United States Copyright Office
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August 12, 2013

Lewitt, Hackman, Shapiro, Marshall & Harlan
Attn: Tal Grinblat
16633 Ventura Boulevard, #1100
Encino, CA 91436

Re: "O" Button Logo
Correspondence ID: 1-DAL1KA

Dear Mr. Grinblat:

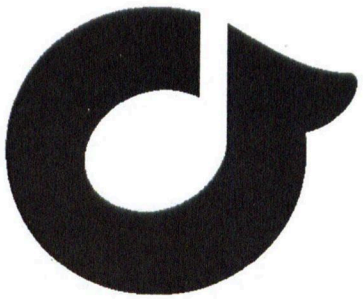
The Review Board of the United States Copyright Office (the "Board") is in receipt of your second request for reconsideration of the Registration Program's refusal to register the work entitled: *"O" Button Logo*. You submitted this request on behalf of your client, Rdio, Inc., on October 31, 2012. I apologize for the lengthy 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

"O" Button Logo (the "Work") consists of the letter "O" with elements of a common musical note shape integrated into it. The inner circle of the "O" is cut out in the shape of a note's head. A gap appears in the outline of the "O" where a note stem would ordinarily extend from the note head shape. The outline of the "O" has a flourish protruding from it at the point where a flag would normally extend from the note stem.

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



II. ADMINISTRATIVE RECORD

On March 29, 2012, the United States Copyright Office (the "Office") issued a letter notifying Rdio, Inc. (the "Applicant"), that it had refused registration of the above mentioned Work. *Letter from Registration Specialist, Ivan Proctor, to Tal Grinblat* (March 29, 2012). 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 April 10, 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 Tal Grinblat to Copyright RAC Division* (April 10, 2012) ("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 graphic authorship to support a copyright registration" and again refused registration. *Letter from Attorney-Advisor, Stephanie Mason, to Tal Grinblat* (August 3, 2012).

Finally, in a letter dated October 31, 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 Tal Grinblat to Copyright R&P Division* (October 31, 2012) ("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 1-4. Specifically, you claim the Work is not a stylized letter "O." Rather, you maintain that it is a pictorial work comprised of a creative combination of a circle shape, a "sloped lip" flourish, and a musical note. *Id.*

In addition to *Feist*, your argument references several cases supporting the general principle that a work that is comprised solely of a combination of basic or common shapes is not a sufficient basis for refusing copyright registration. *Id.* at 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 works comprised of unprotectable elements may be eligible for registration under the Copyright Act. This principle, however, is not at all inconsistent with the express language in 37 C.F.R § 202.1(a) prohibiting the 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." Here, the Work is comprised entirely of a simple, stylized version of the letter "O." Because it is well settled that letters with mere variations in typographic ornamentation are not eligible for copyright protection, we find the Work unregisterable. *Id.; see Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 498-99 (2005) (denying protection to the stylized letter "C" as it appeared on the applicant's line of fashion accessories; and, holding mere variations in typographic ornamentation or lettering cannot support a copyright claim).

You argue in your *Second Request* that the Work is not representative of the letter "O." Specifically, you claim the Work is actually a creative combination of a circle shape, a "sloped lip" flourish, and a musical note. *Second Request* at 1-4. Despite these assertions, it is evident that the Work is an ordinary letter "O" garnished with *de minimis* ornamentation. Indeed, your own correspondence in this matter, in which you refer to the Work as the "'O' Button Logo," reveals as much. *First Request* at 1; *Second Request* at 2. Moreover, a cursory search of the Applicant's website uncovers numerous examples of the Work being used to represent the letter "O" in the spelling of "rdio" or "Rdio." *See, e.g.,* rdio, Home Page, http://www.rdio.com/home/ (last accessed July 25, 2013).

The law is clear that a mere distinctiveness in typographic ornamentation will not ordinarily qualify otherwise unregisterable material for copyright protection. *See* 37 C.F.R. § 202.1(a); *see also Coach, Inc.*, 386 F. Supp. 2d at 498-99. Even with the inclusion of the "slope lip" and musical note, the Work remains a simple variation of the letter "O." Because ornamentation of this nature is insufficient to qualify a stylized letter design for registration, we find that the Work lacks the requisite amount of creativity authorship to warrant protection under the Copyright Act.

IV. CONCLUSION

For the reasons stated herein, the Review Board United States Copyright Office affirms the refusal to register the work entitled: *"O" Button Logo.* 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