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

August 12, 2013

Jay Varon
2864 Vista Acedera
Carlsbad, CA 92009

Re: Magnet Embedded Bracelet
Correspondence ID: 1-AJTSPC

Dear Mr. Varon:

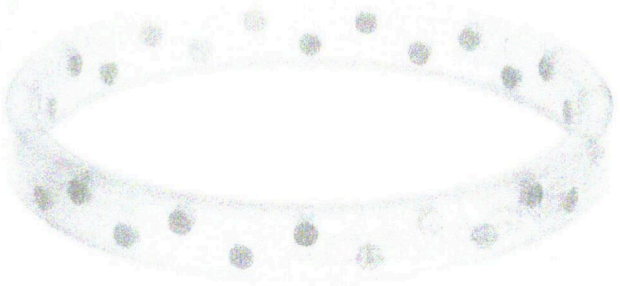
The Review Board of the United States Copyright Office (the "Board") is in receipt of your second request for reconsideration of the Registration Program's refusal to register the work entitled: *Magnet Embedded Bracelet*. You submitted this request on May 1, 2012. I apologize for the delay in the issuance 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 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

Magnet Embedded Bracelet (the "Work") consists of a circular silicone bracelet band inset with roughly thirty small, cylindrical magnets. The magnets are arranged in a basic alternating up-down, off-center pattern. The band is transparent. The magnets retain their metallic coloring.

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



II. ADMINISTRATIVE RECORD

On July 21, 2011, the United States Copyright Office (the "Office") issued a letter notifying you that it had refused registration of the above mentioned Work. *Letter from Registration Specialist Sandra Ware to Jay Varon* (July 21, 2011). In its letter, the Office indicated that it could not register the Work because it lacks the authorship necessary to support a copyright claim. *Id.*

In a letter dated October 7, 2011, you requested that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusal to register the Work. *Letter from Jay Varon to Copyright RAC Division* (October 7, 2011) ("First Request"). Your letter set forth the reasons you believed 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 sculptural authorship in either the treatment and arrangement of its elements to support a copyright registration" and again refused registration. *Letter from Copyright RAC Division to Jay Varon* (February 9, 2012).

Finally, in a letter dated May 1, 2012, 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 Jay Varon to Copyright R&P Division* (May 1, 2012) ("Second Request"). You argue that the Work possesses at least the minimum amount of artistic authorship necessary to be eligible for protection under the Copyright Act. *Id.* at 1. Specifically, you claim your selection and arrangement of the individual elements that comprise the Work is sufficiently creative to warrant registration. *Id.* at 1-2.

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 Work*

After carefully examining the Work and applying the legal standards discussed above, the Board finds that the Work fails to satisfy the requirement of creativity.

The Board accepts the principle that combinations of unprotectable elements may be eligible for copyright protection. However, in order to be accepted for registration, such combinations must contain some distinguishable variation in selection, coordination, or arrangement that is not so obvious or minor that the "creative spark is utterly lacking or so trivial as to be nonexistent." *Feist,* 499 U.S at 359; *see also Atari Games,* 888 F.2d at 883. Here, the Work consists of the basic combination of a silicone bracelet band and roughly thirty small, cylindrical metal magnets. These

elements (an ordinary bracelet band and a small, rounded magnet) are ineligible for protection under the Copyright Act. *See* 37 C.F.R. § 202.1(a) (prohibiting registration of "familiar symbols or designs"); *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"). You have arranged these elements so that the magnets are inset inside the silicone band in a simple, alternating pattern. The pattern repeats across the entire circumference of the band. This basic pairing of two unprotectale elements is, at best, *de minimus* and lacks the requisite "creative spark" for copyrightability. *See Feist*, 499 U.S. at 359. Accordingly, we find the Work ineligible for registration under the Copyright Act.

Your assertion that the Work makes "a strong visual impact which was not present in prior bracelets" does not add to your claim of sufficient creativity. *Id. at* 1. As discussed above, the Board does not assess attractiveness, uniqueness, or a design's visual effect or appearance in determining whether a work contains the requisite minimal amount of original authorship necessary for registration. Thus, even if accurate, the mere fact that the Work consists of a unique, aesthetically appealing arrangement of familiar shapes would not qualify the Work, as a whole, as copyrightable.

In sum, the Board finds that your selection and arrangement of the Work's constituent elements lacks the requisite 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: *Magnet Embedded Bracelet*. This decision constitutes final agency action on this matter. 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

[redacted]

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