ANNOUNCEMENT

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

FINAL REGULATION

CANCELLATION OF COMPLETED REGISTRATIONS

The following excerpt is taken from Volume 50, Number 194 of the Federal Register for Monday, October 7, 1985 (pp.40833-40836)

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket RM 85-3A]

Cancellation of Completed Registrations

AGENCY: Copyright Office, Library of Congress

ACTION: Final regulations.

SUMMARY: The Copyright Office of the Library of Congress is issuing final regulation 37 CFR 201.7 regarding cancellation practices and procedures under the Copyright Act of 1976. The effect of this new regulation is to specify the conditions under which the Copyright Office will cancel a completed registration.

EFFECTIVE DATE: October 7, 1985.

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

SUPPLEMENTARY INFORMATION:

Cancellation is an action taken by the Copyright Office to expunge an already completed registration. On August 16, 1985, the Copyright Office published in the Federal Register a proposed regulation setting forth the policies and procedures governing cancellation [50 FR 33065]. Although the Copyright Office applied cancellation procedures under both the 1909 Act and the 1976 Act, no regulation had ever specified in detail the circumstances under which the Office would cancel a completed registration. Regulations in effect since 1956,[1] however, had established the principle that the Office would correct its own errors by cancelling where the claim is invalid.

The Copyright Office received two comments from three attorneys practicing in the same law firm. The comments urged that the proposed regulation be withdrawn for a variety of reasons. The comments asserted the cancellation regulation posed constitutional problems due to the location of the Library of Congress within the legislative branch. It was further argued that cancellation procedures should be limited to "administrative" cancellations and no action should be taken in the case of "substantive" cancellation. The comments asserted the cancellation regulation enlarged the scope of the Register's authority, and reduced public confidence in the registration system. Additionally, the comments claimed the cancellation regulation would establish procedures similar to "interference" proceedings such as those provided by the Federal trademark and patent laws, and the lack of a hearing procedure raised procedural due process concerns under the Administrative Procedure Act (APA). Finally, the comments asserted the cancellation procedures were properly before a federal court in a case they described as the *"Zap Mail"* case.

The Copyright Office considers the withdrawal of a proposed regulation embodying procedures applied for many years, and described in the Office's publicly available practices,[2] to be an extreme position. For reasons which will be detailed subsequently, the Copyright Office has rejected the request to withdraw the cancellation regulation.

In adopting § 201.7, the Copyright Office has made a technical change in the language of § 201.7(a) regarding the definition of cancellation. The most significant change in this language is the deletion of the reference to "an error of the Office." In general cancellation for substantive invalidity will be invoked to correct Copyright Office errors, i.e., where the original administrative record reveals a material defect in the claim which the examiner should have noticed at the time of original examination. In other instances, however, cancellation is also appropriate where the Office discovers that the factual circumstances relied on at the time of registration were not accurate, and that on the basis of facts as they actually exist, registration was not authorized.[3] Cancellation because of insufficient funds also does

[1] 37 CFR 201.5(a) (1957); 37 CFR 201.5(a)(2) (1978).

[2] *Compendium I of Copyright Office Practices*, Supplementary Practice No. 15, at S-46 and S-49 (1973).

[3] An example of such a case arises where a work is deposited without a notice of copyright and the application designates a date of publication on or after January 1, 1978. After the original registration is made, the copyright claimant files a corrective application designating the publication date as before January 1, 1978. In such a case registration would not be authorized because under the terms of the 1909 Act, publication without notice divested copyright protection. Registration must be refused. It would be a fraud on, or at least a disservice to, the public if the Office allowed the original registration to remain valid where, on the claimant's own admissions, the registration is invalid.

[1] Error; line should read:
"regulation had ever specified in detail"

not involve Office error. Since the reasons for an erroneous registration may encompass errors by either the Copyright Office or by the copyright claimant, the Office decided to delete the reference entirely.

The Office intends no change however in practices that it has been following under the current Act. As we stated in the Supplementary Information to the proposed regulation, the Office "does not invite, and will generally not respond favorably to, requests to cancel a completed registration" from members of the public.

The Copyright Office studied carefully the criticism in both comment letters before it decided to adopt the cancellation regulation in final form. The discussion of the background and present cancellation practices, and of the authority to cancel, as published at 50 FR 33065–67, is reconfirmed and incorporated by reference here. In addition, the Copyright Office has rejected the points raised by the comment letters for the following reasons.

1. *Constitutional infirmities.* The argument that refusals to register on substantive grounds pose constitutional problems because the Library of Congress is located in the legislative branch was considered thoroughly and rejected by the Fourth Circuit in *Eltra Corp.* v. *Ringer*, 579 F.2d 294 (4th Cir. 1978), decided under the Act of 1909:

> * * * It is irrelevant that the Office of the Librarian of Congress is codified under the legislative branch or that it receives its appropriation as part of the legislative appropriation. The Librarian performs certain functions which may be regarded as legislative (i.e., Congressional Research Service) and other functions (such as the Copyright Office) which are executive or administrative. Because of its hybrid character, it could have been grouped code-wise under either the legislative or executive department.[4]

The authority of the Register to examine claims and refuse registration of invalid claims is explicitly stated in the current Act. 17 U.S.C. 410. In a cancellation for substantive invalidity, the Office simply corrects the public record to show what action the Office would have taken initially if the claim had been examined correctly or if the claimant had truthfully presented the material facts on which registration was based. The authority to refuse registration clearly encompasses the authority to cancel a completed registration that is invalid as a matter of law.

Since the courts have held that the Copyright Office can constitutionally refuse registration it seems obvious that the Office can constitutionally act to correct errors (whether its own or the claimant's) by simulating the action that should have been taken initially.

2. *Distinction between "administrative" cancellation and "substantive" cancellation.* The law firm argued that the Copyright Office should limit its cancellation procedures to so-called "administrative" cancellations. No cancellation should be considered on "substantive" grounds, which the firm identified as "based upon non-copyrightable subject matter."

It is unclear why the law firm believes non-copyrightable subject matter is an inherently different matter from other material defects in the validity of the claim. As an example of an "administrative" cancellation, the firm gave the following case: ". . . if the Copyright Office discovers that a renewal copyright application was actually filed too late because the original application discloses an early year date in the copyright notice, then the Copyright Office should have the authority to cancel a registration upon proper notice to the renewal claimant."

In both the above example and the case of registration of non-copyrightable subject matter the registration is invalid under the copyright law. The Office can see no reason why one should be classified as "administrative" cancellation and within the authority of the Copyright Office, and the other a "substantive" cancellation and outside the authority of the Copyright Office. In applying the cancellation policies under the 1909 Act and 1976 Act, the Copyright Office has never attempted to distinguish between "administrative" cancellations and "substantive" cancellations, as defined by the law firm, and no compelling argument or authority has been advanced for establishing such a distinction.

3. *Enlarging the scope of the Register's authority and reducing public confidence.* Section 201.7 neither enlarges the scope of the Register's authority under the statute nor reduces public confidence in the registration system. As detailed in the Supplementary Information published in the **Federal Register** at 50 FR 33065–33067 and hereby incorporated by reference cancellation has long been practiced under both the 1909 Act and 1976 Act. In considering enactment of the 1976 Act Congress was clearly informed of the cancellation procedures.[5] The provisions of the 1976 Act reflect a clear concern that the factual content of Copyright Office registration records be accurate and that claims at least facially satisfy the legal requirements of the Act. Section 410 authorizes an examination for copyrigh validity and section 506(e) makes it a criminal misdemeanor knowingly to misrepresent a material fact in an application for registration. In discussing the correction and amplification provision of section 408(d), both Congressional Reports on the Copyright Revision Bill acknowledges the authority of the Copyright Office to correct its own errors:

> . . . The "error" to be corrected under subsection (d) is an error by the applicant that the Copyright Office could not have been expected to note during its examination of the claim; *where the error in a registration is the result of the Copyright Office's own mistake or oversight, the Office can make the correction on its own initiative and without recourse to the "supplementary registration" procedure.*[6] (Emphasis added.)

Section 201.7 embodies existing Copyright Office procedures with one exception. It authorizes cancellation for substantive invalidity only after a copyright claimant has been notified of the proposed cancellation and has been given an opportunity for 30 days to show cause why the cancellation should not be made. The Copyright Office believes this new policy is a wise addition and the commentators appear to agree that notice to the claimant is desirable.

The Copyright Office believes that cancellation procedures are necessary to maintain the integrity of Copyright Office records. Without cancellation procedures, a copyright registration could be given prima facie effect in federal court where the Copyright Office knew the registration to be invalid under its regulations or practices. This would place an unfair burden on the public and on defendants in copyright litigation to overcome the strong presumption of validity that the courts have generally accorded copyright registrations. If not corrected, registrations that are inconsistent with published regulations and practices might be cited to the courts to support arguments that the Office has not consistently applied its regulations and practices. The Office views cancellation of invalid claims as a necessary measure to ensure the integrity of the copyright registration system and to ensure consistent application of its regulations and practices.[7] In addition, restricting cancellation procedures in the manner suggested by the law firm could create

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[4] *Eltra Corp.* v. *Ringer*, 579 F.2d 294, 301 (4th Cir. 1978). As the court also noted, "it seems incredible that, if there were a constitutional infirmity in the 1909 Act, it would have so long escaped notice by either the Supreme Court or the bar or that the Supreme Court would have given implicit authorization . . . for the exercise by the Register of the power to issue rules and regulations, as provided in the Act." *Id.* at 298.

[5] Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 1965 Revision Bill, Copyright Law Revision. Part 6, 89th Cong., 1st Sess. 120 (Comm. Print 1966).

[6] Sen. Rep. No. 94–473, 94th Cong., 1st Sess. 137 (1975); H.R. Rep. No. 94–1476, 94th Cong., 2d Sess. 155 (1976).

[7] Double examination or other quality review before issuance of the certificate would be another way to obviate the need for most cancellations on substantive grounds. This would of course result in significant delays in certificate issuance. The Office and the public have preferred the present system in the past, and, in view of the exceedingly small number of errors, the Office continues to favor correction of errors after registration to delays in processing for all claims.

an incentive to misrepresent facts since the Copyright Office would be powerless to correct certain errors once the registration was made.

4. *Similarity to interference proceedings and lack of hearing procedures.* The agrument in the comments asserting that the cancellation procedures would establish an interference proceeding similar to the Patent Office is false. In examining claims for copyright registration, the Copyright Office does not resolve factual disputes and does not conduct adversarial proceedings. In general, the Copyright Office accepts the facts as given by the copyright claimant.[6] Interference proceedings before the Patent Office, on the other hand, involve the resolution of difficult factual controversies.

Likewise, the hearing requirement under 5 U.S.C. 554 of the APA involves adjudications. The Copyright Office does not adjudicate factual controversies between parties. There is no requirement of a hearing in the Copyright Act for any action of the Office. Any due process concerns are satisfied by notice to the applicant and the opportunity to show cause why cancellation should not be made.

5. *The "Zap Mail" case.* The Copyright Office is not entirely certain what the commentators mean by the *"Zap Mail"* case. The commentators provided no citation as to the parties nor to the court in which this action is filed. One recent case, *Kiddie Rides, U.S.A., Inc.* v. *Donald Curran,* Civ. No. 85-1366 (D.C.D.C. Apr. 28, 1985) initially raised an issue concerning cancellation procedures, but the case was dismissed on July 31, 1985, after the Copyright Office reinstated the cancelled registrations for the purpose of affording the applicant an opportunity to show cause why the claims should not be cancelled. There are presently no pending actions involving the cancellation procedures.

With respect to the Regulatory Fekxibility 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.[6]

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 proposed regulation will have no significant impact on small businesses.

List of Subjects in 37 CFR Part 201

Claims to copyright, Copyright.

Final Regulations

In consideraion of the foregoing, Part 201 of 37 CFR, Chapter II is amended as follows:

PART 201—[AMENDED]

1. The authority citation for Part 201 is revised to read as follows:

Authority: Sec. 702, 90 Stat. 2541, 17 U.S.C. 702; § 201.7 is also issued under 17 U.S.C. 408, 409, and 410.

2. By adding a new § 201.7 to read as follows:

§ 201.7 Cancellation of completed registrations.

[a] *Definition.* Cancellation is an action taken by the Copyright Office whereby either the registration is eliminated on the ground that the registration is invalid under the applicable law and regulations, or the registration number is eliminated and a new registration is made under a different class and number.

[b] *General policy.* The Copyright Office will cancel a completed registration only in those cases where: (1) It is clear that no registration should have been made because the work does not constitute copyrightable subject matter or fails to satisfy the other legal and formal requirements for obtaining copyright; (2) registration may be authorized but the application, deposit material, or fee does not meet the requirements of the law and Copyright Office regulations, and the Office is unable to get the defect corrected; or (3) an existing registration in the wrong class is to be replaced by a new registration in the correct class.

[c] *Circumstances under which a registration will be cancelled.* (1) Where the Copyright Office becomes aware after registration that a work is not copyrightable, either because the authorship is de minimis or the work does not contain authorship subject to copyright, the registration will be cancelled. The copyright claimant will be notified by correspondence of the proposed cancellation and the reasons therefor, and be given 30 days, from the date the Copyright Office letter is mailed, to show cause in writing why the cancellation should not be made. If the claimant fails to respond within the 30 day period, or if the Office after considering the response, determines that the registration was made in error and not in accordance with title 17 U.S.C., Chapters 1 through 8, the registration will be cancelled.

(2) When a check received in payment of a registration fee is returned to the Copyright Office marked "insufficient funds" or is otherwise uncollectible the Copyright Office will immediately cancel any registration(s) for which the dishonored check was submitted and will notify the remitter the registration has been cancelled because the check was returned as uncollectible.

(3) Where registration is made in the wrong class, the Copyright Office will cancel the first registration, replace it with a new registration in the correct class, and issue a corrected certificate.

(4) Where registration has been made for a work which appears to be copyrightable but after registration the Copyright Office becomes aware that, on the administrative record before the Office, the statutory requirements have apparently not been satisfied, or that information essential to registration has been omitted entirely from the application or is questionable, or correct deposit material has not been deposited, the Office will correspond with the copyright claimant in an attempt to secure the required information or deposit material or to clarify the information previously given on the application. If the Copyright Office receives no reply to its correspondence within 30 days of the date the letter is mailed, or the response does not resolve the substantive defect, the registration will be cancelled. The correspondence will include the reason for the cancellation. The following are instances where a completed registration will be cancelled unless the substantive defect in the registration can be cured:

(i) Eligibility for registration has not been established;

(ii) A work was registered more than 5 years after the date of first publication and the deposit copy or phonorecord does not contain a statutory copyright notice;

(iii) The deposit copies or phonorecords of a work published before January 1, 1978 do not contain a copyright notice or the notice is defective;

(iv) A renewal claim was registered after the statutory time limits for registration had apparently expired;

(v) The application and copy(s) or

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[6] While the Copyright Office generally accepts the factual assertions of the copyright claimant as true, the Copyright Office is not required to accept factual assertions which are beyond belief. For example, the assertion of unconstitutional creation of the U.S. Constitution would not be accepted.

[6] 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. 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.

phonorecord(s) do not match each other and the Office cannot locate a copy of phonorecord as described in the application elsewhere in the Copyright Office of the Library of Congress;

(vi) The application for registration does not identify a copyright claimant or it appears from the transfer statement on the application or elsewhere that the "claimant" named in the application does not have the right to claim copyright;

(vii) A claim to copyright is based on material added to a preexisting work and a reading of the application in its totality indicates that there is no copyrightable new material on which to base a claim;

(viii) A work subject to the manufacturing provisions of the Act of 1909 was apparently published in violation of those provisions;

(ix) For a work published after January 1, 1978 the only claimant given on the application was deceased on the date the application was certified;

(x) A work is not anonymous or pseudonymous and statements on the application and/or copy vary so much that the author cannot be identified; and

(xi) Statements on the application conflict or are so unclear that the claimant cannot be adequately identified.

(d) *Minor substantive errors.* Where a registration includes minor substantive errors or omissions which would generally have been rectified before registration, the Copyright Office will attempt to rectify the error through correspondence with the remitter. Except in those cases enumerated in paragraph (c) of this section, if the Office is unable for any reason to obtain the correct information or deposit copy the registration record will be annotated to state the nature of the informality and show that the Copyright Office attempted to correct the registration.

Dated: September 26, 1985.

Ralph Oman,

Register of Copyrights.

Daniel J. Boorstin,

The Librarian of Congress.

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