# ANNOUNCEMENT

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


FINAL REGULATION

REGISTRATION OF CLAIMS TO COPYRIGHT;
ARCHITECTURAL WORKS


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**LIBRARY OF CONGRESS**

**Copyright Office**

**37 CFR Part 202**

**[Docket No. RM 91-5A]**

**Registration of Claims to Copyright; Architectural Works**


**AGENCY:** Copyright Office, Library of Congress.

**ACTION:** Final regulation.

**SUMMARY:** The Copyright Office of the Library of Congress is issuing final regulations governing the registration and deposit of architectural works. The Judicial Improvements Act of 1990 amended the Copyright Act of 1976 and established "architectural works" as a new category of copyrightable subject matter. These new regulations establish the registration procedures for this new category of authorship, and determine the nature of the required deposit for registration and mandatory deposit.

**EFFECTIVE DATE:** October 1, 1992.



**FOR FURTHER INFORMATION CONTACT:** Dorothy Schrader, (202) 707-8380.


**SUPPLEMENTARY INFORMATION:** On December 1, 1990, the President signed into law the Judicial Improvements Act of 1990, Public Law 101-650, which contained provisions modifying portions of the federal copyright law, the Copyright Act of 1976. 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 work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features."

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 federal copyright 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 of 1990 cures that deficiency.

The Copyright Office published instructions regarding registration procedures in Circular 41. On September 24, 1991, the Copyright Office published proposed regulations embodying the written registration practices which were in place and proposing some unique deposit provisions. (56 FR 48137).

### 1. Proposed Regulation

The proposed regulation on architectural works covered issues unique to this new category of authorship. Issues addressed in the proposed regulation included subject matter of protection and exclusions thereto; the application form; the concept of publication; the relationship with technical drawings; and deposit procedures.

In defining subject matter of protection, the proposed regulations drew upon the statute and legislative history. The term "building" was defined as habitable structures, and structures used by human beings. Stipulated as exclusions from protection were structures other than buildings; individual standard features of buildings; and building designs published or constructed before December 1, 1990.

The Office's proposed regulation designated Form VA as the appropriate form for registering building designs, and information concerning construction of the building, if any, was required to be disclosed at the title line of the application. Where dual copyright claims existed in the technical drawings and the architectural work depicted in the drawings, the claims were required to be registered separately.

On the issue of publication, the proposed regulation took the position that publication of the architectural plans also published the architectural work embodied in the plans. The definition provided in the proposed regulation was based on the definition of publication in the statute, and further provided that construction was not publication.

According to the proposed regulation, deposit for copyright registration would consist of drawings or plans, and, if the building has been constructed, photographs. The proposed regulation also specified certain preferences regarding the archival quality of the deposit. This archival preference also applied to published architectural works subject to mandatory deposit for the benefit of the Library of Congress under section 407 of the Copyright Act.

### 2. Comment Letters

Only three persons or entities submitted comment letters on the proposed regulation.

They were Professor William Fryer of the University of Baltimore School of Law; the American Institute of Architects; and Committee 304 (Pictorial, Graphic, Sculptural and Choreographic Works) of the Patent, Trademark, and Copyright Section of the American Bar Association. This latter Comment apparently presents the views in summary form of 12 of the 36 members of the Committee. These comments are summarized as follows:

*Comment Number 1:* Professor Fryer asserts that the proposed regulation does not fully implement the Berne Convention due to its limitation to habitable structures and structures used by human beings. Professor Fryer notes: "There is no generally accepted Berne practice that removes 'inhabitable structures' from protection or requires that a structure be 'used by human beings' to be protected. These limitations remove from protection a wide range of structures that are architectural works."

*Comment Number 2:* The American Institute of Architects (AIA) requested two modifications in the proposed regulation. First, it argued for adoption of a new form specifically tailored to registering architectural works. Second, it asserted that the definition of publication was confusing, and asked that it be made clear that the filing of plans with public agencies did not constitute publication.

*Comment Number 3:* Twelve members of ABA Committee 304 expressed views on a wide range of issues. Some suggestions were made by one person. Divided opinions were expressed on some points. Some members criticized the proposed definition of a building on the following grounds:

(a) It was unclear whether the phrase "that are used by human beings" modified the term "habitable structures."

(b) The definition might wrongfully include tents and mobile homes.

(c) The list of examples should include museums.

(d) The definition should be expanded to cover creative designs, such as bird houses, dog houses, and zoo enclosures.

The exclusion for "certain functional structures" was criticized as indefinite and ambiguous. The Committee asserted "bridges" should not be excluded. Furthermore, the regulation should make clear that the exclusion for unregistrable matter does not affect the separate pictorial, graphic, or sculptural work that might be attached to the building.

The Committee asked why publication of the blueprints also published the architectural work, but publication of the architectural work would not necessarily publish the blueprints. They urged that the definition be modified to make it clear that distribution of plans to the limited number of people who are necessarily involved in the construction project did not publish the architectural work.

**3. Final Regulations**

*a. Subject Matter of Protection*

The primary criticism of the proposed regulation was that it took an overly restrictive view of the subject matter of protection. The standards proposed by the Copyright Office were largely based on the legislative history, which excludes structures other than buildings.

Protection for architectural works was originally proposed to cover "a building or other three-dimensional structure * * *". The hearings on the legislative proposal to recognize copyright in architectural works debated this broader proposal. Commentators are clearly correct in their assertions that proponents of protection in the legislative hearings offered broad visions of what should be protected.

On the other hand, state highway commissions objected that overbroad protection could result in higher construction costs in the nation's highway system. The House Subcommittee responded to these objections by deleting the reference to "three-dimensional structure" from the legislation. The House Subcommittee explained its action in the following words:

> The Subcommittee made a second amendment in the definition of architectural work: the deletion of the phrase "or three-dimensional structure." This phrase was included in H.R. 3990 to cover cases where architectural works (sic: are) embodied in innovative structures that defy easy classification. Unfortunately, the phrase also could be interpreted as covering interstate highway bridges, cloverleafs, canals, dams, and pedestrian walkways. The Subcommittee examined protection for these works, some of which form important elements of this nation's transportation system, and determined that copyright protection is not necessary to stimulate creativity or prohibit unauthorized reproduction.
>
> The sole purpose of legislating at this time is to place the United States unequivocally in compliance with its Berne Convention obligations. Protection for bridges and related nonhabitable three-dimensional structures is not required by the Berne Convention. Accordingly, the question of copyright protection for these works can be deferred to another day. As a consequence, the phrase "or other three-dimensional structures" was deleted from the definition of architectural work and from all other places in the bill.
>
> This deletion, though, raises more sharply the question of what is meant by the term "building." Obviously, the term encompassed habitable structures such as houses and office buildings. It also covers structures that are used, but not inhabited, by human beings, such as churches, pergolas, gazebos, and garden pavilions. (H.R. Rep. No. 735, 101st Cong. 2d Sess. 19-20 (1990)).

The Copyright Office agrees with the conclusions of the House Subcommittee that protection limited to buildings satisfies our Berne Convention obligations. In the legislative deliberations concerning whether to join the Berne Convention, international experts took the position that the sufficiency of U.S. law in respect to all Berne obligations was a matter for the United States to determine. (*See* discussion of W.I.P.O. Roundtable in Geneva, in H.R. Rep. No. 609, 100th Cong. 2d Sess. 36 (1988)). The study on architectural works conducted by the Copyright Office, moreover, confirms the many differences in approach among Berne member states in addressing protection of architectural works. Our study confirms an absence of uniform standards of protection for architectural works under the Berne Convention.

After careful reconsideration the Copyright Office finds the proposed regulation accurately implemented the policies expressed by legislative history. However, in order to provide further clarification on the important matter of subject matter of protection, the Copyright Office has adopted a number of changes. With respect to the definition of "building," four changes are made in the final regulations. First, a provision is added that the term "building" applies to structures "that are intended to be both permanent and stationary." Second, a clarification is provided that the listing of examples in § 202.11(b)(2) is not all inclusive. Third, the suggestion of the ABA Committee 304 that "museums" be added is adopted. Fourth, we have clarified that the term "humanly" qualifies the phrase "habitable structures."

Three modifications have been made to works excluded in § 202.11(d). First, reference to "certain functional structures" in § 202.11(d)(1) is deleted and in its place is substituted "structures other then buildings." Second, the list of examples of structures other than buildings is expanded to specify the exclusion of "tents, recreational vehicles, mobile homes, and boats." Third, in the exclusion for standard features, the Copyright Office has added: "standard configuration of spaces."

The Copyright Office believes Congress intended to limit protection of architectural works to humanly habitable structures or other similar structures used by human beings. The Office has no doubt that this subject matter qualification is consistent with the Berne Convention obligations, based upon its June 1989 Report "Copyright in Works of Architecture."

*b. Registration Limited to Single Work*

The proposed regulation made no proposal regarding the one registration per work rule. The Copyright Office intended to apply the established principle found in 37 CFR 202.3 (b)(7). Since the proposed regulation has been pending, however, a number of applicants have attempted to register groups of architectural works on a single application form. The Copyright Office finds that accepting such group registrations would lead to confusion over the nature of copyrightable authorship that is being registered. For this

reason, the Copyright Office limits registration to a single work. To avoid any uncertainty, the Office adds a specific provision confirming that a single application may cover only a single architectural work. Additionally, the Copyright Office also clarifies the concept of a single work in the case of tract housing at 37 CFR 202.11 (c)(2).

*c. Publication*

The proposed regulation based its definition of publication on the Copyright Act. The definition drew upon two statutory provisions: the definition of "publication" in section 101 of the Copyright Act, and the definition of "architectural work" which provides that the building design may be embodied in architectural plans or drawings.

The American Institute of Architects ("AIA") criticized the proposed definition on the grounds that it implied that limited distribution of plans to public agencies and subcontractors for purpose of construction constituted publication. The AIA believed this impression was created by the second sentence of the definition ("(t)he offering to distribute copies to a group of persons for purposes of further distribution or public display also constitutes publication"), which is taken nearly verbatim from the Copyright Act's definition of "publication." AIA contended that the majority of cases hold that filing plans with public agencies and limited distribution to subcontractors does not constitute publication.

The AIA position appears consistent with the majority line of the cases on this issue. The Copyright Office had and has no intention of mandating that filing plans with public agencies generally constitutes publication.

The Copyright Office is hesitant, however, to establish a judgmental policy on the extent of distribution necessary to constitute publication. For years, applicants registered architectural plans with the Copyright Office. Many of these applicants have chosen to designate their plans as published on the basis of public filing dates, and/or distribution to subcontractors. The Copyright Office has a natural reluctance to establish a policy that inflexibly mandates a public filing can never be considered a publication of the work.

As an alternative, the Copyright Office has chosen to delete the second sentence of the proposed definition of publication, even though the language is taken nearly verbatim from 17 U.S.C. 101. The purpose of the definition of publication in the regulations of the Copyright Office is to clarify matters that are capable of definitive policies. The applicant has special knowledge about the extent to which a set of plans has been distributed. The Copyright Office prefers a flexible policy, which allows the claimant to consider his or her work has been published on the basis of public filings. The Office does not, of course, take the position that a public filing always or generally constitutes publication of the work.

*d. Application Forms*

The American Institute of Architects endorsed the establishment of a separate registration form dedicated exclusively to registering architectural works.

The Copyright Office gave careful consideration to the proposal for a unique form. While the Copyright Office does not foreclose the possibility of creating such a form in the future, currently annual registrations of architectural works run to about 2,000. Moreover, the Examining Division has not experienced any undue difficulty in dealing with registration on Form VA. Due to the relatively low number of registrations and the lack of recurring problems, the Copyright Office has decided not to adopt a new form at this time. The Office will continue to monitor its experience with the use of Form VA to register architectural works.

**4. 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, which 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 (5 U.S.C. 55 et seq and 5 U.S.C. 701 et seq). 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 and hereby certifies that this regulation will have no significant impact on small business.

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

Copyright, Copyright registration, Architectural works.

**Final Rules**

In consideration of the foregoing, 37 CFR part 202 is amended in the manner set forth below.

[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 of 1976 (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.

## PART 202—[AMENDED]

1. The authority citation for part 202 continues to read as follows:

**Authority:** 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 § 202.11 is adopted to read 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 humanly habitable structures that are intended to be both permanent and stationary, such as houses and office buildings, and other permanent and stationary structures designed for human occupancy, including but not limited to churches, museums, 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) *Registration limited to single architectural work.* For published and unpublished architectural works, a single application may cover only a single architectural work. A group of architectural works may not be registered on a single application form. For works such as tract housing, a single work is one house model, with all accompanying floor plan options, elevations, and styles that are applicable to that particular model.

(3) *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.

(4) *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.

(5) *Publication.* Publication of an architectural work occurs when underlying plans or drawings of the building or other copies of the building design are distributed or made available to the general public by sale or other transfer of ownership, or by rental, lease, or lending. Construction of a building does not itself constitute publication

for purposes of registration, unless multiple copies are constructed.

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

(1) *Structures other than buildings.* Structures other than buildings, such as bridges, cloverleafs, dams, walkways, tents, recreational vehicles, mobile homes, and boats.

(2) *Standard features.* Standard configurations of spaces, and 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, or the buildings were constructed or otherwise published before December 1, 1990.

* * * * *

3. Section 202.19 is 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 works, 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 17 U.S.C. 101.

* * * * *

(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 on good quality paper;

(C) Positive photostat or photodirect positive;

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

* * * * *

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

**§ 202.20 Deposit of copies and 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 17 U.S.C. 101.

* * * * *

(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 (diazo or ozalid process).

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

(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 (diazo or ozalid process).

With respect to the accompanying photographs, the Copyright Office prefers 8 x 10 inches, 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 draftsperson(s) and the building site.

Dated: August 31, 1992.

**Ralph Oman,**

*Register of Copyrights.*

Approved by:

**James H. Billington**

*The Librarian of Congress.*

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