three familiar shapes, two words, 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 *Right Management & Radiance Device*, as a whole, lacks the requisite "creative spark" necessary for registration. *Feist,* 499 U.S at 359.

Likewise, the *Experis & Break-Through Device* is a logo that consists of three basic geometric shapes arranged to resemble an "X" shape. The left side of the "X" is made up of an orange colored arrow shape (">"). The right side of the "X" is made up of two small rectangle shapes with rounded edges; one blue, one green. The word "Experis" appears below the "X" shape. This basic arrangement of three familiar shapes, two words, 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 *Experis & Break-Through Device*, as a whole, lacks the requisite "creative spark" necessary for registration. *Feist,* 499 U.S at 359.

Finally, your assertions that the Works are unique, communicate "a strong upward momentum and a promise of positive growth from the inside out," and evoke "thoughts of accelerated growth," do not add to your claim of sufficient creativity. *Right Management Letter* at 2; *Experis Letter* at 2. As discussed above, the Board does not assess a work's uniqueness, its visual effect or appearance, or its symbolism in determining whether it contains the requisite minimal amount of original authorship necessary for registration. Thus, even if accurate, the mere fact that the Works consist of unique, symbolic arrangement of familiar shapes would not make the Works, as a whole, copyrightable.

In sum, the Board finds that the Applicant's selection and arrangement of the common elements that comprise the Works lack a sufficient level of creativity to make the Works 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 works entitled: *Experis & Break-Through Device* and *Right Management & Radiance Device.* This decision constitutes final agency action on this matter. 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

BY: [redacted]
William J. Roberts, Jr.
Copyright Office Review Board