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

NOTICE OF TERMINATION OF PROPOSED RULEMAKING

37 CFR PART 202

REGISTRATION OF CLAIMS TO COPYRIGHT: NOTICE OF TERMINATION OF PROPOSED RULEMAKING REGARDING REGISTRATION OF CLAIMS TO COPYRIGHT IN THE GRAPHIC ELEMENTS INVOLVED IN THE DESIGN OF BOOKS AND OTHER PRINTED PUBLICATIONS

The following excerpt is taken from Volume 46, Number 111 of the Federal Register for Wednesday, June 10, 1981 (pp. 30651-30653).

37 CFR Part 202

Registration of Claims to Copyright: Notice of Termination of Proposed Rulemaking Regarding Registration of Claims to Copyright in the Graphic Elements Involved in the Design of Books and Other Printed Publications

AGENCY: Library of Congress, Copyright Office.

ACTION: Notice of termination of proposed rulemaking.

SUMMARY: This notice of termination of proposed rulemaking is issued to advise the public that the Copyright Office of the Library of Congress is closing docket RM 79-2 without further action and does not intend to institute additional rulemaking proceedings at this time on the specific subject of registration of claims to copyright in the graphic elements involved in the design of books and other printed publications.

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

SUPPLEMENTARY INFORMATION: Existing Copyright Office regulations preclude registration of claims to copyright in certain works that are not subject to copyright. Specifically, Copyright Office Regulation 202.1(a) prohibits registration based on "mere variations of typographic ornamentation, lettering or coloring." (37 CFR 202.1(a))

On August 14, 1979 (44 FR 47555), the Copyright Office issued an advance notice of proposed rulemaking, inviting interested persons to participate in a public hearing and to submit written comments intended to elicit views and information to assist the Copyright Office in considering all aspects of the question concerning the registration of claims to copyright in the design of books, periodicals, pamphlets, brochures, and other printed publications.

Within the stated limits of the inquiry, the Copyright Office sought clarification of the creative elements involved in "book design," *i.e.*, the arrangement or juxtaposition of text matter, pictorial matter, or combinations of text and pictorial matter, on a page, pages, or in an entire printed publication.

The Copyright Office solicited comments on the meaning of terms such as "layout", "format", "typography", "composition", "arrangement", "makeup", and "color schemes." We inquired whether these elements should be regarded as uncopyrightable ideas or concepts, or whether, alone or in combination, they could be considered copyrightable "works of authorship".

On October 10, 1979, a day-long hearing was held at the former location of the Copyright Office, Room 910, Crystal Mall, Building No. 2 1921 Jefferson Davis Highway, Arlington, Virginia. At that time testimony was received from nine witnesses. The period for written comments was extended to January 2, 1980. As of that closing date the Copyright Office had received twenty-four letters of comment. Four additional letters were received subsequently and have been considered in reaching the decision announced in this notice.

The written comments and oral testimony given at the hearing addressed various topics including technical definitions used in design, printing and publishing; the copyrightability of various subject matter and elements; infringement problems; a limited copyright approach protection only against unauthorized [1] photomechanical duplication; and others. The Copyright Office has carefully considered each of the comment letters and all of the oral testimony. Based on this review, the Copyright Office has decided not to propose further regulations concerning the registration of claims to copyright in the graphic elements involved in the design, of books, periodicals, pamphlets, brochures, and other printed publications.

Section 410(a) of title 17 of the United States Code (as amended by Pub. L. 94-553, 90 Stat. 2541), which became effective on January 1, 1978, authorizes the Register of Copyrights to issue a certificate of registration, after determining that the deposited material constitutes copyrightable subject matter and that other legal and formal requirements for copyright registration have been met. Section 102 extends

[1] Error; line should read: "providing protection only against unauthorized "

copyright protection to "original works of authorship fixed in any tangible medium of expression * * *", and enumerates seven broad categories of copyrightable subject matter, including "literary works" and "pictorial, graphic, and sculptural works". These terms are defined in section 101 as follows:

> "Literary works", are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.
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> "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, technical drawings, diagrams, and models. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately, from, and are capable of existing independently of the utilitarian aspects of the article.

Subsection (b) of section 102 seeks to make clear, in express language, that copyright protection for an original work of authorship does not extend to any ideas, systems, or concepts that are "described, explained, illustrated, or embodied in such work". In commenting on this provision, the legislative reports say:

> Copyright does not preclude others from using the ideas or information revealed by the author's work. It pertains to the literary, musical, graphic, or artistic form in which the author expressed intellectual concepts. (S. Rep. No. 94-473, 94th Cong. 1st Sess., at 54 (1975) and H.R. Rep. No. 94-1476, 94th Cong. 2d Sess., at 56 (1976).

Both Reports accompanying the 1976 Act state that the new law "in no way enlarges or contracts the scope of copyright protection under the * * * (previous 1909 copyright) law. Its purpose is to restate, in the context of the new single Federal system of copyright, that the basic dichotomy between (copyrightable) expression and (uncopyrightable) idea(s) remains unchanged". (H.R. Rep. No. 94-1476, 94th Cong. 2d. Sess., at 57 (1976) and S. Rep. No. 94-473, 94th Cong. 1st Sess., at 54 (1975). Moreover, the legislative history indicates that Congress intended to maintain the same standard of original authorship that had been established under the previous copyright law. (S. Rep. No. 94-473, 94th Cong. 1st Sess., at 50 (1975) and H.R. Rep. No. 94-1476, 94th Cong. 2d Sess., at 51 (1976).

Case law under the 1908 Act clearly established that in order to be copyrightable, books, periodicals, pamphlets, brochures, and other printed publications must contain an appreciable amount of original authorship, usually in the form of literary or pictorial expression. The decisions in a number of cases established that for a work to be[1] copyrightable it must be on a basis other than typography, coloring, general format, or arrangement. That a work is distinctive, unique or pleasing in appearance, and embodies certain ideas of contrast or coloring does not necessarily afford a basis for copyright protection. Likewise, considerable time, effort, and expense may go into the creation of a work, but in the absence of sufficient original, creative expression to constitute a "work or authorship" required by the statute, the "work" does not constitute copyrightable subject matter.

It became evident from the written statements as well as testimony at the hearing that much of the protection sought can be secured under existing Copyright Office regulations and practices. For example, one witness, representing graphic designers and illustrators, presented a series of slides depicting examples of designs for which copyright protection was being urged. Among the examples appeared pictorial posters and illustrated title pages which the Copyright Office would register under existing regulations. Claims in the spacing and arrangement of text would not be registered under existing regulations and practices, however.

The testimony of a substantial number of witnesses was that book design as such should not be considered copyrightable. The elements of typography, layout, and design were said to be constructed within a narrow range of alternatives by unwritten rules of legibility and aesthetics of design. Among the objections of those opposing registration of book designs was the fear that there would be a proliferation of litigation and that the author's ability to license his or her work would be limited. Authors and publishers were also concerned that a separate copyright in the book design might involve an injunction against the distribution of the literary work itself where relief had been granted for even an unintentional infringement of a "book design." Many witnesses pointed to the difficulty of determining the exact scope of protection resulting from such registrations, and anticipated serious pervasive effects on the publishing and graphics industries.

Many of those commenting and testifying in favor of some protection for book design focused on limiting the right to actual reproduction of the design by photocopying, or the like. The statute in the United Kingdom proscribing photoduplication was cited as a model. Under the United Kingdom statute, it is an infringement for unauthorized persons to make "by any photographic or similar process * * * a reproduction of the typographical arrangement of the edition."[1] Such protection exists independently of any copyright in the text of a literary, dramatic, or musical work. The protection is for 25 years from the end of the calendar year in which the edition is first published.

Another witness also suggested that the right to prepare derivative works should be limited to exploitation of the design in the context of exploitation of the literary work for which the design was conceived.

Congress could legislate solutions that would afford limited copyright protection for graphic designers of literary works. However, relief of this sort is beyond the province of the Copyright Office.

The Copyright Office has concluded that existing practices and regulations accurately reflect established principles of statutory and case law. The Copyright Office makes subject matter determinations of registrability solely on the basis of the original creative *expression* (if any) embodied in the works submitted for registration. We recognize that designers may employ substantial effort and artistic skills in the planning and development of book designs. However, we believe that the arrangement, spacing, or juxtaposition of text matter which is involved in book design falls within the realm of uncopyrightable ideas of concepts.[2] Therefore, the Office has decided to terminate its advance notice of proposed rulemaking and to continue its long-standing practice with respect to the graphic elements involved in the design of books, periodicals, pamphlets, brochures, and other printed publications.

(17 U.S.C. 702, 410)

Dated: May 29, 1981.

David Ladd,

Register of Copyrights.

Approved:

Daniel J. Boorstin,

The Librarian of Congress.

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[1] Copyright Act, 1956, 4 & 5 Eliz. 2, c. 74, § 15(3).

1Error; line should read:
"established that for a work to be"

2Error; line should read:
"uncopyrightable ideas or concepts."

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