



ANNOUNCEMENT

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

FINAL REGULATION

PART 201--GENERAL PROVISIONS; WORKS CONSISTING OF SOUNDS, IMAGES, OR BOTH; ADVANCE NOTICE OF POTENTIAL INFRINGEMENT

The following excerpt is taken from Volume 46, Number 103 of the Federal Register for Friday, May 29, 1981 (pp. 28846-50).

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket RM 80-1]

General Provisions; Works Consisting of Sounds, Images, or Both: Advance Notice of Potential Infringement

AGENCY: Library of Congress, Copyright Office.

ACTION: Final regulation.

SUMMARY: This notice is issued to advise the public that the Copyright Office of the Library of Congress is adopting a new final regulation designed to implement paragraph (b) of section 411 of the Copyright Act of 1976, Title 17 of the United States Code, as amended by Pub. L. 94-553. This paragraph provides for the service of advance notices of potential infringement for the purpose of preventing the unauthorized use of certain works that are being transmitted "live" at the same time that they are being fixed in tangible form for the first time. The effect of the final regulation is to establish requirements governing the content and manner of service of the advance notices.

EFFECTIVE DATE: July 1, 1981.

FOR FURTHER INFORMATION CONTACT: Dorothy Schrader, General Counsel, Copyright Office, Library of Congress, Washington, D.C. 20559, (202) 287-8380.

SUPPLEMENTARY INFORMATION: Section 411(b) of the Copyright Act of 1976 [Act of October 19, 1976, 90 Stat. 2541] concerns the unauthorized use of works

consisting of sounds, images, or both, that are fixed for the first time simultaneously with their transmission. It provides generally that the copyright owner may institute an action for infringement under section 501 of the Act, either before or after the first fixation takes place, and seek any or all of the remedies provided for by sections 502 through 506 and sections 509 and 510 of the Act so long as certain requirements are met.

In discussing the purpose of this provision, the Reports of the Judiciary Committees of the House of Representatives and the Senate [H.R. Rep. 94-1476, 94th Cong., 2d Sess. (1976) * at 157 and S. Rep. 94-473, 94th Cong. 1st Sess. (1975) at 140, respectively] state:

Section 411(b) is intended to deal with the special situation presented by works that are being transmitted "live" at the same time they are being fixed in tangible form for the first time. Under certain circumstances, where the infringer has been given advance notice, an injunction could be obtained to prevent the unauthorized use of the "live" transmission.

Under the statute, this Advance Notice must be served on the person responsible for the potential infringement at least ten days but not more than thirty days before the first fixation of the work and must identify the work and specify the time and source of its first transmission. The Advance Notice must also include a declaration of "an intention to secure copyright in the work." Section 411(b) further provides that the Advance Notice must comply "with the requirements that the Register of Copyrights shall prescribe by regulation."

On July 31, 1980, the Copyright Office published in the Federal Register (45 FR 50823) a proposal to adopt a new regulation § 201.22 establishing requirements governing the content and manner of service of the Advance Notices. A total of six initial and reply comments were received in response to the Notice of Proposed Rulemaking.

A majority of these comments focused on the use of the Advance Notice procedure in connection with the rules of the Federal Communications Commission (FCC) governing retransmission by cable television systems of sports programming (47 CFR § 76.67). In general, under these FCC rules, the holder of broadcast rights to certain sporting events may request a cable television system to delete carriage of the event upon timely notification. The FCC rules require the notification to include: the name and address of the party requesting deletion, the date, time and expected duration of the sports event and, in some cases, the call letters of the television broadcast station(s) televising the event. Carriage by a cable television system in violation of these rules may be considered a violation of the system's compulsory license under section 111(c)(2)(A) of the copyright law possibly providing a basis for an infringement action under section 411 (a) or (b) of the Copyright Act. Section 111(c)(2) also provides, however, that the secondary transmission must be "willful or repeated" in order to give rise to copyright liability.

After careful consideration of all of the comments, and those comments concerning application of the provision in connection with the FCC sports exclusivity rules in particular, the

*Error; lines should read:

"Rep. No. 94-1476, 94th Cong., 2d Sess. [1976] at 157 and S. Rep. No. 94-473, 94th Cong. 1st"

Copyright Office has decided to adopt the proposed regulation with several changes. A discussion of the major substantive comments appears below.

1. Definition of Copyright Owner

Because section 411(b) requires the service of an Advance Notice before fixation of a work, no statutory copyright will exist at the time it must be served. As a result, the Copyright Office proposed in § 201.22(a)(2) to define a "copyright owner" in part as:

The person who will be considered the author of the work upon its fixation (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 an exclusive right, initially owned by the person who will be considered the author of the work upon its fixation.

A comment submitted on behalf of a cable television system questioned the legitimacy of an Advance Notice served by a purported "copyright owner" as defined in the regulation. The comment suggested that the term "copyright owner" be limited to "all who have ownership in the work" and that reference to one who "has obtained ownership of an exclusive right" be eliminated.

The Copyright Office considers these suggestions contrary to the principles of copyright divisibility and ownership as set forth in sections 101 and 201 of the Copyright Act and, therefore, has not adopted them. Any questions arising as to the propriety of a particular Advance Notice should be resolved by the courts.

2. Authorship

Comments submitted on behalf of several professional sports leagues questioned the necessity of introducing the concept of authorship in the regulation on the ground that it complicates the advance notification procedure. While the Copyright Office is aware that questions of authorship and copyright ownership of televised sporting events have arisen between broadcasters and sports interests, the Office does not believe that identification of one author complicates the Advance Notice, and we have retained the requirement.

Under the Copyright Act, copyright vests initially in the author(s) of the work. Anyone who wishes to claim rights under the Act must be either the author or someone who obtains the rights from the author. Since section 411(b) requires that a copyright owner who brings an infringement action under that section make registration for the work within three months after its first transmission, it would ordinarily be necessary to identify the author at the time of registration. The Office therefore believes it is appropriate to include the information in the Advance Notice. However, the Office has modified

paragraph (c)(1)(v) of the regulation to clarify that identification of "at least one person or entity that will be considered the author of the work upon its fixation" is sufficient.

3. Expected Duration of First Transmission

A comment submitted on behalf of a cable television system requested that an Advance Notice include the expected duration of the first transmission of a work. The comment notes that this information would permit a potential infringer closely to monitor its activities in order to reduce the possibility of unintentional infringements. The Copyright Office believes that a copyright owner should have within his or her knowledge the approximate duration of the first transmission of a work and should be able to include it in an Advance Notice without any burden; this is especially true with respect to copyright owners of sporting events since this information, as noted earlier, is required to be given as part of the FCC sports exclusivity notification procedure. Accordingly, the Office has accepted this request and has so revised paragraph (c)(1)(ii) of the regulation.

4. Identification of Primary Transmitters

A comment submitted on behalf of a cable television system proposed that an Advance Notice include the identity of the primary transmitter or transmitters of the work so that a potential infringer will be in a better position to comply with the Notice. This proposal was opposed by copyright owners of sporting events as being too burdensome; instead, they suggested that the identification of a particular network of stations to whom the rights have been sold should be sufficient.

The identification of a particular primary transmitter or transmitters could probably be justified as within the "identification of source" requirement of section 411(b)(1) and such identification is encouraged. However, the Copyright Office has decided not to require such specific identification at this time. If a potential infringer needs further information with respect to the particular transmitter or transmitters of the work subject to the Advance Notice, he or she may contact the copyright owner or his or her duly authorized agent as identified in the notice.

5. Identification of the Copyright Owner

Paragraph (c)(1)(vi) of the proposed regulation requires an Advance Notice to include the identification of the copyright owner. A comment submitted on behalf of a cable television system suggested that this provision be amended to require in addition the address of the copyright owner, author, agent and primary transmitter of the work in order to facilitate clarification

of a vague or incomplete notice.

The Copyright Office has not adopted this suggestion. Paragraph (d)(2) of the regulation specifies that an Advance Notice include the "full name, address, and telephone number" of the person signing the notice; this person either will be the copyright owner or his or her duly authorized agent. The Office believes that a potential infringer should be able to resolve any questions regarding a notice through this individual, particularly since the notice must be served at least ten days before a potential infringement.

6. Rights and Activities

Under paragraphs (c)(1)(vii) and (viii) of the proposed regulation, an Advance Notice had to describe the "nature of the rights" which might be infringed and the "relevant unauthorized activities" which would result in an infringement. A comment submitted on behalf of a cable television system urged that the regulation require that these descriptions be fully and precisely set forth. On the other hand, another commentator believed that the requirements as proposed place an unfair burden on copyright owners using the advance notification procedure and should be deleted.

The Copyright Office believes that general descriptions of the activities relating to a potential infringement are necessary and pertinent elements of an Advance Notice. The regulation, however, should not require such extensive and specific descriptions as to place an unfair burden on a copyright owner serving a notice. We have decided to delete clause (vii) as unnecessary and to retain and renumber clause (viii). If a potential infringer need further information with respect to the particular rights or activities addressed in an Advance Notice, he or she may contact the copyright owner or his or her duly authorized agent as identified in the notice. The Office intends that where the copyright owner gives a general description of potential infringing activities within his or her knowledge, any failure to specify other activities not within the copyright owner's knowledge will not constitute a waiver of such infringement claims.

7. Captioning

A comment submitted on behalf of a cable television system noted the large amounts of mail that cable television systems and other potential infringers ordinarily may receive. Because of this, the commentator proposed that an Advance Notice and the envelope containing an Advance Notice be captioned "ADVANCE NOTICE OF POTENTIAL INFRINGEMENT" so that the personnel of the potential infringer will be alerted to the importance of the notice and forward it promptly to the proper persons.

The Office agrees that such captioning would seem to be beneficial and has decided to require in paragraph (c)(1) of the final regulation that an Advance Notice be "clearly and prominently ** captioned 'ADVANCE NOTICE OF POTENTIAL INFRINGEMENT'" so that it can be given prompt attention. Although similar captioning of the envelope containing a notice is strongly encouraged, the final regulations do not require it; since an envelope containing an Advance Notice must be served at least ten days before a potential infringement, a potential infringer should have adequate time to ascertain its contents.

8. Warning about unauthorized Activities

Under paragraph (c)(2)(i) of the proposed regulation, an Advance Notice must include a warning that "a failure to cease the unauthorized activities may subject the person responsible to further liability for copyright infringement." As discussed earlier, sports teams have *** declared an intention to use Advance Notices in connection with the FCC sports exclusivity notification procedure. Comments submitted on behalf of several sports leagues contend that when so used, it is difficult to impute "unauthorized activity" on the part of a cable system until a demand for protection under the FCC rules has been made; thus, they argue, it would be improper to address the consequences from a failure to "cease" these "unauthorized" activities.

The Copyright Office agrees that the reference to "unauthorized" activities raises unnecessary complications and has revised the warning to alert a potential infringer that the "relevant activities may, if carried out, subject the person responsible to liability for copyright infringement."

Correspondingly, reference to "unauthorized" activities in paragraph (c)(1) of the regulation has been deleted.

9. Signature and Identification

Paragraph (d) of the proposed regulation requires an Advance Notice to contain the actual handwritten signature of the copyright owner or his or her duly authorized agent. Comments submitted on behalf of several professional sports leagues contend that this requirement creates an unfair, onerous burden since, they assert, a substantial number of Advance Notices are likely to be sent to various cable systems during the course of a team's playing season in connection with the FCC's sports exclusivity notification procedure. They further contend that this burden would be compounded if the regulation restricts an Advance Notice to one particular work.

Because of the important legal implications accompanying the filing of

an Advance Notice and the greater assurance of validity provided by requiring an actual handwritten signature, the Copyright Office has decided to adopt paragraph (d) of the regulation as originally proposed. Moreover, the Office does not make the assumption that a substantial number of Advance Notices will be mailed each sports season. Another view is that section 411(b) constitutes an exceptional procedure that will be invoked sparingly. It clearly establishes an alternative procedure to 17 U.S.C. 411(a) for bringing a suit for copyright infringement. As such, the Office does not assume that section 411(b) will be invoked with greater frequency than section 411(a).

10. Types of Works Covered by the Advance Notice

Section 411(b) refers to "a work consisting of sounds, images or both." This concept has been incorporated in the definitions found in paragraph (a) of the proposed regulation. In the proposed rulemaking, the Office asked whether the regulation "should define more specifically the works that it covers, for example in terms of the types of works of authorship set forth in section 102(a) of the Copyright Act?" Several comments suggested that the regulation should be more specific in this respect; another comment felt that specificity would be useful for illustrative purposes only. In addition, comments submitted on behalf of sports leagues indicated that any list should include specific reference to copyrighted telecasts of live sporting events.

After careful consideration, the Copyright Office has decided not to specify further the types of copyrighted works that may be the subject of an Advance Notice. In enacting section 411(b), Congress consciously determined that the Advance Notice provision should be applicable only to works "consisting of sounds, images, or both." The Office has concluded that further refinement of this term in particular situations should, if necessary, be left to the courts in infringement actions brought under this section. It should be noted, however, that the types of "live" transmissions that commonly will be the subject of an Advance Notice include sporting events, concerts, theatrical presentations and news and public affairs programs.

11. Multiple Works

Each Advance Notice, as contemplated in the proposed regulation, was limited to one particular work. Since it may be possible for a given transmission to contain multiple works, the Office asked whether the regulation should "permit an advance notice to accommodate more than one work, particularly where multiple copyright owners are involved?"

A comment submitted on behalf of a cable television system encouraged the Office to retain the singular work requirement as proposed. Comments submitted on behalf of sports interests, however, argued that the filing of a single notice covering multiple works not only would be beneficial to the particular copyright owner involved but also to potential infringers who otherwise might be inundated with notices. This contention, they asserted, is particularly true with respect to Advance Notices served in conjunction with the FCC sports exclusivity notification procedure. Furthermore, the sports interests argued that a singular work requirement would add enormous costs to the notification procedure and could render section 411(b) ineffective.

When the "multiple works" question was posed as part of the proposed rulemaking, the Copyright Office envisioned occasions where multiple works are included in a single transmission program rather than instances of multiple transmissions of different copyrighted works, such as different sporting event programs. The Copyright Office considers the Advance Notice procedure to be an important mechanism for protecting the rights of copyright owners whose works are first fixed simultaneously with their transmission. At the same time, the Office recognizes that this provision is unique and unprecedented in the copyright law. Under section 411(b) service of an Advance Notice of Potential Infringement is a prelude to court action and a probable request for an injunction to prohibit retransmission of programs in advance of their broadcast.

For these reasons, the Office believes that the regulation governing Advance Notices should permit service on reasonable terms but should not encourage indiscriminate service. The final regulation in paragraph (c)(1) modifies the proposed regulation by permitting service of a single notice with respect to all of the works of the copyright owner embodied in a specific "transmission program" using the definition of that term in 17 U.S.C. 101. However, separate Advance Notices must be served with respect to works embodied in different transmission programs.

12. Registration as a Condition Subsequent

In addition to service of an Advance Notice, section 411(b) further requires a copyright owner instituting an infringement action to make "registration for the work within three months after its first transmission." With respect to this requirement, the Copyright Office asked whether the mandate given the Register under section 411(b) authorizes him to compel registration for the work and/or provide certain penalties for a failure to register.

**Error; line should read:
"Notice be "clearly and prominently"

***Error; line should read:
"discussed earlier, sports teams have"

All of the comments responsive to this question urged the Office generally to forego imposition of penalties for failure to register. Comments submitted on behalf of the professional sports interests, for example, argued that the registration requirement is triggered only if the author or copyright owner proceeds to file an action for infringement. They indicated that they do not intend to register every work that is mentioned in an Advance Notice, but will of course register the works if an infringement action is brought. If registration is not made in such cases, they state the Register would have the authority to compel registration and to provide certain financial penalties for a failure to register timely.

The Copyright Office has decided not to promulgate any regulations on this point at this time. Since, under section 411(b), registration clearly is a condition subsequent to the institution of judicial proceedings, it is within the authority of the court to compel registration and/or provide certain penalties for a delay in meeting this statutory requirement.

The Office has therefore decided that it is not necessary to impose any penalties in a regulation and has also deleted the reference to registration in paragraph (c)(2)(ii) of the regulation. This provision would have required the copyright owner to declare in an Advance Notice that he or she intends "to make registration of the copyright claim for the work within three months from the date of its first transmission." Under the regulation as adopted, however, the copyright owner will be required to declare that he or she "intends to secure copyright in the work upon its fixation." This declaration tracks the statutory language and is intended to assure that the copyright owner does not plan to place the work in the public domain.

Final Regulation

Part 201 of 37 CFR Chapter II is amended by adding a new § 201.22 to read as follows:

§ 201.22 Advance notices of potential infringement of works consisting of sounds, images, or both.

(a) *Definitions.* (1) An "Advance Notice of Potential Infringement" is a notice which, if served in accordance with section 411(b) of title 17 of the United States Code, and in accordance with the provisions of this section, enables a copyright owner to institute an action for copyright infringement either before or after the first fixation of a work consisting of sounds, images, or both that is first fixed simultaneously with its transmission, and to enjoy the full remedies of said title 17 for copyright infringement, provided registration for the work is made within three months after its first transmission.

(2) For purposes of this section, the

"copyright owner" of a work consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, is the person or entity that will be considered the author of the work upon its fixation (including, in the case of a work made for hire, the employer or other person or entity for whom the work was prepared), or a person or organization that has obtained ownership of an exclusive right, initially owned by the person or entity that will be considered the author of the work upon its fixation.

(3) A "transmission program" is a body of material that, as an aggregate, has been produced for the sole purpose of transmission to the public in sequence and as a unit.

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

(c) *Contents.* (1) An Advance Notice of Potential Infringement shall be clearly and prominently captioned "ADVANCE NOTICE OF POTENTIAL INFRINGEMENT" and must clearly state that the copyright owner objects to the relevant activities of the person responsible for the potential infringement, and must include all of the following:

(i) Reference to title 17, U.S.C. section 411(b) as the statutory authority on which the Advance Notice of Potential Infringement is based;

(ii) The date, specific time, and expected duration of the intended first transmission of the work or works contained in the specific transmission program;

(iii) The source of the intended first transmission of the work or works;

(iv) Clear identification, by title, of the work or works. A single Advance Notice of Potential Infringement may cover all of the works of the copyright owner embodied in a specific transmission program. If any work is untitled, the Advance Notice of Potential Infringement shall include a detailed description of that work;

(v) The name of at least one person or entity that will be considered the author of the work upon its fixation;

(vi) The identity of the copyright owner, as defined in paragraph (a)(2) of this section. If the copyright owner is not the person or entity that will be considered the author of the work upon its fixation, the Advance Notice of Potential Infringement also shall include a brief, general statement summarizing the means by which the copyright owner obtained ownership of the copyright and the particular rights that are owned; and

(vii) A description of the relevant activities of the person responsible for the potential infringement which would, if carried out, result in an infringement of the copyright.

(2) An Advance Notice of Potential Infringement must also include clear and prominent statements:

(i) Explaining that the relevant activities may, if carried out, subject the person responsible to liability for copyright infringement; and

(ii) Declaring that the copyright owner intends to secure copyright in the work upon its fixation.

(d) *Signature and Identification.* (1) An Advance Notice of Potential Infringement shall be in writing and signed by the copyright owner, or such owner's duly authorized agent.

(2) The signature of the 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.

(3) If an Advance Notice of Potential Infringement is initially served in the form of a telegram or similar communication, as provided by paragraph (e)(2)(iii) 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) An Advance Notice of Potential Infringement shall be served on the person responsible for the potential infringement at least ten days but not more than thirty days before the first fixation and simultaneous transmission of the work as provided by 17 U.S.C. 411(b)(1).

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

(i) Personal service;

(ii) First-class mail; or

(iii) Telegram, cablegram, or similar form of communication, if: (A) the Advance Notice meets all of the other conditions provided by this section; and (B) before the first fixation and simultaneous transmission take place, the person responsible for the potential infringement receives written confirmation of the Advance Notice, bearing the actual handwritten signature of the copyright owner or duly authorized agent.

(3) The date of service is the date the Advance Notice of Potential Infringement is received by the person responsible for the potential infringement or by any agent or employee of that person (17 U.S.C. 411, 702).

Dated: May 18, 1981.

David Ladd,
Register of Copyrights.

Approved:
William J. Welsh,
Acting Librarian of Congress.

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