
ANNOUNCEMENT

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

INTERIM REGULATION

37 CFR Part 202

REGISTRATION OF CLAIMS TO COPYRIGHT; FULL TERM RETENTION OF COPYRIGHT DEPOSITS

The following excerpt is taken from Volume 48, Number 139 of the Federal Register for Tuesday, July 19, 1983 (pp. 32775-32778).

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 202

[Docket RM 83-5]

Registration of Claims to Copyright; Full Term Retention of Copyright Deposits

AGENCY: Copyright Office, Library of Congress.

ACTION: Interim regulation.

SUMMARY: This notice is issued to inform the public that the Copyright Office of the Library of Congress is adopting a new regulation on an interim basis to implement section 704(e) of the Copyright Act. Section 704(e) directs the Register of Copyrights to issue regulations prescribing the conditions under which requests for full term retention of copyright deposits are to be made and granted, including the fees for this service.

The effect of the interim regulation is to provide a mechanism for requesting retention of copyright deposits, to establish the conditions under which such requests are granted or denied, and to fix the fee to be charged pursuant to section 708(a)(11), if the request is granted.

DATES: Effective July 19, 1983. Written comments should be received before

August 30, 1983.

ADDRESSES: Ten copies of written comments should be addressed, if sent by mail to: Dorothy Schrader, Library of Congress, Department D.S., Washington, D.C. 20540.

If delivered by hand, copies should be brought to: Office of the General Counsel, Copyright Office, James Madison Memorial Building, Room 407, First and Independence Avenue, S.E., Washington, D.C.

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

SUPPLEMENTARY INFORMATION: Copyright registration is a legal formality intended to make a public record of the basic facts of a particular copyright. In order to register a work, an appropriate application, fee, and copyright deposit must be submitted to the Copyright Office. The Copyright Act [title 17 of the United States Code] gives the Register of Copyrights the authority to issue regulations concerning the required copyright deposit. Existing regulations require or permit, for particular classes, the deposit of identifying material instead of copies or phonorecords, the deposit of only one copy or phonorecord where two would normally be required, and in some cases material other than complete copies of the best edition. See the deposit regulations, 37 CFR 202.20 and 202.21. The copies, phonorecords, or identifying

material deposited under these deposit regulations and retained by the Copyright Office upon completion of registration of the copyright claim are hereafter referred to as "copyright deposits."

Under subsection (a) of section 704 of the Copyright Act, any copy, phonorecord, or identifying material deposited for registration, whether registered or not, becomes "the property of the United States Government."

With respect to published works, section 704(b) makes all deposits available to the Library of Congress "for its collections, or for exchange or transfer to any other library." Where the work is unpublished, the Library is authorized to select any deposit for its own collections or for transfer to the National Archives of the United States or to a Federal records center, but the Copyright Office will first make a facsimile reproduction of the unpublished deposit. See 37 CFR 201.23.

For deposits not selected by the Library, subsection (d) provides that they, or "identifying portions or reproductions of them," are to be retained under Copyright Office control "for the longest period considered practicable and desirable" by the Register of Copyrights and the Librarian of Congress. When and if they ultimately decide that retention of certain deposited articles is no longer "practicable and desirable," the Register and the Librarian have joint discretion to order their "destruction or other

disposition." Because of the unique value and irreplaceable nature of unpublished deposits, the Copyright Act prohibits their intentional destruction or disposition during their copyright term, unless a facsimile reproduction has been made a part of the records of the Copyright Office.

As stated in House Report 94-1476:

A recurring problem in the administration of the copyright law has been the need to reconcile the storage limitations of the Copyright Office with the continued value of deposits in identifying copyrighted works. Aside from its indisputable utility to future historians and scholars, a substantially complete collection of both published and unpublished deposits, other than those selected by the Library of Congress, would avoid the many difficulties encountered when copies needed for identification in connection with litigation or other purposes have been destroyed. The basic policy behind section 704 is that copyright deposits should be retained as long as possible, but that the Register of Copyrights and the Librarian of Congress should be empowered to dispose of them under appropriate safeguards when they decide that it has become necessary to do so. [H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 171 (1976).]

In 48 FR 12862 the Copyright Office announced that the Register of Copyrights and the Librarian of Congress have made a determination pursuant to section 704(d) regarding retention of copyright deposits at government expense. They have determined that it is no longer practicable to retain published copyright deposits for more than five years from the date of deposit, except for works of the visual arts (Class VA), which will be retained for ten or more years, if possible.

Section 704 also recognizes that some copyright owners wish to assure that¹ the deposit for a registered work will be stored for the full term of the copyright, and they are willing to assume the cost of storage. Thus, subsection (e) of section 704 authorizes the Register to issue a regulation under which a copyright owner can request retention of deposited material for the full term of copyright. The Register of Copyrights is authorized to prescribe the fees for this service and the "conditions under which such requests are to be made and granted."

Section 708 contains a schedule of fees for specific services performed by the Copyright Office, and in subsection (a)(11) authorizes the Register to fix additional fees "for any other special services requiring a substantial amount of time or expense * * * on the basis of the cost of providing the service."

This interim regulation is generally self-explanatory but a few provisions deserve special comment:

1. *Copyright Office Storage Limitations and Costs.* This regulation attempts to balance the interest of copyright owners and the public in full term storage of copyright deposits against the limitations on storage space and the handling costs faced by the Copyright Office. Copies retained under the control of the Copyright Office serve to identify the work, and in many cases, establish prima facie the scope of the copyright, both in connection with litigation and commercial transactions. For many years the Copyright Office has recognized this need and supported it by retaining copyright deposits for as long as possible at public expense.

The Copyright Office currently faces a storage crisis. The storage space allotted by the Library of Congress to the Copyright Office is virtually filled, and growth projections estimate that receipts within the next ten years may double the deposit material now being held. There is no possibility of acquiring additional storage space in the foreseeable future. Within the next twelve months, the Copyright Office must eliminate a substantial amount of stored material merely to accommodate deposits now being processed.

Full term retention of deposit material upon request, and at the expense of the requestor, was authorized by Congress as one way of resolving, at least in part, the tension between the recognized need for full term retention on the one hand, and rising storage costs and limited storage space, on the other.

The fee for full term retention was calculated to take account both of inflationary increases in storage costs over a 75 year period and the reduced need of the Government to borrow funds because the fee for future storage has been paid in advance. Thus, the cost of storing an average deposit copy under Copyright Office control is currently \$1.80 per year. In establishing a fee of \$135.00 for full term retention, the Office has assumed an average interest rate of 6% and an average inflation rate between 5% and 7% for storage costs, both calculated over a 75 year period.

The Office expects that it may be necessary to revise the fee for full term retention from time to time. The public will be notified of any change by publication of a revised regulation, and the revised fee will of course apply only to requests for full term retention granted after the effective date of any revised regulation.

2. *Circumstances under which a request for a long-term storage can be denied.*

A request for full term retention will be denied if the unusual size, weight, or fragility of the deposit would place unreasonable costs or administrative

burdens on the Copyright Office, or if the nature of the deposit could cause health or safety problems. However, we have also provided an option in the interim regulation for preparation of identifying reproductions, at the expense of the requestor, and subsequent retention of the identifying reproductions in lieu of oversize or otherwise unacceptable copies.

One of the general purposes of the deposit system is to enrich the collections of the Library of Congress. Therefore the deposit needs of the Library will prevail should they conflict with a request for full term retention under this regulation, unless the requestor deposits an extra copy, as provided in § 202.23(c)(2). If a published work has been exempted from deposit under section 407 or if the Library wants only one of two deposit copies or phonorecords, no conflict exists.

3. *Definition of "full term."*

The copyright term for works by² individual authors created on or after January 1, 1978 is usually life of the author plus 50 years. However, under section 302(e) of the statute, after 75 years from the year of first publication of a work or one hundred years from the year of its creation, whichever expires first, if the Copyright Office records do not show that the author of the work is living or died less than 50 years before, a presumption exists that the author has been dead for at least 50 years.

In the case of works made for hire and anonymous or pseudonymous works, section 302(c) establishes a copyright term of 75 years from publication, or 100 years from creation, whichever is shorter. Requests for full term retention of copyright deposits will be made exclusively with respect to published works, since the Copyright Act already mandates full term retention of unpublished works.

The 75 year period set by the Act was selected on the basis of statistical studies by the Copyright Office which suggested that 75 years was the average equivalent of a life-plus-50 term. [H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 135 (1976).]

The legislative history behind section 704(e) shows the intent that the Copyright Office use some rational means by which it can measure the necessary term of storage for deposits. For purposes of section 704(e), the Copyright Office has determined that "full term retention" means a period of 75 years from publication, and that period has been used in calculating the deposit retention fee.

4. *Under the Control of the Copyright Office.*

Section 704(e) specifies that deposit

¹Error; line should read:
"copyright owners wish to assure that"

²Error; line should read:
"The copyright term for works by"

material retained for full term storage in response to a request will be kept "under the control of the Copyright Office."

Accordingly, deposit material retained under the interim regulation pursuant to section 704(e) will be kept within the confines of Copyright Office buildings or under the control of Copyright Office employees, and will not be transferred to the Library of Congress collections.

The Copyright Office will exercise normal due care in processing and maintaining copyright deposits in full term retention status, but the Office will not apply special preservation techniques. Moreover, full term deposits are open to public inspection pursuant to 17 U.S.C. 705(b).

5. Interim effect.

This regulation is being issued on an interim basis to allow eligible persons to request full term retention of copyright deposits immediately. The regulation extends a privilege to the public. The Office does invite public comment before the regulation is made final.

With respect to the Regulatory Flexibility Act, the Copyright Office takes the position this Act does not apply to Copyright Office rulemaking. The Copyright Office is a department of the Library of Congress and is part of the legislative branch. Neither the Library of Congress nor the Copyright Office is an "agency" within the meaning of the Administrative Procedure Act of June 11, 1946, as amended (title 5, Chapter 5 of the U.S. Code, Subchapter II and Chapter 7). The Regulatory Flexibility Act consequently does not apply to the Copyright Office since that Act affects only those entities of the Federal Government that are agencies as defined in the Administrative Procedure Act.¹

Alternatively, if it is later determined by a court of competent jurisdiction that the Copyright Office is an "agency" subject to the Regulatory Flexibility Act, the Register of Copyrights has determined that this interim regulation will have no significant impact on small businesses.

List of Subjects in 37 CFR Part 202

Claims to copyright, Copyright, Registration requirements.

¹ The Copyright Office was not subject to the Administrative Procedure Act before 1978, and it is now subject to it only in areas specified by section 701(d) of the Copyright Act (i.e., "all actions taken by the Register of Copyrights under this title [17]," except with respect to the making of copies of copyright deposits). [17 U.S.C. 706(b)]. The Copyright Act does not make the Office an "agency" as defined in the Administrative Procedure Act. For example, personnel actions taken by the Office are not subject to APA-FOIA requirements.

Interim Regulation

PART 202—[AMENDED]

In consideration of the foregoing, Part 202 of 37 CFR Chapter II is amended on an interim basis by adding a new § 202.23 to read as follows:

§ 202.23 Full term retention of copyright deposits.

(a) *General.* (1) This section prescribes conditions under which a request for full term retention, under the control of the Copyright Office, of copyright deposits (copies, phonorecords, or identifying material) of published works may be made and granted or denied pursuant to section 704(e) of Title 17 of the United States Code. Only copies, phonorecords, or identifying material deposited in connection with registration of a claim to copyright under Title 17 of the United States Code are within the provisions of this section. Only the depositor or the copyright owner of record of the work identified by the copyright deposit, or a duly authorized agent of the depositor or copyright owner, may request full term retention. A fee for this service is fixed by this section pursuant to section 708(a)(11) of Title 17 of the United States Code.

(2) For purposes of this section, "under the control of the Copyright Office" shall mean within the confines of Copyright Office buildings and under the control of Copyright Office employees, including retention in a Federal records center, but does not include transfer to the Library of Congress collections.

(3) For purposes of this section, "full term retention" means retention for a period of 75 years from the date of publication of the work identified by the particular copyright deposit which is retained.

(4) For purposes of this section, "copyright deposit" or its plural means the copy, phonorecord, or identifying material submitted to the Copyright Office in connection with a published work that is subsequently registered and made part of the records of the Office.

(b) *Form and content of request for full term retention.*—(1) *Forms.* The Copyright Office does not provide printed forms for the use of persons requesting full term retention of copyright deposits.

(2) Requests for full term retention must be made in writing, addressed to the Chief, Records Management Division of the Copyright Office, and shall: (i) Be signed by or on behalf of the depositor or the copyright owner of record, and (ii) clearly indicate that full term retention is desired.

(3) The request for full term retention must adequately identify the particular copyright deposit to be retained, preferably by including the title used in the registration application, the name of the depositor or copyright owner of record, the publication date, and, if registration was completed earlier, the registration number.

(c) *Conditions under which requests will be granted or denied.*—(1) *General.* A request that meets the requirements of subsection (b) will generally be granted if the copyright deposit for which full term retention is requested has been continuously in the custody of the Copyright Office and the Library of Congress has not, by the date of the request, selected the copyright deposit for its collections.

(2) *Time of request.* The request for full term retention of a particular copyright deposit may be made at the time of deposit or at any time thereafter; however, the request will be granted only if at least one copy, phonorecord, or set of identifying material is in the custody of the Copyright Office at the time of the request. Where the request is made concurrent with the initial deposit of the work for registration, the requestor must submit one copy or phonorecord more than the number specified in § 202.20 of 37 CFR for the particular work.

(3) *One deposit retained.* The Copyright Office will retain no more than one copy, phonorecord, or set of identifying material for a given registered work.

(4) *Denial of request for full term retention.* The Copyright Office reserves the right to deny the request for full term retention where: (i) The excessive size, fragility, or weight of the deposit would, in the sole discretion of the Register of Copyrights, constitute an unreasonable storage burden. The request may nevertheless be granted if, within 60 calendar days of the original denial of the request, the requestor pays the reasonable administrative costs, as fixed in the particular case by the Register of Copyrights, of preparing acceptable identifying materials for retention in lieu of the actual copyright deposit;

(ii) The Library of Congress has selected for its collections the single copyright deposit, or both, if two copies or phonorecords were deposited; or

(iii) Retention would result in a health or safety hazard, in the sole judgment of the Register of Copyrights. The request may nevertheless be granted if, within 60 calendar days of the original denial of the request, the requestor pays the reasonable administrative costs, as fixed in the particular case by the

Register of Copyrights, of preparing acceptable identifying materials for retention in lieu of the actual copyright deposit.

(d) *Form of copyright deposit.* If full term retention is granted, the Copyright Office will retain under its control the particular copyright deposit used to make registration for the work. Any deposit made on or after September 19, 1978 shall satisfy the requirements of 37 CFR 202.20 and 202.21.

(e) *Fee for full term retention.*—(1) Pursuant to section 708(a)(11) of title 17 of the United States Code, the Register of Copyrights has fixed the fee for full term retention at \$135.00 for each copyright deposit granted full term retention.

(2) A check or money order in the amount of \$135.00 payable to the Register of Copyrights, must be received in the Copyright Office within 60 calendar days from the date of mailing of the Copyright Office's notification to the requestor that full term retention has been granted for a particular copyright deposit.

(3) The Copyright Office will issue a receipt acknowledging payment of the fee and identifying the copyright deposit for which full term retention has been granted.

(f) *Selection by Library of Congress—*

((1) *General.* All published copyright deposits are available for selection by the Library of Congress until the Copyright Office has formally granted a request for full term retention. Unless the requestor has deposited the additional copy or phonorecord specified by paragraph (c)(2) of this section, the Copyright Office will not process a request for full term retention submitted concurrent with a copyright registration application and deposit, until the Library of Congress has had a reasonable amount of time to make its selection determination.

(2) A request for full term retention made at the time of deposit of a published work does not affect the right of the Library to select one or both of the copyright deposits.

(3) If one copyright deposit is selected,

the second deposit, if any, will be used for full term retention.

(4) If both copyright deposits are selected, or, in the case where the single deposit made is selected, full term retention will be granted only if the additional copy or phonorecord specified by paragraph (c)(2) of this section was deposited.

(g) *Termination of full term storage.* Full term storage will cease 75 years after the date of publication of the work identified by the copyright deposit retained, and the copyright deposit will be disposed of in accordance with section 704, paragraphs (b) through (d), of title 17 of the United States Code.

(17 U.S.C. 408, 702, 704, and 708)

Dated: June 27, 1983.

David Ladd,

Register of Copyrights.

Approved by:

Daniel J. Boorstin,

The Librarian of Congress.

[FR Doc. 83-19480 Filed 7-18-83; 8:45 am]

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