

Announcement

from the Copyright Office, Library of Congress, Washington, D.C. 20559

FINAL REGULATION

NOTICES OF OBJECTION TO CERTAIN NON-COMMERCIAL PERFORMANCES OF NON-DRAMATIC LITERARY OR MUSICAL WORKS

The following excerpt is taken from Volume 42, No. 249 of the Federal Register for Wednesday, December 28, 1977 (pp. 64682-4).

[1410-03]

Title 37—Patents, Trademarks and Copyrights

CHAPTER II—COPYRIGHT OFFICE,
LIBRARY OF CONGRESS

[Docket RM 77-7]

PART 201—GENERAL PROVISIONS

Notices of Objection to Certain Noncommercial Performances of Nondramatic Literary or Musical Works

AGENCY: Library of Congress, Copyright Office.

ACTION: Final regulation.

SUMMARY: This notice is issued to inform the public that the Copyright Office of the Library of Congress is adopting a new regulation pertaining to the service of notices of objection for the purpose of preventing certain noncommercial performances of nondramatic literary or musical works. The regulation is adopted to implement section 110(4) of the Act for General Revision of the Copyright Law. The effect of the regulation is to establish requirements governing the form, content, and manner of service of the notices.

EFFECTIVE DATE: This regulation takes effect on January 1, 1978.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION: Section 110(4) of the first section of Pub. L. 94-553 (90 Stat. 2541) deals with the performance of nondramatic literary or musical works otherwise than in transmissions to the public. It provides gen-

erally that such a performance, even if carried out before an audience, is exempt from copyright liability if two basic conditions are both met: (1) the performance must be "without any purpose of direct or indirect commercial advantage"; and (2) there must not be "payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers."

Assuming these conditions are met, the exemption applies if there is "no direct or indirect admission charge" or, alternatively, if "the proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes. * * *" In cases where proceeds are to be derived from an admission charge, the statute also provides a procedure under which a copyright owner can prevent the performance by serving an advance notice of objection.

Under the statute, this notice must be in writing and signed by the copyright owner or the owner's authorized agent. It must be served on the person responsible for the performance at least seven days before the date of the performance, and it must state the reasons for the objection. The Act also provides that the notice of objection must "comply in form, content, and manner of service with requirements that the Register of Copyrights shall prescribe by regulation."

On September 2, 1977, we published in the FEDERAL REGISTER (42 FR 44247) a proposal to adopt a new regulation

§ 201.13 establishing requirements governing the form, content, and manner of service of notices of objection. A total of twelve initial and reply comments were received in response to that proposal. Several of these comments have led us to make changes of substance in the regulation as originally proposed. A discussion of the major substantive comments follows:

1. IN GENERAL

For the most part the persons commenting on the proposed regulation fell into two categories: Those who considered some or all of the proposed requirements for a notice much too restrictive, and those who supported the proposal because of its restrictive requirements. One comment urged that, under the regulation, users be required to give advance notice to copyright owners; it took the position that, unless the initial requirements for serving notice were placed on the user, the purpose of the statute could be served only by placing few if any restrictions on the right of copyright owners to serve blanket notices. Other comments took the opposite view: That there would be no justification for placing the burden of serving advance notice on the user, and that the regulations should not encourage the routine filing of blanket notices that would in practice require the payment of royalties for all nonprofit performances where admission fees are charged.

After careful consideration the Copyright Office can see no basis for requiring, by regulation, the user to notify the copyright owner of the performance of the works to be performed. At the same time, we recognize the formidable practical problems facing copyright owners in learning of performances and in giving meaningful notices. On the basis of the comments, we believe that the requirements under our earlier proposals would have been too stringent to be practical. We have therefore made some substantial changes which liberalize the requirements, particularly in the area of blanket notices.

2. CONTENTS OF NOTICE

Reference to statutory authority. One comment recommended changing the obligation to refer to "17 U.S.C. § 110 (4)" to a more general requirement. We agree that, as long as the user is given a general reference to the statutory provision involved, an explicit citation is not necessary, and we have revised the proposed regulation accordingly.

Date and place of performance. Two comments objected to the proposed requirement that, where the exact date or place of a particular performance, or both, are not known, the notice must describe "all of the information the copyright owner has about the plans for the particular performance and the source of that information." It was argued that, since only the time and place of the performance are relevant, the copyright owner should not be required to give other information; it was also urged that a requirement for revealing the source of the information might be inhibiting if the source were confidential. We believe these arguments have merit, and have revised paragraph (c) (1) (ii) accordingly. However, we cannot agree with the further suggestion that a notice be considered valid even if the copyright owner has no information whatever about any plans for a performance. We believe that the statutory scheme envisioned the serving of notices with respect to particular performances, and was not intended to allow the filing of one blanket notice that would be effective for all future performances by a particular user and for all time to come.

Identification of works. Objections were also raised with respect to those parts of the regulation requiring clear identification of the particular works involved by title and author, and permitting the service of blanket objections only under certain rather restrictive conditions. The substance of these objections, which we have accepted to some extent, is discussed below in connection with paragraph (c) (2), dealing with the requirements for blanket notices. We have amended paragraph (c) (1) (iii) to reflect the liberalized requirements for blanket notices in paragraph (c) (2). The thinking behind revised paragraph (c) (1) (iii) is that, if the copyright owner is aware of the particular works to be performed, or if the owner has objections to the

performance of particular works, those works should be clearly identified; however, if the objections extend beyond* the particular works identified, or if no particular works are identified, the notice of objection can include a blanket objection to the performance of unspecified works of that copyright owner, if the conditions for the service of blanket objections are met.

Statement of reasons. No objections were raised with respect to the specific provision of paragraph (c) (1) (iv), requiring "a concise statement of the reasons for the objection." However, strong exception was taken to statements in the preamble to the proposed regulation indicating that, in the view of the Copyright Office, the legislative history of section 110(4) "suggests that notices of objection were not intended to consist of general or blanket prohibitions, but were intended to be the result of individual copyright owners' decisions based on personal objections to having their works used without permission for 'education, religious, or charitable' fund raising activities with which they were not in sympathy." Upon further consideration we adhere to the first part of this statement—that the intention of the statute was for notices to be filed in particular cases rather than on a blanket basis. However, we agree that the last part of the statement—that the objections were intended to be based on personal reactions against having an individual owner's works used for causes with which that owner is unsympathetic—is too restrictive. While this thinking undoubtedly influenced the Congressional decision to provide for a "veto" in section 110(4)(B), there is nothing in the statute or its legislative history to prevent a copyright owner from filing an objection based on a desire not to have his or her works performed without permission under any circumstances when an admission fee is charged.

Blanket Notices. As already indicated, the strongest and most serious objections to the proposed regulation dealt with the conditions for the validity of "a blanket notice lacking separate identification of the particular copyrighted works covered by the objection." Section 110(4) speaks in terms of exempting from liability the "performance of a nondramatic literary or musical work," and passes on to the Register of Copyrights the responsibility for prescribing the "form, content, and manner of service" of notices of objection that, if served by "the copyright owner" under specified conditions, will negate the exemption. Taken as a whole, we believe the Register's responsibility in issuing these regulations is to reach a reasonable balance that carries out the fundamental purposes of section 110(4) in practice. As a practical matter, we believe this means that blanket objections should be permitted to the extent that they are necessary to avoid unfair burdens on copyright owners, but not to the extent that they are used routinely to render the exemption of section 110(4)

nugatory whenever admission fees are charged. Achieving this balance is extremely difficult but, since Congress has chosen to entrust this responsibility to the Copyright Office, we cannot abdicate it.

It should be recognized that the system envisioned by section 110(4)(B) of the statute represents an entirely new departure in copyright law, and that any effort to implement it must necessarily be considered experimental. It will, of course, be necessary to evaluate very closely how these regulations work out in practice over a reasonable period of time. If it should become apparent that these regulations are being used to negate the exemption of section 110(4), we will be prepared to consider appropriate amendments.

Under our earlier proposal, the validity of blanket notices would have depended on five conditions: (1) all copyrights must have at least one common owner who has authorized service of the objection and is identified in the notice; (2) the owner lacks complete knowledge of the works to be performed and wishes to object to "a particular performance of any or all works of which he or she is copyright owner";—(3) more than one hundred works are involved; (4) if the notice is served by an agent or performing rights society, the owner must have expressly authorized the service with respect to the particular performance and works; and (5) the Notice must identify a person to contact for information about particular titles. There were strenuous objections to these conditions; authors and publishers objected particularly to the third and fourth conditions on the grounds of burdensomeness and impracticality, and one performing rights society argued that imposing the first four of the five conditions would, in effect, reduce a "meaningful right" to a "compulsory and gratuitous license." In the light of these arguments, we have modified our earlier proposal in an effort to make the requirements for blanket notices less onerous and more practical while, at the same time, seeking to provide the user with meaningful information as to the particular works covered by the notice.

A point of particular concern involves the status of performing rights societies under the regulation, whether as "copyright owners," "duly authorized agents," or otherwise. Upon consideration of the various questions raised in this connection we have concluded that it would be a mistake to deal with performing rights societies as a category separate and different from the two categories identified in the statute as entitled to sign the notice: "the copyright owner" and "such owner's duly authorized agent." We have therefore deleted the definition of "performing rights society" in subsection (a) and the references to performing rights societies in subsections (c) and (d) and have added a definition of "copyright owner" for purposes of this section.

As modified, the requirements for a blanket notice under subsection (c) (2)

*Error; line should read: "ever, if the objections extend beyond"

are substantially liberalized. A notice can be filed by an agent for more than one copyright owner. Instead of the earlier requirements that the owner lodge objection with respect to all works of which he or she is copyright owner and that these works total one hundred or more, the final regulation asks for some descriptive identification of the common characteristics shared by each group of works covered by the blanket notice (e.g., common author, owner, publisher or licensing agent). The requirement for express authorization has been dropped, but the provision requiring identification of an individual who can be contacted for further information has been expanded in an effort to insure that users are not left in the dark as to whether a particular work or works is actually covered by the blanket notice. Additionally, where the notice does not identify the copyright owner, the agent filing the objection must include an offer to identify the owner or owners, so that the person responsible for the performance can contact them directly.

3. SIGNATURE AND SERVICE

Several comments suggested that, because of the strict time-limit provided by the statute, it should be possible to file notice by wire, following up with a confirmation bearing a handwritten signature. We have adopted this suggestion and, as recommended in one of the comments, have added a requirement that the date of signature be included in the notice. Because of questions raised as to the effective date of service, we have also added a provision making clear that it is the date the notice is received by the person responsible for the performance.

4. EFFECTIVE DATE OF REGULATION

As recommended in the one comment received on the point, the effective date of the final regulation is January 1, 1978. This is the effective date of the new Act, and it would not be fair to copyright owners to delay the effective date of the regulation beyond the date when their rights are established by law.

Final Regulation. Part 201 of 37 CFR Chapter II is amended by adding a new § 201.13 to read as follows:

§ 201.13 Notices of objection to certain noncommercial performances of nondramatic literary or musical works.

(a) *Definitions.* (1) A "Notice of Objection" is a notice, as required by section 110(4) of title 17 of the United States Code as amended by Pub. L. 94-553, to be served as a condition of preventing the noncommercial performance of a nondramatic literary or musical work under certain circumstances.

(2) For purposes of this section, the "copyright owner" of a nondramatic literary or musical work is the author of the work (including, in the case of a work made for hire, the employer or other person for whom the work was prepared), or a person or organization that has obtained ownership of the exclusive right, initially owned by the au-

thor, of performance of the type referred to in 17 U.S.C. § 110(4). If the other requirements of this section are met, a Notice of Objection may cover the works of more than one copyright owner.

(b) *Form.* The Copyright Office does not provide printed forms for the use of persons serving Notices of Objection.

(c) *Contents.* (1) A Notice of Objection must clearly state that the copyright owner objects to the performance, and must include all of the following:

(i) Reference to the statutory authority on which the Notice of Objection is based, either by citation of 17 U.S.C. § 110(4) or by a more general characterization or description of that statutory provision;

(ii) The date and place of the performance to which an objection is being made; however, if the exact date or place of a particular performance, or both, are not known to the copyright owner, it is sufficient if the Notice describes whatever information the copyright owner has about the date and place of a particular performance, and the source of that information unless the source was considered private or confidential;

(iii) Clear identification, by title and at least one author, of the particular nondramatic literary or musical work or works, to the performance of which the copyright owner thereof is lodging objection; a Notice may cover any number of separately identified copyrighted works owned by the copyright owner or owners serving the objection. Alternatively, a blanket notice, with or without separate identification of certain copyrighted works, and purporting to cover one or more groups of copyrighted works not separately identified by title and author, shall have effect if the conditions specified in paragraph (c) (2) of this section are met; and

(iv) A concise statement of the reasons for the objection.

(2) A blanket notice purporting to cover one or more groups of copyrighted works not separately identified by title and author shall be valid only if all of the following conditions are met:

(i) The Notice shall identify each group of works covered by the blanket notice by a description of any common characteristics distinguishing them from other copyrighted works, such as common author, common copyright owner, common publisher, or common licensing agent;

(ii) The Notice shall identify a particular individual whom the person responsible for the performance can contact for more detailed information about the works covered by the blanket notice and to determine whether a particular work planned for performance is in fact covered by the Notice. Such identification shall include the full name and business and residence addresses of the individual, telephone numbers at which the individual can be reached throughout the period between service of the notice and the performance, and name, addresses, and telephone numbers of another individual to contact during that period in case the first cannot be reached.

(iii) If the copyright owner or owners of all works covered by the blanket notice is not identified in the Notice, the Notice shall include an offer to identify, by name and last known address, the owner or owners of any and all such works, upon request made to the individual referred to in paragraph (c) (2) (ii) of this section.

(3) A Notice of Objection must also include clear and prominent statements explaining that:

(1) A failure to exclude the works identified in the Notice from the performance in question may subject the person responsible for the performance to liability for copyright infringement; and

(ii) The objection is without legal effect if there is no direct or indirect admission charge for the performance, and if the other conditions of 17 U.S.C. § 110(4) are met.

(d) *Signature and Identification.* (1) A Notice of Objection shall be in writing and signed by each copyright owner, or such owner's duly authorized agent, as required by 17 U.S.C. § 110(4) (B) (i).

(ii) The signature of each owner or agent shall be an actual handwritten signature of an individual, accompanied by the date of signature and the full name, address, and telephone number of that person, typewritten or printed legibly by hand.

(iii) If a Notice of Objection is initially served in the form of a telegram or similar communication, as provided by paragraph (e) of this section, the requirement for an individual's handwritten signature shall be considered waived if the further conditions of said paragraph (e) are met.

(e) *Service.* (1) A Notice of Objection shall be served on the person responsible for the performance at least seven days before the date of the performance, as provided by 17 U.S.C. § 110(4) (B) (ii).

(2) Service of the Notice may be effected by any of the following methods:

(i) personal service;

(ii) first-class mail;

(iii) telegram, cablegram, or similar form of communication, if: (A) the Notice meets all of the other conditions provided by this section; and (B) before the performance takes place, the person responsible for the performance receives written confirmation of the Notice, bearing the actual handwritten signature of each copyright owner or duly authorized agent.

(3) The date of service is the date the Notice of Objection is received by the person responsible for the performance or any agent or employee of that person.

(17 U.S.C. 207, and under the following sections of Title 17 of the United States Code as amended by Pub. L. 94-553: §§ 110(4); 702.)

Dated: December 20, 1977.

BARBARA RINGER,
Register of Copyrights.

APPROVED BY:

DANIEL J. BOORSTIN,
Librarian of Congress.

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