



ANNOUNCEMENT

from the Copyright Office, Library of Congress,
101 Independence Avenue, S.E., Washington, D.C. 20559-6000

PROPOSED REGULATIONS WITH REQUEST FOR COMMENTS.

REGISTRATION OF CLAIMS TO COPYRIGHT, GROUP REGISTRATION OF PHOTOGRAPHS

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LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 202

[Docket No. RM 95-7B]

Registration of Claims to Copyright, Group Registration of Photographs

AGENCY: Copyright Office, Library of Congress

ACTION: Proposed regulations with request for comments.

SUMMARY: The Copyright Office of the Library of Congress is proposing regulations to facilitate group registration of published photographs. These proposed regulations differ significantly from regulations proposed earlier in this rulemaking proceeding, as they require the deposit of the actual photographic images, rather than merely written identifying descriptions, for registration purposes and as they pertain only to published photographs. This option for group registration of photographs is available only for registration of works by an individual photographer which are published within one calendar year. In addition, the Office also proposes to liberalize the deposit requirements for groups of unpublished photographs registered as unpublished collections. The Office is seeking comments on these proposals.

DATES: Written comments on the proposed regulations should be received on or before June 19, 2000.

ADDRESSES: If sent BY MAIL, an original and 15 copies of written comments should be addressed to David O. Carson, General Counsel, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington,

DC 20024. If delivered by hand, an original and 15 copies should be brought to: Office of the Copyright General Counsel, James Madison Memorial Building, Room LM-403, 101 Independence Avenue, SE., Washington, DC 20559.

FOR FURTHER INFORMATION CONTACT: **David Carson, General Counsel, or Patricia L. Sinn, Senior Attorney Advisor.** Telephone: (202) 707-8380. Fax: (202) 707-8366.

SUPPLEMENTARY INFORMATION:

I. Background

Registration of a copyright can be made at any time during the term of statutory protection; however, with the exception of a three-month grace period dating from first publication, the law prohibits the award of statutory damages or attorney's fees where a work has not been registered before infringement occurs. 17 U.S.C. 412.

Under the 1976 Copyright Act, as amended, an applicant may register a claim in an original work of authorship with the Copyright Office by submitting a completed application, a fee, and a deposit of copies of the work to be registered. The nature of the copy to be deposited is set out in the statute in general terms, *e.g.*, one complete copy or phonorecord of an unpublished work,

[[Page 26163]]

and two complete copies or phonorecords of the best edition of a published work if first published in the United States. 17 U.S.C. 408(b). The Register of Copyrights may require or permit the deposit of identifying material instead of copies or phonorecords; and the Register may allow a single registration for a group of related works. 17 U.S.C. 408(c).

A. Legislative Intent

In explaining section 408(c), the House Judiciary Committee noted that it was intended to give the Register of Copyrights "latitude in adjusting the type of material deposited to the needs of the registration system." H. R. Rep. No. 94-1476, at 153 (1976). It stated that "Where the copies or phonorecords are bulky, unwieldy, easily broken, or otherwise impractical to file and retain as records identifying the work registered, the Register would be able to require or permit the substitute deposit of material that would better serve the purpose of identification. Cases of this sort might include, for example, billboard posters, toys and dolls, ceramics and glassware, costume jewelry, and a wide range of three-dimensional objects embodying copyrighted material. The Register's authority would also extend to rare or extremely valuable copies which would be burdensome or impossible to deposit." *Id.* at 154 (emphasis added).

Finally, Congress noted that the provision empowering the Register to allow a number of related works to be registered together as a group "represents a needed and important liberalization of the law now in effect. At present the requirement for separate registrations where related works or parts of a work are published separately has created administrative problems and has resulted in unnecessary burdens and expense on authors and other copyright owners." *Id.* A group of photographs by one photographer was cited as one example where these results could be avoided by allowing a group registration.

B. Registration Concerns Expressed by Photographers

For some time the Copyright Office has been working with photographers to devise a registration system that works more effectively for photographers who have said that they find it difficult to register the many

images they create due to concerns of time, effort and expense. At the same time, the procedure adopted must meet the requirement that the deposit adequately identify the work registered. Photographers have urged that the nature of much photography, where thousands of images may be created, particularly by free-lance photographers, with only a few images, if any, being published, makes registration difficult. They assert that at the time registration may be sought, the photographer may not know which photographs, if any, will be or have been published. Often a photographer's film is turned over to another party which processes and uses the images, leaving the photographer with nothing to deposit with the Copyright Office for registration purposes.

In an attempt to make registration easier for such photographers, the Office expanded its procedures regarding deposit materials for two and three dimensional works of the visual arts. For example, the Office accepts the deposit of a videotape or filmstrip as identifying material for collections of unpublished photographs. Despite the liberalization of deposit procedures, many photographers continued to urge that the requirement that they deposit a visual image of each photograph covered in the registration precludes them from registering. They claim that while they have been given a legal right by the copyright law, they have no effective remedy, thus leading to continued infringement of their works.

During congressional hearings on the proposed Copyright Reform Act of 1993, photographers stated that they could not take advantage of the benefits of copyright registration because the Office's practices were too burdensome in terms of the time and cost required to submit a copy of each image included in a collection of photographs.¹

In June, 1993, the Librarian of Congress appointed an Advisory Committee on Copyright Registration and Deposit (ACCORD) to advise him "concerning the impact and implications of the [proposed] Copyright Reform Act of 1993. . ." Library of Congress, Advisory Committee on Copyright Registration and Deposit, *Report of the Co-Chairs*, vii (1993). The Committee recommended that the Office expand "the use of group registration and optional deposit to reduce the present burdens" and "consult more actively and frequently with present and potential registrants to hear their problems and to respond to them whenever possible." *Id.* at 20.

C. Office's Further Attempts to Address Photographer's Concerns.

After the ACCORD report was issued, the Copyright Office met with photographers and their representatives and sought a workable solution for photographers which would not cause unforeseen problems for publishers, photofinishers, and other users of photographs. On December 4, 1995, the Office initiated a rulemaking proceeding by publishing proposed regulations with a request for comments. 60 FR 61657 (Dec. 4, 1995). The proposed regulations would have permitted individual photographers and photography businesses to make group registrations of mixed unpublished and published photographs with the deposit of identifying material consisting of written descriptions of the photos in a particular grouping rather than copies of individual photo images. The notice of proposed rulemaking also framed questions regarding possible consequences of adopting the proposed regulations which were much more liberal than anything the Office had previously proposed.

The proposed regulations elicited a great deal of controversy. In an effort to reach consensus, the Office held a public hearing and provided for an additional comment period. See 61 FR 28829 (June 6, 1996).² Some respondents approved the proposed regulations, in whole or in part, as aiding photographers in their desire for access to legal remedies. Others raised a number of concerns, the most serious of which is the value of the copyright deposit as an identification of the work registered and the question of whether descriptive identifying material serves as well as the deposit of the complete image of a photograph for a court's purposes. Some respondents claimed that based on past experience, it was likely that the proposed regulations would promote frivolous litigation targeting parties who unknowingly reproduced copies of copyrighted photographs without the copyright owner's permission. In response to this concern, industry representatives presented a set of proposed guidelines that not only would be followed by industry members who had previously agreed to them, but also were proposed to be included in, or referenced by, the Office's final regulations.

Another controversial issue highlighted by commenters was whether registration claimants who decided to use proposed group registration

[[Page 26164]]

procedures would (or could), by making that choice, be forced by provisions of the industry agreement to waive rights to statutory damages and attorney's fees in

²All comments and the transcript of the June 26, 1996, public meeting are available for inspection in the Copyright Office Public Information Office.

innocent infringement determinations. Further comments concerned other registration requirements, identifying deposit information, effective date of registration, and consumer education about copyright law.

Professor Peter Jaszi, a member of the ACCORD advisory committee, asserted that although some specific and limited suggestions about how to address photographers' concerns were incorporated in recommendations made by the Librarian of Congress' advisory group ACCORD in response to the proposed 1993 Copyright Reform Act, "there is little if anything in the ACCORD record which lends support to such a far-reaching revision of registration and deposit practice" as was contained in the Office's proposed group registration regulations. Jaszi reply comments in RM 95-7 at 1.

D. Further Reflection on the 1995 Proposal

When the Office opened this rulemaking proceeding in 1995, its goals were to determine how to modify registration and deposit procedures to ensure deposit of works for the record, to register works to protect claimants, and ultimately to benefit the public by providing access to information on copyright status and ownership of photographic works. Its efforts to further liberalize deposit provisions for photographers led to what seemed insurmountable differences about the purpose of the copyright deposit which could not be resolved to the satisfaction of all interested parties. Although the rulemaking proceeding has remained open for a considerable period of time, the Office has continued to consider the issues raised in the proceeding and in other contexts (e.g., the adjustment of registration fees and other statutory fees). It has also determined that it should reexamine the purpose of the section 408 copyright deposit for all classes of works and expects to publish a Notice of Inquiry to begin the study this year. Meanwhile, the Office is reluctant to implement a procedure that would permit the acceptance of deposits that do not meaningfully reveal the work for which copyright protection is claimed.

The Office has decided that it should move forward with a more modest proposal which would permit group registration of related published photographs. Since this rulemaking proceeding commenced in 1995, there have been advances in the technology that permits the taking and/or preservation of photographs in digital form, and in the commercial availability of such technology. The Office expects that such advances over the next several years will make identification and imaging of photographs for registration purposes even easier so that registration will become more readily available for photographers.

¹See Copyright Reform Act of 1993: Hearings on H.R. 897 Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary, 103d Cong., 1st Sess. 370-72 (1993). See also, Copyright Reform Act of 1993: Hearing on S. 373 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary, 103d Cong., 1st Sess. 169 (1993).

II. Group Registration of Photographs Published in the Same Calendar Year

Continued reflection on the issue suggested a possible alternative that would give many photographers a more flexible group registration procedure by permitting registration of multiple photographs created by one photographer which are published on different dates but in the same calendar year. The Office is now proposing regulations that would permit such an alternative.

A. Works Covered and Required Identification.

Each submission for group registration must contain photographs by an individual photographer that were all published³ within the same calendar year. The claimant(s) for all photographs in the group must be the same. The date of publication for each photograph must be indicated either on the individual image or on the registration application or application continuation sheet in such a manner that for each photograph in the group, it is possible to ascertain the date of its publication. However, the Office will not catalog individual dates of publication; the Copyright Office catalog will include the single publication date or range of publication dates indicated on the Form VA. If the claimant uses a continuation sheet to provide details such as date of publication for each photograph, the certificate of registration will incorporate the continuation sheet, and copies of the certificate may be obtained from the Copyright Office and reviewed in the Office's Card Catalog room.

The Office notes that although it will accept group registration claims for all photographs published within a calendar year, an applicant who wishes to ensure that he is eligible for statutory damages and attorney's fees must register within three months of publication. 17 U.S.C. 412. Applicants would be well-advised to submit a group registration claim within each three-month period in which any photographs in the group were published.

The Office recognizes that some commenters have previously expressed the view that photographers sometimes have difficulty knowing exactly when--or even whether⁴--a particular photograph has been published. With respect to date of publication, it should be noted that the

³The definition of "publication" in the 1976 Copyright Act, as amended, is as follows: "Publication" is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication. 17 U.S.C. 101.

⁴The Compendium of Copyright Office Practices, Compendium II, Sec. 904 states the Office's general practice with respect to publication, including that "The Office will ordinarily not attempt to decide whether or not publication has occurred but will generally leave this decision to the applicant."

Office's longstanding practices permit the claimant some flexibility in determining the appropriate date. See, e.g., Compendium of Copyright Office Practices, Compendium II, Sec. 910.02 (1984) (Choice of a date of first publication).⁵

Notwithstanding such concerns, the Office has concluded that it cannot establish a group registration procedure that permits claimants to include both published and unpublished photographs within a single group registration due to their inability to determine whether a particular photograph has been published. A procedure permitting inclusion of both published and unpublished works in a single registration would be unprecedented and would ignore critical distinctions between the copyright law's treatment of published works and its treatment of unpublished works. See, e.g., 1 Melville B. Nimmer and David Nimmer, Nimmer on Copyright Sec. 4.01[A] (1999). Moreover, an application for copyright registration must identify the date and nation of first publication for each published work. 17 U.S.C. 409(8). That statutory requirement would be inconsistent with a procedure that permitted claimants to refrain from identifying whether a particular photograph has been published.

The Office also requests comments on whether applications for group registration of photographs should be permitted to state a range of dates of up to three months (e.g., January 1-March

[[Page 26165]]

31, 2001) in which all the photographs in the group were published, rather than stating specific dates of publication for each photograph. The Office would consider such an alternative only if it were persuaded that requiring specific dates of publication for each photograph would impose an unjustifiable and burdensome hardship on photographers, and that the advantages (to claimants and to the public record) of such an alternative would outweigh its disadvantages.

The Office believes that it would be beneficial and would create a clearer public record if claimants are required to number the photographs in a group consecutively (e.g., from 1 to 500), and to indicate the number of each photograph on or affixed to the individual image of the photograph that is deposited. The Office requests comments on whether such a requirement would be desirable.

⁵"1) Where the applicant is uncertain as to which of several possible dates to choose, it is generally advisable to choose the earliest date, to avoid implication of an attempt to lengthen the copyright term, or any other period prescribed by the statute. "2) When the exact date is not known, the best approximate date may be chosen. In such cases, qualifying language such as 'approximately,' 'on or about,' 'circa,' 'no later than,' and 'no earlier than,' will generally not be questioned."

B. Use of the Appropriate Form, Deposit, and Fee

To register qualified works as a group, an applicant should submit an application Form VA, with the appropriate fee and a deposit consisting of an image of each photograph included in the group. The statutory requirement of a deposit of two complete copies of the best edition of each published photograph is waived, and a claimant may submit a single copy of each image in any of the following formats: images in digital form on CD-ROM or DVD-ROM; single images (prints, at least 3 inches by 3 inches and preferably archivally-processed on fiber-based paper); contact sheets (preferably archivally-processed on fiber-based paper); slides with single images; slides each containing up to 36 images; or multiple images on video tape. In addition, any or all of the photographs may be deposited in the format in which they were originally published, such as clippings from a newspaper or magazine. The Office seeks comment on whether there are other formats for deposit of full images of photographs that will minimize the burden on photographers while providing the Office and the public record with accessible and usable images. The Office also seeks comment on what file formats should be acceptable for photographs submitted on CD-ROM.

The Office also seeks comments on whether it should provide an optional specialized continuation sheet, similar to Form GR/CP (the adjunct application form for group registration of contributions to periodicals), which could provide specific information (e.g., title or other description, date of publication) about each photograph included in the group.

C. How Many Photographs May Be Included in One Registration?

Due to administrative and workload considerations, a maximum of 500 photographs may be included in a single group registration. The approximate number of photographs in the group submitted must be indicated on the application.

D. Relationship of This New Procedure to Other Types of Registration of Photographs

Registration and deposit requirements for unpublished photographs remain unchanged, and may be found in 17 U.S.C. 408(b)(1) and 37 CFR 202.20(b)(1)(i), and (c)(4)(xix). Registration for individual photographs may still be made using a Form VA, submitted with a registration fee of \$30.00 and a copy of the photograph which complies with the existing deposit requirements found at 37 CFR 202.20.

Unpublished collections of photographs may be registered pursuant to the requirements set forth in 37 CFR 202.3(b)(3). The new liberalized deposit requirements of 37 CFR 202.20(c)(2)(xx), discussed above in section C for group registration of published photographs, shall also apply to deposit of

unpublished collections of photographs.

Thus, photographers will be able to register groups of unpublished photographs in much the same manner as that in which they can register groups of published photographs.

III. Public Comment

The Copyright Office is seeking comment only on the rules proposed in this notice. Reargument of issues raised earlier in this rulemaking that have, at this point, been rejected by the Office (e.g., acceptance of descriptive identifying material as deposits in lieu of actual images) will not be productive. Following review of comments, the Office will adopt final regulations. Interested parties are invited to submit comments on the following points:

1. Under the proposed regulations, a claimant must identify the date of publication of each image published within the same calendar year and submitted for registration. As deposit copies, the Office will accept images in digital form on CD-ROM or DVD-ROM; single images; contact sheets; slides with single images; slides each containing up to 36 images; or multiple images on video tape. The Office will also accept copies of the photographs in the formats in which they were originally published (e.g., clippings from newspapers or magazines). The final regulation will specify how dates must be provided for each photograph in the group in such a way that for each photograph, one can ascertain its date of publication. Recommendations about the best methods for providing this information are invited now. In the proposed regulations, applicants will have the option of identifying each photograph and its date of publication separately on a continuation sheet or of indicating the date of publication on each photograph itself. For example, if separate photographic prints were deposited, the date of publication of each photograph could be written on the back of the print. However, for other formats (e.g., CD-ROM, slides containing up to 36 images, videotapes, contact sheets), other ways of indicating the date of publication for each image will be necessary.

A. Comments are invited on how the date of publication of each photograph can be indicated on the deposit itself for deposits made in such formats, and how each date can be connected to the pertinent photograph.

B. Comments are also invited on how the date of publication of each photograph can be indicated on a continuation sheet, and how each date of publication entry on the continuation sheet can be related to a particular photograph or photographs. For example, if the continuation sheet is used, should each photograph be numbered consecutively; and for each photograph, should that number be written or otherwise indicated on the corresponding copy of the photograph that is deposited?

C. Comments are also invited on whether the Office's general continuation sheet, Form

CON, should be used for this purpose or whether the Office should provide an optional specialized continuation sheet, similar to Form GR/CP (the adjunct application form for group registration of contributions to periodicals), which could provide specific information (e.g., title or other description, date of publication) about each photograph included in the group.

2. Comments are invited on whether claimants should be required to number the photographs in a group consecutively (e.g., from 1 to 500), and to indicate the number of each photograph on or affixed to the individual image of the photograph that is deposited. Would such a numbering requirement assist in identifying dates of publication of each photograph when a continuation sheet is used, as

[[Page 26166]]

suggested in question I.B. above? Would such a requirement assist in creating a clearer public record? How burdensome would such a requirement be?

3. Should the Office accept deposits in formats other than those mentioned in item 1? If so, what other formats should be accepted? Each format must be capable of providing a complete image of each photograph in the group.

4. For photographs submitted on CD-ROMs or in other electronic formats, what file formats (e.g., JPEG, GIF, etc.) should be accepted, and why?

5. As an alternative to requiring a claimant to provide the date of publication of each photograph in the group, should the Office consider offering the alternative of providing a range of dates over a three-month period (e.g., January 1-March 31, 2001)? What would be the advantages and disadvantages--to claimants and to the public record--of such an approach?

List of Subjects in 37 CFR Part 202 Claims, Copyright.

Proposed Rule

In consideration of the foregoing, the Copyright Office proposes to amend 37 CFR part 202 in the manner set forth below:

PART 202--REGISTRATION OF CLAIMS TO COPYRIGHT

1. The authority citation for part 202 is revised to read as follows:

Authority: 17 U.S.C. 408, 702.

2. In section 202.3, paragraph (b)(9) is redesignated as paragraph (b)(10), and a new paragraph (b)(9) is added to read as follows:

Sec. 202.3 Registration of copyright.

(b) ***

(9) Group registration of published photographs. Pursuant to the authority

granted by 17 U.S.C. 408(c)(1), the Register of Copyrights will accept a single application (on Form VA), deposit and filing fee for registration of a group of at least two and no more than 500 photographic works if the following conditions are met:

(i) The author of all the photographic works submitted for registration as part of the group must be the same person.

(ii) The copyright claimant in all of the photographic works must be the same.

(iii) The photographs in the group must have been published within the same calendar year.

(iv) The date of publication of each work within the group must be identified either on the deposited image, on the application form, or on a continuation sheet, in such a manner that one may specifically identify the date of publication of any photograph in the group. If the photographs in a group were not all published on the same date, the range of dates of publication (e.g., January 1-March 31, 2001) should be provided in space 3b of the application.

(v) The deposit(s) and application must be accompanied by the fee set forth in Sec. 201.3(c) of this chapter for a basic registration using Form VA.

(vi) The applicant must note on the application Form VA the approximate number of photographs included in the group.

(vii) As an alternative to the best edition of the work, one copy of each photographic work shall be submitted in one of the formats set forth in Sec. 202.20(c)(2)(xx).

3. Section 202.20 is amended by adding a new paragraph (c)(2)(xx) to read as follows:

§202.20 Deposit of copies and phonorecords for copyright registration.

(c) ***

(2) ***

(xx) Photographs: group registration. For groups of photographs registered with one application under Sec. 202.3(b)(3) or Sec. 202.3(b)(9), photographs must be deposited in one of the following formats (listed in the Library's order of preference):

(A) Digital form on one or more CD-ROMs (including C-RW's) or DVD-ROMs;

(B) Unmounted prints measuring at least 3 inches by 3 inches (not to exceed 20 inches by 24 inches) submitted on fiber-based paper;

(C) Contact sheets on fiber-based paper;

(D) Slides, each with a single image;

(E) The form in which each photograph was originally published (e.g., clippings from newspapers or magazines);

(F) Slides, each containing up to 36 images; or

(G) A videotape clearly depicting each photograph.

Dated: April 25, 2000.
Marybeth Peters,
Register of Copyrights

Approved By:
James H. Billington,
The Librarian of Congress.

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