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September 30, 1998

RE: Color Music: Collected Works, Vol. I
Control No. 50-503-5927(P)

Dear Mr. Poast:

This is in response to your letter, dated January 5, 1998, in which you appealed the Copyright Office's refusal to register a work entitled "Color Music: Collected Works, Vol. I." The Copyright Office Board of Appeals affirms the Examining Division's refusal to register.

Administrative Record

On November 13, 1995, the Copyright Office received a Form PA application for copyright registration from you, the applicant, for music and artwork. The application is for a collection of nine "color music" scores.

In a letter dated January 15, 1997, the Performing Arts Section of the Examining Division advised you that it had refused to register eight of the nine items in this collection of color music scores on the basis that they lack a minimum of fixed musical expression. The letter stated that the collection contains little, if any, original musical expression that is sufficiently fixed in a tangible medium of expression. Applicant's method of communicating musical expression is by using strokes of color from a paint brush rather than standard musical notation. Examining Division's refusal was based on the fact that the brush strokes of color do not sufficiently fix the musical expression because they give a performer broad latitude to determine the actual or approximate sound progressions.

While Examining Division refused to register the entire collection for a claim in music, it did identify one individual work, Color-Music Quartet (1984), that could be

registered as music because it contains a minimum amount of fixed musical expression. The Office invited you to submit a new, separate application for Color-Music Quartet (1984), to register it for "artwork and music." However, with regard to the other nine works, Examining Division stated that these were eligible for registration on the basis of the artwork contained in them but not for a claim of music, for the reasons stated above. Guidelines were provided for applying to register these works as "artwork" only.

In a letter dated April 26, 1997, you asked Examining Division to reconsider its refusal to register the entire collection of color music scores as "music and artwork." You explained that color music is based on the principle that colors are associated with emotions. "To assign one color to one musical tone would defeat the entire expression and concept of color music." You also stated that the color music shown in the deposits is in a fixed form and represents musical sound notation or score. Color music notation depends on the complexity of hues to express tone height, tempo, mood and intensity. Musical line and harmony is based on the movement of the upper part and the bass lines. The shapes of these lines are literal and can be easily seen in the scores. Phrasing is also part of the musical shape painted on the pages. Phrases are indicated where the lines end, spaces occur and new ideas are introduced by means of new shapes and colors.

You described color music as "the expression of a 'passage of time', [sic] a 'progression' from somewhere to elsewhere based on elaborate, complex structures." You stated that, as required by the legal definition of "fixed" at 17 U.S.C. 101, color music is "communicated for a period of more than transitory duration" because it can be studied, learned and interpreted which results in a common musical content. You further argued that the fact that color music requires interpretation is no different than what a performer must always do, even with standard music notation. As an example, you cited the work of J.S. Bach, the "Art of the Fugue," in which the instrumentation is left up to the performers. You asserted that color music communicates certain musical expression, not just random sounds. To document the fact that color music has been performed and is recognized as a legitimate form of musical expression, you provided evidence in the form of media reports, including newspapers like the New York Times, and programs from performances, including one from the Lincoln Center for the Performing Arts.*

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* You also submitted copies of musical scores that did not use standard musical notation but which exhibited copyright notices. A search of the Copyright Office records did not show that any of the works had been registered. The examples you provided contained creative elements other than music, such as artwork and lyrics or text, which might be entitled to copyright protection.

In a letter dated September 17, 1997, Examining Division advised you that it had considered your appeal and had again refused to register eight of the nine works of color music, for music and artwork, on the basis that they lack a minimum amount of fixed musical expression. Examining Division noted that your discussion of color music included admissions that the score is not fixed to specific pitches. As you characterized it, color music creates a general framework that extends along a time line in which the performers react to various color patterns. Examining Division noted that the musical expression in color music is fixed only if it is recorded because the musical expression is created during the performance by the performers. Examining Division pointed out that while traditional musical scores are open to interpretation, anyone listening to them would perceive that the same work is being communicated, no matter how interpreted. Examining Division offered to register any recorded performances of the color music collection.

In a letter dated January 5, 1998, you submitted a second request for reconsideration. You stated that, as required by 17 U.S.C. §102, the color music collection contains copyrightable musical expression fixed in a tangible medium. You argued that color music can be "perceived , reproduced, or otherwise communicated" and color notation could be "later developed" into a standardized, recognizable musical expression. You challenged the implication that musical expression should be equated with a specific pitch. "Is not musical expression more than simply isolated pitch? You define it as 'pitch, rhythm, harmony, dynamics' and I've addressed all these, except for pitch specifics, where I have created a 'generalized framework.' " You argued that generalized notation is an acceptable form of musical expression among well respected Twentieth Century composers, such as Gyorgy Ligeti.

Lack of Fixed Musical Expression

The Copyright Office Board of Appeals affirms the decision of Examining Division and denies registration for eight of the items in "Color Music: Collected Works, Vol. I" because they lack a minimum amount of fixed musical expression as required by the definition of "fixed" at 17 U.S.C. §101. Your method of communicating musical expression is by using strokes of color from a paint brush rather than standard musical notation. The brush strokes of color do not sufficiently fix the musical expression because they give a performer broad latitude to determine the actual or approximate sound progressions. While the visual images that you have created are fixed, the music is not fixed.

Your requests for reconsideration contain admissions that the score is not fixed to specific pitches. For example, you stated that, "To assign one color to one musical tone would defeat the entire expression and concept of color music." You also stated that color music is

"the expression of a 'passage of time', [sic] a 'progression' from somewhere to elsewhere based on elaborate, complex structures." As characterized by you, color music creates a general framework that extends along a time line in which the performers react to various color patterns. It appears that the musical expression in color music can be fixed only if it is recorded because the actual musical expression is created during the performance by the performers. While traditional musical scores are open to interpretation, anyone listening to them would perceive that the same work is being communicated, no matter how interpreted. In contrast, it appears that any two performances of color music would, to the lay listener, sound like the performances of two entirely different works.

The Copyright Office has offered to register any recorded performances of the color music collection. Also, the Copyright Office has offered to register one work, Color-Music Quartet (1984), for music and artwork because it contains a minimum amount of fixed musical expression. The other eight works can be registered as artwork if you would like to submit the appropriate applications.

For the reasons stated in this letter, the Board of Appeals affirms the refusal to register the submitted claims and is closing the file in this case. This decision constitutes final agency action on this matter. Also, we are returning one of the color music works because you sent us two copies of it.

Sincerely,

David O. Carson
General Counsel
for the Appeals Board
U.S. Copyright Office

Enclosure

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