



ANNOUNCEMENT

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

PROPOSED REGULATION

REGISTRATION OF CLAIMS TO COPYRIGHT ARCHITECTURAL WORKS

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LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 202

(Docket No. RM 91-5)

Registration of Claims to Copyright— Architectural Works

AGENCY: Library of Congress, Copyright Office.

ACTION: Proposed regulation.

SUMMARY: This notice of proposed rulemaking is issued to inform the public that the Copyright Office of the Library of Congress is considering adoption of new regulations governing the registration and deposit of architectural works. The Judicial Improvements Act of 1990, Public Law 101-650, amended the Copyright Act, title 17 of the U.S. Code and established "architectural works" as a new category of copyrightable subject matter. These proposed regulations are intended to implement copyright registration of this new category of copyrightable authorship and to establish the nature of the required deposit for mandatory deposit purposes.

DATES: Comments should be received on or before October 24, 1991.

ADDRESSES: Ten copies of written comments should be addressed, if sent by mail to: Library of Congress, Department 100, Washington, DC 20540. If delivered by hand, copies should be brought to: Office of the General Counsel, James Madison Memorial Building, room 407, First and¹ Independence Avenue, SE., Washington, DC 20559, (202) 707-8380.

FOR FURTHER INFORMATION CONTACT: Dorothy Schrader, General Counsel, U.S. Copyright Office, Library of Congress, Washington, DC 20559, (202) 707-8380.

SUPPLEMENTARY INFORMATION: On December 1, 1990, the President signed into law the Judicial Improvements Act of 1990, which contained provisions modifying portions of the federal copyright law, the Copyright Act of 1976, title 17 of the United States Code. One of the most significant amendments established "architectural works" as copyrightable subject matter. The amendment defined "architectural work" as "the design of a building as embodied in any tangible medium of expression, including a building, architectural plans or drawings * * *"

The issue of protecting architectural works became a prominent copyright concern as a result of United States adherence to the Berne Convention, which was effective on March 1, 1989. Article 2(1) of the Berne Convention requires member countries to provide copyright for "works of architecture," that is, for the original design of buildings. The U.S. copyright law before December 1990 provided protection for "diagrams, models, and technical drawings, including architectural plans" as a species of protected "pictorial, graphic, and sculptural work." However, no protection was provided for original designs of buildings. In 1989, the Copyright Office conducted a study of issues relating to works of architecture and concluded that the U.S. law was deficient in its protection of architectural works. The amendment passed in December 1990 cures that deficiency.

Because protection covering architectural works became

immediately effective upon the President's signature, the Copyright Office was unable to institute a rulemaking proceeding before making preliminary decisions as to implementation. Written practices were developed instead in order to guide the staff and the public as to registration procedures, and a preliminary decision has been made to register claims in architectural works on Form VA, the form used to register claims in "pictorial, graphic, or sculptural works." These preliminary decisions, however, can be restudied and possibly improved through this public proceeding. The written practices will govern registration of architectural works, pending issuance of final regulations.

In general, copyright principles, regulations, and practices applying to other categories of copyrightable authorship will apply in a similar fashion to architectural works, except as modified by specific written practices or any final regulations. The proposed regulations on architectural works cover issues unique to this new category of copyrightable authorship. Prominent issues addressed in the proposed regulations are as follows:

1. Subject Matter

While the definition of "architectural work" limits subject matter coverage to embodiments of "buildings," no definition of "building" is provided by the statute. The legislative history indicates that the term "building" is intended to mean habitable structures and structures used by humans.¹

The regulation's specified exclusions closely track the statute. Structures other than buildings are outside of the definition of "architectural work."

¹ Error: line should read: "Building, Room 407, First and"

¹ H.R. Rep. No. 101-736, 101st Cong. 2d Sess. p.20 (1990).

Standard features of buildings are likewise specified by the definition as being outside the scope of coverage. The law is mainly prospective in its effect. The provision concerning the effective date of the amendment excludes most pre-December 1, 1990 building designs.

2. Application Form

The proposed regulation designates Form VA as appropriate for registering claims in architectural works. Ultimately, the Copyright Office may decide to create a new form specifically tailored to architectural works rather than continue to register architectural works on Form VA. The copyright Office² is interested in receiving public comments on the issue.

The advantage in using existing Form VA is largely administrative simplicity. Development of a new form costs money. A separate form may not be wanted for only a few hundred or few thousand registrations annually. In the first six months under the new law, the copyright office has received fewer than³ 100 applications to register architectural works.

On the other hand, if a new form were developed, the instructions and requested information could be tailored specifically to fit architectural works. For example, information about construction of the building could be explicitly requested on the form. In addition, possibly less confusion would occur concerning whether the registered work is an "architectural work" (embodiment of a building design), or a "technical drawing" (a species of pictorial, graphic, or sculptural works).

3. Publication

The Copyright Office interprets the Copyright Act to provide that publication of architectural plans also publishes the architectural work embodied in the plans. The proposed regulation adopts this interpretation of the Act. Since the definition of architectural work provides that an architectural work may be embodied in the plans, the Copyright Office believes it would be inconsistent to treat architectural works embodied in published plans as unpublished works. Clearly, the plans are copies of the architectural work for infringement purposes, and distribution of copies constitutes publication.

4. Relationship With Technical Drawings

Frequently, dual copyright claims exist in technical drawings and the architectural work depicted in the

technical drawing. In such circumstances, the proposed regulation provides that separate registrations covering each category of authorship must be made, if both forms of authorship are to be placed on public record. Registration, as always, is permissive except as a jurisdictional prerequisite to an infringement suit in the case of non-Berne Convention works.

The Copyright Office considered allowing a unitary registration and decided that such a practice would not produce a clear public record. In most instances, different information is required to register a technical drawing from that required to register an architectural work. For example, it would be possible for the architectural work to be published by virtue of a distribution of models, or the public offering to sell copies of the building design, while the underlying technical drawings might remain unpublished. In a unitary registration, there would be no way to reflect this diverse information.

5. Deposit

The definition of architectural work provides that authorship "includes the overall form as well as the arrangement and composition of spaces and elements in the design * * *." The deposit provision governing copyright registration requires disclosure of the interior space if this is part of the claim. In general, architectural plans or drawings are required for unpublished, unconstructed works; for constructed works, photographs are also required.

Materials deposited for registration are considered for inclusion in the collections of the Library of Congress. The quality and longevity of the submitted copies is an important factor in the determination of their suitability for selection. The Copyright Office considered adoption of high archival quality standards for all deposits submitted for registration of architectural works. On further reflection, the Library of Congress and the Copyright Office decided to follow a unique approach to the deposit requirements in which we specify minimum mandatory deposits for purposes of registration, but also express a preference for receiving higher archival quality deposits. While the Copyright Office will not insist upon compliance with the archival quality standards in order to make registration, we encourage architects and other registrants to prepare deposits in accordance with the archival quality

standards. The Library of Congress is a "treasure house" for the nation. It seeks to acquire the highest quality architectural works to reflect our national heritage. The Library must of course be selective regarding its permanent acquisitions, and will be more inclined to select an architect's work for the collections if the deposit meets archival quality standards.

Accordingly, the proposed regulations first prescribe the minimum deposit and then express preferences for archival quality deposits. Depositing high quality copies will both ensure a clearer public record of the authorship being registered and enhance the possibility that the deposit will be retained in the permanent collections of the Library.

Finally, published architectural works are subject to mandatory deposit for the benefit of the Library of Congress under section 407 of the Copyright Act. The Library seeks to acquire high quality, archival deposits of architectural works for the collections on a selective basis.

Regulatory Flexibility Act

With respect to the Regulatory Flexibility Act, the Copyright Office takes the position that this Act does not apply to Copyright Office rulemaking. The Copyright Office is a department of the Library of Congress, and is a 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.²

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 and hereby certifies that this regulation will have no significant impact on small business.

² The Copyright Office was not subject to the Administrative Procedure Act before 1976, 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. 708(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.

²Error; line should read:
"works on Form VA. The Copyright Office"

³Error; line should read:
"Copyright Office has received fewer than"

List of Subjects in 37 CFR Part 202

Copyright, Copyright registration:
Architectural works.

Proposed Regulations

In consideration of the foregoing, the Copyright Office proposes to amend part 202 of 37 CFR, chapter II.

1. The authority citation for part 202⁴ would continue to read as follows:

Authority: Sec. 702 90 Stat. 2541 17 U.S.C. 702; §§ 202.19, 202.20 and 202.21 are also issued under 17 U.S.C. 407 and 408.

2. New section 202.11 would be added as follows:

§ 202.11 Architectural works.

(a) *General.* This section prescribes rules pertaining to the registration of architectural works, as provided for in the amendment of title 17 of the United States Code by the Judicial

Improvements Act of 1990, Public Law 101-650.

(b) *Definitions.*

(1) For the purposes of this section, the term "architectural work" has the same meaning as set forth in section 101 of title 17, as amended.

(2) The term *building* means habitable⁵ structures, such as houses and office buildings, and structures that are used by human beings, such as churches, gazebos, and garden pavilions.

(c) *Registration.*

(1) *Original Design.* In general, an original design of a building embodied in any tangible medium of expression, including a building, architectural plans, or drawings, may be registered as an architectural work.

(2) *Application form.* Registration should be sought on Form VA. Line one of the form should give the title of the building. The date of construction of the building, if any, should also be designated. If the building has not yet been constructed, the notation "not yet constructed" should be given following the title.

(3) *Separate registration for plans.* Where dual copyright claims exist in technical drawings and the architectural work depicted in the drawings, any claims with respect to the technical drawings and architectural work must be registered separately.

(4) *Publication.* Publication of an architectural work occurs when underlying plans or drawings of the building or other copies of the building design are distributed to the general public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies to a group of persons for further distribution or public display also constitutes publication. Construction of a building does not itself constitute publication.

(d) *Works excluded.* The following structures, features, or works cannot be registered:

(1) *Certain functional structures.* Purely functional structures other than buildings, such as bridges, cloverleaves, dams, or walkways.

(2) *Standard features.* Individual standard features, such as windows, doors, and other staple building components.

(3) *Pre-December 1, 1990 building designs.* The designs of buildings where the plans or drawings of the building were published before December 1, 1990,⁶ or the buildings were constructed or otherwise published before December 1, 1990.

3. Section 202.19 would be amended by revising paragraph (b)(3), by removing paragraph (b)(4), and by adding new paragraph (d)(2)(viii) as follows:

§ 202.19 Deposit of published copies or phonorecords for the Library of Congress.

(b) *Definitions.* * * *

(3) The terms "architectural work," "copies," "collective work," "device," "fixed," "literary work," "machine," "motion picture," "phonorecord," "publication," "sound recording," "useful article," and their variant forms, have the meanings given to them in section 101 of title 17.

(d) *Nature of required deposit.* * * *

(2) * * *
(viii) In the case of published architectural works, the deposit shall consist of the most finished form of presentation drawings in the following descending order of preference:

(A) Original format, or best quality form of reproduction, including offset or silk screen printing;

(B) Xerographic or photographic copies of good quality paper;⁷

(C) Positive photostat or photodirect positive;

(D) Blue line copies (diaz or ozalid process). If photographs are submitted, they should be 8 x 10 inch and should clearly show several exterior and interior views. The deposit should disclose the name(s) of the architect(s) and draftsman(s) and the building site.

4. Section 202.20 would be amended by revising paragraph (b)(3) and by⁸ adding new paragraph (c)(2)(xvii) as follows:

§ 202.20 Deposit of copies of phonorecords for copyright registration.

(b) *Definitions.* * * *

(3) The terms "architectural works," "copy," "collective work," "device," "fixed," "literary work," "machine," "motion picture," "phonorecord," "publication," "sound recording," "transmission program," and "useful article," and their variant forms, have the meanings given to them in section 101 of title 17.

(c) *Nature of required deposit.* * * *

(2) * * *
(xviii) *Architectural works.*

(A) For designs of unconstructed buildings, the deposit must consist of one complete copy of an architectural drawing or blueprint in visually perceptible form showing the overall form of the building and any interior arrangements of spaces and/or design elements in which copyright is claimed. For archival purposes, the Copyright Office prefers that the drawing submissions consist of the following in descending order of preference:

(1) Original format, or best quality form of reproduction, including offset or silk screen printing;

(2) Xerographic or photographic copies on good quality paper;

(3) Positive photostat or photodirect positive;

(4) Blue line copies (diaz or ozalid process).

The Copyright Office prefers that the deposit disclose the name(s) of the architect(s) and draftsman(s) and the building site, if known.

⁴Error; lines should read:
"Copyright Office proposes to amend Part 202 of 37 CFR, Chapter II.
1. The authority citation for Part 202"

⁵Error; line should read:
"(2) The term "building" means habitable"

⁶Error; line should read:
"were published before December 1, 1990,"

⁷Error; line should read:
"copies on good quality paper."

⁸Error; line should read:
"by revising paragraph (b) and by"

(B) For designs of constructed buildings, the deposit must consist of one complete copy of an architectural drawing or blueprint in visually perceptible form showing the overall form of the building and any interior arrangement of spaces and/or design elements in which copyright is claimed. In addition, the deposit must also include identifying material in the form of photographs complying with § 202.21 of these regulations, which clearly discloses the architectural works being registered. For archival purposes, the

Copyright Office prefers that the drawing submissions constitute the most finished form of presentation drawings and consist of the following in descending order of preference:

- (1) Original format, or best quality form of reproduction, including offset or silk screen printing;
- (2) Xerographic or photographic copies on good quality paper;
- (3) Positive photostat or photodirect positive;
- (4) Blue line copies (dialzo or ozalid process).

With respect to the accompanying photographs, the Copyright Office prefers 8 x 10 inch, good quality photographs, which clearly show several exterior and interior views. The Copyright Office prefers that the deposit disclose the name(s) of the architect(s) and draftsman(s) and the building site.

* * * * *

Dated: September 12, 1991.
Ralph Oman,
Register of Copyrights.

Approved:
James H. Billington,
The Librarian of Congress.
(FR Doc. 91-22790 Filed 9-23-91; 8:45 am)
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