SR # 1-862251051

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

October 30, 2014

Manatt, Phelps & Phillips, LLP
Attn: Kenneth M. Kaufman
700 12th Street, NW, Suite 1100
Washington, DC 20005

RE: HIVE (BLEEKER STREET)
Correspondence ID: 1-GKAVNP

Dear Mr. Kaufman:

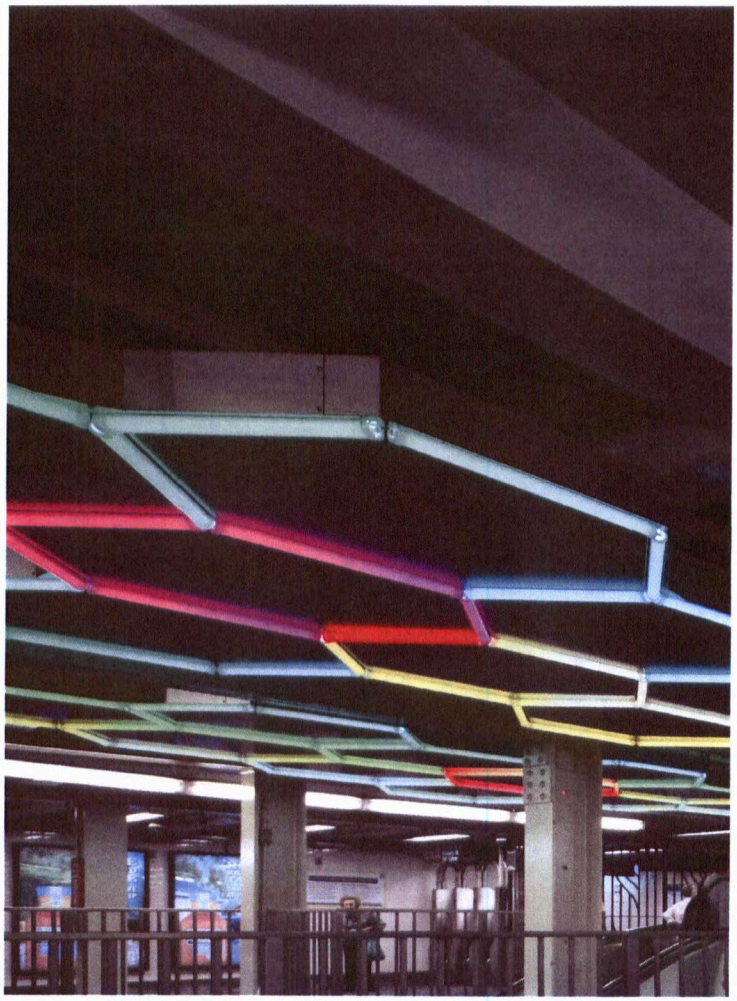
The Review Board of the United States Copyright Office has considered your second request for reconsideration of the Registration Program's refusal to register a copyright claim to the work entitled *Hive (Bleeker Street)* (the "Work"). The application for registration was submitted on behalf of Leo Villareal. The Review Board has carefully examined the application, the accompanying deposit material, and all of the briefing and correspondence in this case. In addition, the Board has granted several of your requests for extension of time to enable you to best prepare your arguments in favor of registration. After consideration of these arguments, the Board affirms the denial of registration of this copyright claim because the Work does not contain a sufficient amount of original and creative authorship to support a copyright registration. This decision constitutes final agency action in this matter. 37 C.F.R. § 202.5(g).

I. DESCRIPTION OF THE WORK

Hive (Bleeker Street) is a lighting fixture installed on the ceiling of the MTA/New York City Transit subway station located at Bleeker Street in Manhattan. The Work consists of a series of luminescent LED (light-emitting diodes) tubes arranged in hexagons, a configuration which you submit is suggestive of the honeycombs of a beehive. The LED tubes are illuminated in different colors and sequences over a period of time as driven by a computer program which controls their operation. You state that "[t]he Work is properly viewed as a computer-generated series of light images whose colors and sequences change (in accordance with the computer program which Mr. Villareal[1] and his team wrote), and which is displayed or performed (in the case of this installation) through the medium of LED tubes." *Letter from Kenneth M. Kaufman to Copyright RAC Division*, at 3 (March 17, 2014).

[1] Leo Villareal is the author and claimant of the Work.

A still image of the work, taken from the deposit material, is reproduced below:



Videos of the Work in operation can be seen at http://vimeo.com/54700159 and http://vimeo.com/54700328.

II. ADMINISTRATIVE RECORD

On December 10, 2012, the Copyright Office received an electronic copyright registration application submitted by Amy Hausman of MTA Arts for Transit, identifying Leo Villareal as the author and claimant of the Work. The application identifies the Work as a "sculpture."

On March 27, 2013, the Copyright Office issued a letter notifying Ms. Hausman that is had refused registration of the Work. *Letter from Adrienne Brown to Amy Hausman*, (March 27, 2013). In its letter, the Office stated that it could not register the Work because it is a useful article that lacks sufficiently creative, separable authorship. On June 16, 2013, the Office received a letter from John Charles Thomas requesting reconsideration of the refusal to register. *Letter from John Charles*

Thomas to Copyright RAC Division, (June 12, 2013). Mr. Thomas asserted that the Work was created and installed as a work of fine art (light art), did not provide useful or functional light to the subway station, and, therefore, should not be viewed as a useful article. Upon reviewing these assertions, the Office affirmed the initial refusal, once again determining that the Work was a useful article that lacked sufficiently creative authorship that was separable, either physically or conceptually, from the LED tubes themselves. *Letter from Stephanie Mason, Attorney-Advisor, to John Thomas* (September 30, 2013). You subsequently sought a second reconsideration of the registration refusal. *Letter from Kenneth Kaufman to Copyright RAC Division* (March 17, 2014) ("*Second Request*").

In your second request for reconsideration, you argue that the Office possibly misperceived the nature of the Work as a stationary light fixture, when in fact it is a "dynamic work" that lit up the hexagonal-shaped LED tubes in a color sequence to produce a work of "light art." *Id.* at 1-2. You state that the Work "is no different conceptually from, e.g., a videogame or a television program that is displayed or performed through a computer monitor or a television monitor. In such cases, the copyright claim does not relate to the shape of the computer monitor or television monitor on which the videogame or television program is displayed or performed, but rather to the original creative elements embodied in the game or program." *Id.* at 3-4. You describe the Work as "a 21st century iteration of a sculpture," and submit that if it is deemed a useful article, there is physically separable authorship (the computer generated sequence of lights) that warrants registration. *Id.* at 4, 6.

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. *Feist Publications, Inc. v. Rural Telephone Service Co.* 499 U.S. 340, 345 (1991). First, the work must have been independently created by the author, *i.e.*, not copied from another work. Second, the work must possess sufficient creativity. While only a modicum of creativity is necessary to establish such creativity, the Supreme Court has ruled that some works (such as a telephone directory at issue in the case) fail to meet the standard. The Court observed that "[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimus* quantum of creativity." *Id.* at 363. 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; *see also* 37 C.F.R. § 202.10(a) ("In order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form.").

The Copyright Office's regulations implement the long-standing requirements of originality and creativity set forth in the law and, subsequently, the *Feist* decision. The regulations prevent 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" 37 C.F.R. § 202.1(a). Of course, some combinations of common or standard design elements may contain sufficient creativity with respect to how they are combined or arranged to support a copyright. *See Feist,* 499 U.S. at 358 (the Copyright Act "implies that some 'ways' [of selecting, coordinating, or arranging uncopyrightable material] will trigger copyright, but that others will not." The determination of

copyrightability rests on whether the selection, coordination, or arrangement was done in "such a way" as to result in copyrightable authorship). However, not every combination or arrangement will be sufficient to meet this grade. 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. *John Muller & Co v. New York Arrows Soccer Team*, 802 F.2d 989 (8th Cir. 1986). And as the Ninth Circuit stated in *Satava v. Lowry*, 323 F. 2d 805 (9th Cir. 2003):

> It is true, or course, that a *combination* of unprotectible elements may qualify for copyright protection. But it is not true that any combination of unprotectible elements automatically qualifies for copyright protection. Our case law suggests, and we hold today, that a combination of unprotectible 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. at 811 (citations omitted; emphasis in original). 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. *Atari Games Corp. v. Oman*, 888 F.2d 878 (DC Cir. 1989).

Finally, Copyright Office registration specialists and the Review Board 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*

1. *Useful Article*

The Copyright Act defines a "useful article" as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." 17 U.S.C. § 101. The determination of whether or not an article is useful is important to the registration analysis because it determines the legal standard to be applied to the work.

You assert that the Work is not a useful article because its purpose is not to provide light within the Bleeker Street subway station, but rather is an installation of light art. You analogize it to a projection screen whose purpose is to perform an audiovisual work, even though a byproduct of such projection would be light. After reviewing the file and, in particular, after examining the video links that you have provided in your second request for reconsideration, the Board agrees that the Work is not a useful article. Therefore, the Board has not applied the legal standards for examining useful articles in reviewing the applicant's second request for reconsideration.

2. *Sculptural Work*

Section 101 of the Copyright Act provides in the pertinent part:

> 'Pictorial, graphic and sculptural works' include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans.

17 U.S.C. §101. As the definition provides, sculptural works are three-dimensional. *See, also* MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/sculpture (Last visited August 29, 2014) (defining sculpture as: "a three-dimensional work of art (as a statue)"). Mr. Villareal's application plainly states that he is seeking to register a sculptural work. You do not disavow this claim in you second request, although you characterize the work as a "21st-century iteration of a sculpture." *Second Request* at 4. The only three-dimensional elements of the Work are the LED tubes that are attached to the subway roof. Although these tubes may create "light art," as you describe it, light itself is not a three-dimensional object and is not a sculptural work. As a consequence, the only three-dimensional objects present in the work are the colored LED tubes themselves, and their arrangement in a connected hexagonal pattern.

After carefully examining the Work and applying the legal standards discussed above, the Board determines that the Work fails to satisfy the requirement of sufficient creativity. We begin our analysis with an examination of the constituent elements that comprise the Work. These are the LED tubes, which are in the very familiar configuration of luminescent tube lighting, along with the electrical fixtures to which they are attached. As discussed above, Copyright Office regulations prevent 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" 37 C.F.R. § 202.1(a). The LED tubes are common geometric shapes that do not warrant copyright protection. The colors emitted by the lights do not contribute to the registrability of the Work, as coloring alone, though varied, does not make a sculptural work copyrightable.

The Board also considered whether the selection, coordination, and/or arrangement of the tubes can support a registration. *Feist*, 499 U.S. at 358. The selection and arrangement of common, interconnecting hexagons is basic and commonplace, and is the most basic depiction of the concept of a honeycomb. As such, the selection, coordination, and arrangement of the tubes lacks the necessary "creative spark" required for registration. *Situation Management Systems, Inc. v. ASP Consulting LLC*, 560 F.3d 50, 53 (1st Cir. 2009). Likewise, the changing colors of the LED tubes do not make the three-dimensional elements of the Work copyrightable. Consequently, the Board has determined that the Work, as a whole, is lacking in sufficient creativity to warrant a copyright registration. *Atari Games Corp.*, 888 F. 2d at 883.

The Board notes that much of your argument in your second request for reconsideration is devoted to an analysis of the Work as an audiovisual work, and you state that the Work is controlled by a computer program that in your view would be copyrightable. *See, e.g., Second Request* at 3 ("We believe that with regard to registrability, this is no different conceptually from, *e.g.*, a videogame or television program that is displayed or performed through a computer monitor or a

television monitor.") Audiovisual works and computer programs are not three-dimensional, and as such, they cannot be registered as sculptural works. In any event, those claims were not asserted in the application and they were not reflected in the deposit material (which consists of two still images). Therefore, the Board expresses no opinion on whether this Work contains sufficient creativity to be registered as an audiovisual work, or whether the computer program that drives the lighting sequence is copyrightable.

IV. CONCLUSION

For the reasons stated above, the Review Board affirms the refusal to register the Work entitled *Hive (Bleeker Street)*. This decision constitutes final agency action in this matter. 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

By: _____
Erik Bertin
Copyright Office Review Board