



# ANNOUNCEMENT

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

## NOTICE OF INQUIRY

### REGISTRATION OF CLAIMS TO COPYRIGHT NOTICE OF INQUIRY; COLORIZATION OF MOTION PICTURES

The following excerpt is taken from Volume 51, Number 178 of the Federal Register for Monday, September 15, 1986 (pp. 32665-32667)

#### LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 202

[Docket No. 86-1]

Registration of Claims To Copyright  
Notice of Inquiry; Colorization of  
Motion Pictures

AGENCY: Library of Congress, Copyright  
Office.

ACTION: Notice of Inquiry.

**SUMMARY:** This notice of inquiry is issued to advise the public that the Copyright Office of the Library of Congress is examining the copyright registrability of colorization (colored versions) of black-and-white motion pictures. This notice is intended to elicit public comment, views, and information which will assist the Copyright Office in developing its practices regarding colorization and may lead to proposals to amend the regulations.

**DATES:** Initial comments should be received on or before October 15, 1986. Reply comments should be received on or before December 15, 1986.

**ADDRESS:** Interested persons should submit ten copies of their written comments to Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C. 20559.

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

#### SUPPLEMENTARY INFORMATION: 1.

*Originality requirement for derivative works.* The existing Copyright Office regulations provide that "mere variations of . . . coloring" are not subject to copyright. 37 CFR 201.1(a).

It has been suggested,<sup>1</sup> and the courts have held<sup>2</sup> that while color *per se* is uncopyrightable and unregistrable, arrangements or combinations of colors may warrant copyright protection.

Original and quantitatively non-trivial contributions by an author to a preexisting work may sustain a copyright in a derivative work. *Durham Industries, Inc. v. Tomy Corporation*, 630 F.2d 905, 909 (2d Cir. 1980). A derivative work is a work "based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, . . . or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship is a derivative work." 17 U.S.C. 101 (1982).

Copyright in a derivative work extends only to the new material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. 17 U.S.C. 103(b). The copyright in such a work is

independent of, and does not affect or enlarge the scope, duration, ownership or subsistence of any copyright protection in the preexisting material. *Ibid.* Moreover, copyright protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully. *Ibid.*, 103(a).

To be copyrightable, the new material in the derivative work must constitute an "original work of authorship." To be copyrightable, a derivative work must embody new and original creativity that makes the resulting work more than a trivial variation of the original. Thus, the quantity of new matter added is relevant to copyrightability. Courts have defined the necessary *quantum* of original creative authorship in different ways, ranging from "a modicum," "a minimum," or "an appreciable amount" of creative authorship. The colorization of motion pictures presents new questions concerning the registrability of claims to copyright. The Copyright Office wants to elicit the views of the public with respect of claims in colorization.

2. *Colorization processes.* A motion picture generally embodies the contributions of many persons whose efforts are brought together to make a cinematographic work of authorship. Copyrightable elements include audio and visual components, literary or dramatic and musical elements, integrated into a unique whole. Mere mechanical or industrial processes however have never served as the basis for original or derivative authorship. Thus, for example, a claim to copyright

<sup>1</sup> NIMMER ON COPYRIGHT Section 2.14 (1985).

<sup>2</sup> *Pantone, Inc. v. A. I. Friedman, Inc.*, 294 F. Supp. 545 (S.D.N.Y. 1968); *Sargent v. American Greeting 3 Corp.*, 588 F. Supp. 912, 918 (N.D. Ohio, 1984).

<sup>3</sup> Error; line should read: "545, 547 (S.D.N.Y. 1968); *Sargent v. American Greeting*"

film to one-half inch videocassette will not be registered, even though technical skill is often needed to assure faithful reproduction. In a highly technologic environment, distinguishing industrial artisanship from artistic creativity is not always easy. This is, however, what the Office must do—within the limits of its overall authority—under 17 USC 410(a).

The process of colorization of black-and-white motion pictures is an attempt to respond effectively to the apparent demands and tastes of the viewing public, which tends to prefer color.

The Copyright Office is aware of sharply held differences of view on the aesthetic consequences of colorizing previously distributed black and white film. Although it follows with interest the public and industry debate as to whether colorizations risks "mutilating" the conscious artistry of black-and-white cinematographers, these issues can not and do not form any part of this present inquiry.

Colorization practices tangentially raise questions about the term of copyright. Motion picture marketing practices might, in some cases, result in the effective extension of the copyright term in copyrighted preexisting works or in the recapture of works previously in the public domain. The Copyright Office requests that parties with knowledge of industry practices address these and other possibilities.

To date, the Copyright Office is aware that at least two enterprises have ventured in the business of colorization. They are the Color Systems Technology, Inc. (hereafter "CST") of Hollywood,

Toronto, Canada. The systems may involve the use by "colorists" and art directors of computer data bases storing information gleaned by researchers relating to the actual color of costumes, sets, locales, and performers in black-and-white films. They apparently involve the application of colors to shots in films by individuals interacting with computers and special software. "Perfection" of the results may involve use of animation techniques. Once the colorists make certain initial decisions, the actual process of imposing color onto the entire film appears to be largely computer directed.

In addition to these computer-assisted coloring systems, another means of adding color to film exists, known as "Chromaloid." A so-called "color-retrieval" process, it does not appear to be computer-assisted.

3. *Specific questions.* To assist the Copyright Office in determining the registrability of colorized black-and-white motion pictures, comments are specifically requested on the following questions:

1. Which steps, if any, in the colorization processes involve individual creative human authorship?

2. Who are the authors of the copyrightable elements, if any, in colorized film?

3. With specific reference to the role of computer programs in colorization processes:

(a) How are colors selected? How are colors made available for selection? What factors influence color selection?

(b) In addition to coloring in the strict sense, are other cinematographic contributions, such as animation or other hand or computer assisted effects, utilized in colorizing?

4. Are all colorization processes intended solely to create videotapes in color? Are any methods now available or under development that would permit the commercially feasible colorization of 35mm prints of a quality that would permit theatrical distribution?

Copies of all comments received will be available for public inspection and copying between the hours of 8 a.m. and 4 p.m., Monday through Friday, in the Public Information Office, Room 401, James Madison Building, Library of Congress, 1st & Independence Avenue, SE., Washington, DC 20559.

If the Copyright Office decides to propose any change in the relevant regulations, it will publish a proposed text in the *Federal Register* and invite further comments at that time.

Authority: 17 U.S.C. 409, 410, and 702.

#### List of Subjects in 37 CFR Part 202

Claims, Copyright, Copyright Office, Registration of claims to copyright.

Dated: August 20, 1986.

Ralph Oman.

Register of Copyrights.

Approved:

Daniel J. Boorstin.

The Librarian of Congress.

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