



ANNOUNCEMENT

from the Copyright Office, Library of Congress, Washington, D.C. 20559-6000

NOTICE OF PROPOSED RULEMAKING

RESTORATION OF CERTAIN BERNE AND WTO WORKS

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LIBRARY OF CONGRESS

Copyright Office

37 CFR Parts 201 and 202

[Docket No. RM 95-1A]

Restoration of Certain Berne and WTO Works

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Copyright Office is proposing regulations for the filing of Notices of Intent to Enforce (NIEs) copyright and the registering of copyright claims as required by the Uruguay Round Agreements Act (URAA); the Act automatically restores copyright for certain foreign works effective January 1, 1996. Although restoration is automatic, the copyright owner must file a Notice of Intent to Enforce the restored copyright in order to enforce rights against reliance parties. The Act requires the Copyright Office to establish regulations for filing NIEs and for registration of those restored works. The Office is seeking public comment on its proposed regulations.

DATES: Comments should be in writing and received on or before August 23, 1995.

ADDRESSES: If sent BY MAIL, fifteen copies of written comments should be addressed to: Marilyn J. Kretsinger, Acting General Counsel, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, D. C. 20540. Telephone: (202) 707-8380. Telefax: (202) 707-8366. If hand delivered, fifteen copies should be brought to: Office

of the General Counsel, Copyright Office, James Madison Memorial Building, Room LM-407, First and Independence Avenue, S.E., Washington, D.C. 20540. If sent electronically via the Internet send to: (NPRMURAA@LOC.GOV). Comments submitted electronically must include the following information: your name, the organization or institution you represent, if any; your mailing address; telephone number and FAX number, if any.

FOR FURTHER INFORMATION CONTACT: Marilyn J. Kretsinger, Acting General Counsel, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, D.C. 20024. Telephone: (202) 707-8380. Telefax: (202) 707-8366.

I. Background

On December 8, 1994, President Clinton signed the "Uruguay Round Agreements Act" (URAA), Pub. L. No. 103-465, 108 Stat. 4809. The URAA contains several significant copyright amendments. It amends the software rental provision found in 17 U.S.C. 109(b) by eliminating the expiration or sunset date, amends Titles 17 and 18 to create civil and criminal remedies for "bootlegging" sound recordings of live musical performances and music videos, and adds a new 17 U.S.C. 104A which restores copyright in certain foreign works. The URAA also gives the Copyright Office several responsibilities related to restoration of those works.

A. Restoration of Copyright of Eligible Works.

Under the URAA, restoration of copyright in works from countries which are currently eligible occurs automatically on January 1, 1996. An eligible country is a nation, other than the United States, that is

a member of the Berne Convention¹, or a member of the World Trade Organization, or is the subject of a presidential proclamation.

Works from any source country eligible under the URAA may be subject to automatic copyright restoration. However, to be so restored, a work must meet certain other requirements:

1. It is not in the public domain in its source country through expiration of the term of protection;

2. It is in the public domain in the United States due to noncompliance with formalities imposed at any time by United States copyright law, lack of subject matter protection in the case of sound recordings fixed before February 15, 1972, or lack of national eligibility;

3. It has at least one author or rightholder who was, at the time the work was created, a national or domiciliary of an eligible country;

4. If published, it was first published in an eligible country and was not published in the United States during the 30-day period following publication in such eligible country.

Notwithstanding the fact that the work meets the above requirements, any work ever owned or administered by the Alien Property Custodian and in which the restored copyright would be owned by a government, is not a restored work.

B. Effective Date of Restoration.

On February 9, 1995, the Copyright Office published a notice in the **Federal**

¹Convention concerning the creation of an International Union for the Protection of Literary and Artistic Works (Sept. 9, 1886, revised in 1908, 1928, 1948, 1967, 1971), hereinafter cited as the Berne Convention.

Register summing up the provisions in the URAA with regard to the restoration of copyright protection for certain foreign works and announcing a public meeting on March 20, 1995, to discuss those provisions related to the responsibilities Congress gave the Copyright Office. 60 FR 7793 (Feb. 9, 1995). The effective date of copyright restoration is crucial to fulfilling those responsibilities in a timely manner. Eligible copyrights are restored automatically on the date the Agreement on Trade Related Aspects of Intellectual Property (TRIPs) enters into force with respect to the United States (URAA, section 514(a)). As discussed in the February notice, the Copyright Office concluded that the effective date of copyright restoration is January 1, 1996. 60 FR 7793 (1995). Since then President Clinton has issued a proclamation confirming that the date on which the obligations of the TRIPs Agreement will take effect for the United States is January 1, 1996. Proclamation No. 6780, 60 FR 15845 (Mar. 27, 1995).

II. The Copyright Office's Responsibilities

Although copyright restoration is automatic for eligible works, the new section 104A, which will go into effect on January 1, 1996, charges the Office with establishing regulations for two filings which may be made with the Copyright Office and may assist the owner of the restored work in securing certain remedies. The URAA requires the Copyright Office to publish regulations governing the filing of Notices of Intent to Enforce (NIEs) a restored copyright and the registering of copyright claims in restored works no later than ninety days before the date the TRIPs Agreement takes effect with respect to the United States. This date has been determined to be January 1, 1996; therefore, the Copyright Office will need to publish final regulations establishing the procedures for filing NIEs and applications for registration by no later than October 1, 1995.

The Act also requires the Office to publish a list in the **Federal Register** identifying restored works and their ownership where NIEs have been filed with the Office. The Office must publish its first list by no later than May 1, 1996, and must publish lists at regular four-month intervals for a period of two years thereafter. The Office must also maintain for inspection and copying a list containing all NIEs.

A. Notices of Intent to Enforce.

In order to enforce certain rights against reliance parties, the URAA directs copyright owners to notify these parties that they are enforcing the rights in a restored work. A reliance party is a business or individual who, relying on the public domain status of a work, was

already using the work prior to the enactment of the URAA. The URAA authorizes the owner of a right in a restored work either to serve an actual NIE directly on a reliance party or provide constructive notice through the filing of such notices with the Copyright Office. Notices may be served on a reliance party at any time after the date of restoration of the restored copyright, i.e., January 1, 1996. As noted above, the Copyright Office is to publish a list in the **Federal Register** identifying NIEs filed with it. Reliance parties have a twelve-month grace period after they have been notified either by publication in the **Federal Register** or by actual notice to sell off previously manufactured stock, to publicly perform or publicly display the work, or to authorize others to conduct these activities. All reliance parties, except those who created derivative works, must cease using the work after the twelve-month grace period unless they reach a licensing agreement with the copyright owner for continued use of the restored work. The effective date of notification is thus very important both to owners of the restored works and reliance parties.

B. Registration of Copyright Claims in Restored Works.

The second filing that the owner of a restored work may want to make with the Copyright Office is an application for registration of a copyright claim. The URAA directs the Office to provide procedures for such registration, but it does not require owners of the restored works to register. An author of a work which is not considered a Berne work must obtain or seek registration for a work before he or she can bring a copyright infringement action in federal court.² While the owner of rights in a Berne work does not have to register before initiating a copyright infringement suit, the holder of a copyright certificate of registration may secure some procedural advantages in litigating the suit. Under 17 U.S.C. 412 the remedies of statutory damages and attorney's fees are typically contingent upon the securing of a copyright registration before the date of copyright infringement. Under section 410(c), a certificate of registration obtained within five years from the date of publication is accorded *prima facie* evidence of the validity of the copyright and the facts stated in the certificate. After five years, the weight accorded the certificate is within the discretion of the court.

² The question of whether a work from a country that is a member of WTO but not Berne must be registered was not specifically addressed in the legislation; therefore, it would seem that works that do not come under the definition of a "Berne Convention work" found in 17 U.S.C. 101 would have to be registered before the owner can initiate a suit.

III. The Comments

A. Comments Submitted.

Recognizing that the URAA makes significant changes in established U.S. copyright practice, the Copyright Office sought public comment even before it published a Notice of Proposed Rulemaking (NPRM) concerning the implementation of the URAA. To that end, the Office published a notice inviting interested parties to submit written comments and/or to attend a public meeting held at the Copyright Office on March 20, 1995, to discuss issues related to NIEs and registration of restored works. 60 FR 7793 (1995). It also sent this notice to over ninety artists rights organizations and industry groups, as well as 182 foreign government agencies with copyright authority, to give them the opportunity to respond. Approximately forty individuals from outside the Copyright Office attended the meeting, including representatives from authors and artists rights organizations, museums, the publishing industry, the film industry, and the computer software industry.³ The Copyright Office accepted written comments filed after the meeting from those unable to attend the meeting or those able to attend, who wanted to comment further. A total of fifteen comments were received.

The Office received comments from the following parties: Dr. Theodore H. Feder, for Artists Rights Society; Andrew Yeates, for Channel Four Television; Confédération Internationale des Sociétés d'Auteurs et Compositeurs (CISAC); Fernando Zapata Lopez, for Direccion Nacional del Derecho de Autor of Colombia; Melinda T. Koyanis, for Harvard University Press; Nobutake Ide, for Japanese Society for Rights of Authors, Composers and Publishers (JASRAC); Edwin Komen, of Cleary & Komen; Maria Pallante, for the National Writers Union; Blanche Gwilliams, for the Performing Rights Society of the United Kingdom; Neil Turkewitz, for the Recording Industry Association of America (RIAA); Eduardo Bautista, for Sociedad General de Autores de España (SGAE); Jean-Marc Gutton, for Société des auteurs dans les arts graphiques et plastiques (ADAGP); Janine Lorente, for Société des Auteurs et Compositeurs Dramatiques (SACED); Jay Gast, Jerry L. Robb, and Nancy H. McAleer, for Thomson & Thomson; and Richard Wincor, of Coudert Brothers. Those attending the meeting but not filing written comments include: Dr. Carole Ganz Brown, for the National

³ A summary of the meeting can be found in the Public Information Office of the Copyright Office, Room LM-401, James Madison Memorial Building, Washington, D.C.

Science Foundation; Linda Chase, Melissa Levine, and Billie Munro, for the Smithsonian; Hayden Gregory, for the American Bar Association; Herbert Hirsch, of Fried, Frank, Harris, Shriver & Jacobson; Carol Risher and Lois Wasoff, for the Association of American Publishers; Bernard Korman and Gloria Messinger, of Dornbush Mensch Mandelstam & Schaeffer; Steve Metalitz, for the International Intellectual Property Alliance; Felipe Mier and Juan Jose Ortega, for the Association of Producers and Distributors of Mexican Films; Charles Ossola, for the American Society of Media Photographers; Bill Patry, former Assistant Counsel, Subcommittee on Intellectual Property and Judicial Administration; Shira Perlmutter, for the International Literary and Artistic Association; and Ralph Weinstein, for Copyright Connection.

B. Formality Issue.

It was at times unclear whether the commentators were speaking with regard to NIEs or registration of copyright claims. However, it is clear that many of the commentators view the NIEs and registration for restored works as burdensome formalities and ask for their abolition or simplification. For example, both CISAC and Mr. Gutton of ADAGP asserted that requirements for NIEs and registration for restored works are new formalities in violation of the Berne Convention. CISAC asked that no formalities be required in order to assure protection in the United States for eligible foreign works of visual art and photography. Mr. Ide representing JASRAC asked that after a twelve-month grace period, no procedure be required to enforce rights against any party, including reliance parties.

The Copyright Office cannot alter the legislative requirements. The restoration of copyright in certain foreign works considered in the public domain in the United States creates a conflict between reliance parties and copyright owners, with legitimate interests on both sides. Reliance parties have invested capital and labor in the lawful exploitation of public domain property; the sudden restoration of copyright divests them of these investments. Without some provision addressing this potential loss, successful challenges based on the "taking" clause of the Fifth Amendment of the U.S. Constitution would appear possible.

On the other hand, it was important that the United States restore copyright protection in certain foreign works. The United States arguably failed to fully conform its law to the Berne Convention in 1989 when it declined to interpret Article 18(1)⁴ on restoration as being mandatory. Moreover, foreign copyright claimants have lost copyright protection due to inadvertent noncompliance with unique

U.S. formalities.

The filing of NIEs was required in the draft URAA legislation. When the U.S. Justice Department reviewed the draft bill, it concluded that under existing precedents interpreting the Fifth Amendment, the notice of intent to enforce the restored copyright avoided an unconstitutional "taking."⁵ These procedures are part of the enacted bill. Such a filing is not inconsistent with the Berne Convention because Article 18(3)⁶ of the Berne Convention specifically permits member nations to determine "conditions" for applying the principles of restoration.

Neither procedures permitting copyright registration of restored works nor requiring the filing of NIEs are formalities in violation of the Berne Convention. Registration is entirely voluntary for Berne works since copyright registration of restored works is not a prerequisite for the filing of a copyright infringement action. Copyright restoration occurs automatically; the URAA merely creates a narrow set of conditions that requires notice to reliance parties. These conditions do not violate the Berne Convention. Without such notice the effect of restoration on a reliance party could be unconstitutional. Moreover, the information sought on the NIEs is calculated to assist in the voluntary licensing of the restored work. The decision of Congress to enact these provisions is, therefore, supported by the legitimate interests of both reliance parties and copyright owners, by constitutional considerations, and by Article 18(3) of the Berne Convention.

C. Issues Related to Notices of Intent to Enforce.

The URAA specifies the minimum content of the NIEs. It requires that the notice be signed by the owner or the

⁴ This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection. Berne Convention art. 18(1)(Paris text).

⁵ See Memorandum from Chris Schroeder, Counsellor to the Assistant Attorney General, Office of Legal Counsel, United States Dept. of Justice to Ira S. Shapiro, General Counsel, USTR, on Whether Certain Copyright Provisions in the Draft Legislation to Implement the Uruguay Round of Multilateral Trade Negotiations Would Constitute a Taking Under the Fifth Amendment (July 29, 1994).

⁶ The application of this principle shall be subject to any provisions contained in special conventions to that effect existing or to be concluded between countries of the Union. In the absence of such provisions, the respective countries shall determine, each in so far as it is concerned, the conditions of application of this principle. Berne Convention art. 18(3) (Paris text).

⁷ Ownership of a restored work vests initially in the author or initial rightholder (if the work is a sound recording) of the work as determined by the law of the source country of the work. Amended sec. 104A(b).

owner's agent.⁷ In addition to the signature, the URAA states that the NIE must contain the title, including an English-language translation, any other alternative titles known to the owner by which the restored work may be identified, the name of the owner, and an address and telephone number at which the owner can be located. The URAA specifies that the Copyright Office can ask for additional information, but the failure to provide such information will not invalidate the NIE. At the March 20 meeting, the Office sought information from representatives of authors and user groups on what optional data would be helpful in creating a useful public record for both groups.

1. Useful public record

Many of the commentators expressed concern that unless filers of NIEs provide information beyond the minimum required by the statute, the NIE will not provide adequate notice to reliance parties. A number of commentators, including Ms. Perlmutter, Ms. Wasoff, and Thomson & Thomson asked that a public record be created for NIEs that provides information sufficient to identify a work and differentiate it from those with the same title. The commentators noted that the type of work and the name(s) of the author(s) would provide particularly valuable and essential information. Ms. Wasoff, Ms. Risher, Mr. Mier, Mr. Ortega, Mr. Chaubau, and Thomson & Thomson also indicated that other information would help in differentiating between works, such as date and nation of first publication, names of producers, directors, and leading actors (in the case of motion pictures), and birth and death dates for authors. Though date and location of publication could be helpful as identifying information, Dr. Feder and Ms. Koyanis pointed out that the date of publication is not particularly useful in establishing the expiration of the copyright term since most countries use the date of the author's death to establish the term. Ms. Koyanis and Thomson & Thomson stated that the NIE should specify whether the "owner" named is the owner of the restored copyright or the owner of an exclusive right. Several parties, including Dr. Feder, Ms. Messinger, and Thomson & Thomson suggested that the person who signs the certification statement should indicate whether he or she is acting as an agent. Ms. Koyanis suggested that no more proof of agency be required beyond that currently required for routine registrations.

2. Group filing

Dr. Feder, Mrs. Gwilliams, and Mr. Bautista asked the Copyright Office to permit the filing of a single NIE for the body of an author's work. Mr. Patry pointed out that the law requires a NIE to be filed only for the "restored works" for which the copyright is going to be enforced

against reliance parties, not all works, and that the titles must all be listed in the **Federal Register**. Mr. Patry stated that this was done as part of an effort to balance the interests of owners of restored works and reliance parties, so that the reliance parties could have a date certain when they would not have liability through constructive notice.

3. Acknowledgment

Another issue addressed at the public meeting was whether the publication in the **Federal Register** would be sufficient notice to the filer of a NIE that the NIE had been received and/or recorded by the Office. A number of parties, including Mr. Ossola, Ms. Munro, Dr. Feder, Mr. Ortega, and Thomson & Thomson asserted that acknowledgment of receipt and recordation of an NIE is an essential service that the Copyright Office should provide since foreign remitters will be anxious to know the status of the NIE(s) and would otherwise flood the Office with calls.

4. Fees

The Act allows the Office to charge a reasonable fee for recording a NIE, and the Office raised the question of what this fee should be. Mr. Komen stated that fees for NIEs should be consistent with current recordation fees. Thomson & Thomson suggested that since most works will have two titles, the basic fee (\$20) could cover the first two titles, with an additional \$10 for each group of ten or fewer titles. Mr. Turkewitz urged the Copyright Office to keep fees for the NIE to a minimum.

D. Issues Related to Registration of a Restored Work.

Another subject addressed at the public meeting was what the registration procedures should be for restored works. Particularly, the Office asked whether there should be a new registration form, what simultaneous filing under the URAA meant, whether group registration should be available, who the appropriate author is for registration purposes, and what the appropriate fee and deposit should be.

1. A new registration form

Mr. Yeates and Thomson & Thomson supported the creation of a new form. Mr. Komen recommended against adoption of a separate URAA copyright registration form.

2. Simultaneous filing

Thomson & Thomson stated that simultaneous filing of a NIE and a registration should be allowed, as is currently the case with an assignment or a renewal application and a registration. Mr. Turkewitz urged that simultaneous registration of claims of copyright be both automatic and at no additional cost.

3. Group registration

Many of the commentators urged the

Copyright Office to allow group registration of restored works. Mr. Gutton and Dr. Feder asked the Copyright Office to accept one registration for the entire body of an artist's work. Ms. Koyanis noted that it is unlikely that the entire body of an artist's restored work will have been developed and distributed in such a way that the same facts would apply, but she asserted that a single registration could suffice if the facts do agree for all works, and if each work is given a title or description to aid identification. Thomson & Thomson indicated that every work in a group registration should have the same author(s) and owner(s).

4. Author

Dr. Feder, Mr. Yeates, Mr. Zapata, Mr. Gutton and Thomson and Thomson all stated that the author should be determined by the law of the source country.

5. Fees

Ms. Pallante and Thomson & Thomson suggested that fees be kept consistent with current Copyright Office practice.

6. Claimant and Transfer statement

Thomson & Thomson noted that the claimant should be the owner of all the restored rights in the United States on the date the application is filed. Mr. Zapata, Mr. Turkewitz, and Thomson & Thomson stated that a claimant should be required to indicate if there has been a transfer of rights and that a transfer statement should be attached to the application. Dr. Feder and Mr. Turkewitz asked that a person claiming ownership by virtue of transfer be required to set forth all documents (omitting confidential information) by which the transfer occurred. At a minimum, Mr. Turkewitz asked that a transfer statement identify the name of the person from whom the rights were acquired as well as the date and location of the transfer. Mr. Yeates stated that the source country should be required in order to demonstrate how the author claiming the benefit of restored copyright has acquired title. Ms. Koyanis stated that as with current registrations, the owner should not be required to submit documents showing the chain of title to the Office.

7. Deposit

Thomson & Thomson suggested that, as copyright notice is not an issue, deposit requirements be greatly simplified. With regard to motion pictures, they asked that the deposit copy represent the foreign published version, not the U.S. dubbed version.

E. Public Access to NIE and Registration Information

The final topic of discussion at the March 20th meeting was what kind of records the Office should maintain for these new filings.

1. Online record

Mr. Yeates indicated that for overseas distributors any system whereby NIE or registration information can be easily accessed online via the Internet would be helpful. Ms. Koyanis also supported the availability of the records on the Internet. Many of the parties, including Ms. Koyanis, Mr. Komen, and Thomson & Thomson stated that it is critical to include the effective date of the NIE in the COPICS⁸ record. Ms. Koyanis, Mr. Komen, Ms. Pallante, and Thomson & Thomson argued that the online record would be of little use unless the author's name is included in COPICS, and unless that name is fully indexed and searchable. Ms. Pallante recommended that COPICS be adjusted to allow for searches within designated time periods. Mr. Yeates recommended a system that would highlight URAA registrations for those conducting searches.

2. Frequency of Federal Register publication

The Act requires the Office to publish a list identifying the titles and ownership of restored works for which NIEs have been filed at four-month intervals and then again annually. The Office proposed publishing the list at shorter intervals. Many of the parties felt that the list of NIEs should be published on a four-month schedule as opposed to more often. They also felt that publication in the **Federal Register** was not the best record and urged the Office to provide a more detailed record, available on COPICS. The parties stated that the annual publication in the **Federal Register** would be costly and not necessarily helpful.

IV. Procedures for Notices of Intent to Enforce

A Copyright Office task force has been meeting for several months to discuss issues related to establishing regulations for both URAA filings. The Office also carefully considered comments of the interested parties on these issues. Most of the commentators supported a detailed NIE rather than the minimal information required by the statute. Based on those comments, the Office is encouraging the filer of a NIE to give more information than is required under the URAA. As provided in the statute, this additional information is optional and will not affect the validity of the notice; however, the Copyright Office and the interested parties believe this additional

⁸ COPICS is the Copyright Office's automated database of registrations and recorded copyright transfers and other documents. These records may be accessed by the public on terminals in the Copyright Office at the Library of Congress and are also available via the Internet.

information, such as the identity of the author, is necessary in order to identify the specific work where enforcement of copyright is sought. The additional information will also facilitate the licensing of uses of restored works. We, therefore, urge those parties who are filing NIEs to provide this additional information, if at all possible.

A. Proposed Format for NIEs

The Copyright Office will not publish NIE forms; however a proposed format for the NIE is included in the Appendix below. Moreover, this format will be available over the Internet, and could be downloaded for use as a form. The proposed format requests information required by the statute and information which is optional but deemed necessary and useful. The Copyright Office adopted a similar approach of providing a format but not a form for the filings under NAFTA, and filers followed the suggested format with few problems.

B. The Public Record

The URAA requires publication of the titles and owners of restored works in the **Federal Register**, and the Copyright Office will do this. Since publication in the **Federal Register** is costly and the parties indicated that such information would not be as accessible as information made available via the Internet, the Office will limit the information published in the **Federal Register** to titles and the name of the first owner listed on the NIE. However, the Copyright Office plans to make much of the information contained in the NIE available on COPICS, which can be accessed over the Internet. Online access will be the primary means for providing this information to the public. The database will be searchable by title, copyright owner, and author.

C. Recordation Fee

The Office is proposing a fee of \$30 for recording a NIE covering one work; and for recording an NIE covering multiple works \$30, plus \$1 for each additional work beyond the first work. The proposed regulation additionally includes special provisions relating to foreign payments which must be followed in order to permit processing of the fee.

For all URAA filings, both recordation of an NIE and registration of a restored work, the Copyright Office will accept Visa, Master Card, and American Express credit cards. The Copyright Office is accepting these credit cards for URAA filings in order to make payment in U.S. dollars easier. Payment by credit card will be available only for URAA filings. Acceptance of credit cards for URAA

filings will serve as a test, however, under which the Office can determine the feasibility of accepting credit cards in other areas at a later date.

D. Certification

The Office will require the filer to sign a short certification statement at the end of the NIE indicating that the information given is correct to the best of his or her knowledge. The statute states that any materially false statement knowingly made with respect to any restored copyright identified in any Notice of Intent shall make void all claims and assertions made with respect to such restored copyright, 104A(e)(3) of the URAA.

E. Mailing Address

It is expected that the volume of NIEs filed at the Copyright Office may be high and turnaround time is critical; therefore, it is important that URAA mail not come in with regular mail addressed to the Copyright Office. The Copyright Office is planning to obtain a special post office box. Notices of Intent to Enforce should be mailed to: (Address to be given in the final rule) or delivered personally to: (Address to be given in the final rule).

V. Procedures for Registering Copyright Claims in Restored Works

The URAA raises a number of unique considerations regarding registering copyright claims in restored works. First, a number of technical requirements, many of which are contained in the definition of "restored work," govern whether a foreign copyright is subject to automatic restoration under the URAA. In many cases applicants seeking restoration will be foreign claimants who are unfamiliar with the registration procedures of the U.S. Copyright Office. In addition, communication over technical issues may be difficult. Finally, virtually all of the restored copyrights will be older works; and in some cases, this will raise problems with submitting a copy or phonorecord of the work.

The Copyright Office weighed all of these considerations before developing the proposed procedure for registering copyright claims in restored works. The Copyright Office believes the proposed procedure is as simple as it can be, while still maintaining the basic integrity of the public record and adhering to the provisions of the copyright law and the URAA.

A. Registration Forms

Because the URAA creates unique requirements for eligibility, the Copyright Office believes it is necessary to create two new forms which are specifically designed to secure only the necessary information.

One of the new forms will cover registration of individual restored works and works published under a single series title, and the second form will cover registration of groups of related restored works under the conditions set forth in the regulations.

B. Foreign Law Questions

One of the more difficult issues facing the Copyright Office is to what extent foreign law issues should be raised in the registration process. Section 104A(b) of the Act provides: "A restored work vests initially in the author or initial rightholder of the work as determined by the law of the source country of the work." The Copyright Office does not plan to question an applicant's determination of foreign law issues. Interested parties may wish to comment on this matter.

C. Deposit Required

In recognition of the difficulty some applicants might have in submitting a deposit of an older work "as first published," the Copyright Office has proposed special deposit provisions which permit a deposit of other than the first published edition of the work, if necessary. However, applicants should keep in mind that the deposit serves as a crucial part of the public record.

D. Registration Fee

The fee for registration will be the standard \$20, since the Copyright Office believes the work in administering the proposed registration procedure for restored works will be roughly comparable to general registration procedures. In addition, special group registration options are proposed which will permit the registration of:

- (1) A group of works published under a single series title. This option would be filed on the basic GATT registration form and would cost the basic fee of \$20 for up to a year's worth of episodes, installments, or issues published under the same single series title; and
- (2) A group of up to 10 related individual works published within the same calendar year. This option would be filed on the GATT/GROUP registration form and would cost a fee of \$10 per individual work.

Finally, special rules are proposed regarding payment, including permitting the use of credit cards for fee payment.

E. Mailing Address

For the reasons given above in discussion of NIE filings, the Office has determined that a separate mailing address is necessary for all URAA filings. This address will be given in the final rule.

VI. NAFTA

Exactly a year before the URAA was signed into law, Congress enacted the North American Free Trade Agreement Implementation Act (NAFTA) of December 8, 1993, adding a new section 104A to the Copyright Code that allowed copyright restoration in certain Mexican and Canadian works. See generally, Federal Register notices leading to the implementation of NAFTA, 59 FR 1408 (Jan. 10, 1994); 59 FR 12162 (Mar. 16, 1994); and 59 FR 58787 (Nov. 15, 1994). Although Congress modeled the URAA provisions on NAFTA, there are significant differences. For example, under the URAA, copyright restoration is automatic; under NAFTA it was not. Moreover, the URAA requires an English translation of the title as part of the NIE. On January 1, 1996, section 104A, as modified by the URAA, will replace the NAFTA version of section 104A.

In enacting these two laws, Congress intended the restoration provisions to operate separately from one another. Therefore, works restored under NAFTA are not additionally restored under the URAA. Unfortunately, the statutory language in the URAA creates some ambiguities. The recent presidential proclamation clarifies some of these questions. 60 FR 15845 (Mar. 27, 1995).

The proposed regulations clarify other issues relating to the operation of NAFTA. A technical amendment is proposed for the first sentence of the regulation governing filings under NAFTA whereby reference to section 104A is deleted in favor of reference to the public law. This change is made necessary by the deletion of the NAFTA version of section 104A on January 1, 1996. In addition, proposed §§ 201.32 and 202.12 of the Copyright Office regulations contain provisions clarifying that works already restored under NAFTA do not additionally fall within the provisions of the URAA.

Despite the differences in NAFTA and URAA filings, the task force has determined that the group registration procedures available for URAA restored works should also apply to those restored works that come in under NAFTA.

APPENDIX—Notice of Intent to Enforce a Copyright Restored under the Uruguay Round Agreements Act (URAA)

1. Title: _____
(If this work does not have a title, state "No title.")

or

Brief description of work (for untitled works only):

2. English translation of title (if applicable): _____

3. Alternative title(s) (if any): _____

4. Type of work: _____
(e.g. painting, sculpture, music, motion picture, sound recording, book)

5. Name of author(s): _____

6. Source country: _____

7. Approximate year of publication: _____

8. Additional identifying information: _____
(e.g. for movies: director, leading actors; for photographs or books: subject matter / content)

9. Name of copyright owner: _____
(Statements may be filed in the name of the owner of the restored copyright or the owner of an exclusive right therein.)

10. If you are not the owner of all rights, specify the right for which the NIE is being filed: _____
(e.g. translation, screenplay, etc.)

11. Address at which copyright owner may be contacted: _____
(Give complete address, including an "attention" line, or "in care of" name, if any. Give the country if other than the United States.)

12. Telephone number of owner: _____

13. Telefax number of owner: _____

14. Certification and Signature: _____
I hereby certify that, for each of the work(s) listed above, I am the copyright owner, or the owner of an exclusive right, or the owner's authorized agent and that the information given herein is true and correct to the best of my knowledge.

Signature: _____
Name (printed or typed): _____
As agent for (if applicable): _____
Date: _____

Note: Notices of Intent to Enforce must be in English, except for the original title, and either typed or printed by hand legibly in dark, preferably black, ink. They should be on 8-1/2" by 11" white paper of good quality, with at least a 1-inch (or 3cm) margin.

List of Subjects

37 CFR Part 201

Copyright, Restoration of Copyright.
37 CFR Part 202

Registration of claims to copyright, Restored works.

Proposed Regulations

In consideration of the foregoing, the

Copyright Office proposes to amend 37 CFR parts 201 and 202 in the manner set forth below:

PART 201—GENERAL PROVISIONS

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

Authority: 17 U.S.C. 702.

§ 201.31 [Amended]

2. Section 201.31 is amended by revising the first sentence of paragraph (a) to read as follows:

(a) General. This section prescribes the procedures for submission of Statements of Intent pertaining to the restoration of copyright protection in the United States for certain motion pictures and works embodied therein as required by the North American Free Trade Agreement Implementation Act of December 8, 1993, Pub. L. No. 103-182. * * *

3. A new section 201.32 is added to read as follows:

§201.32 Procedures for filing Notices of Intent to Enforce a restored copyright under the Uruguay Round Agreements Act.

(a) General. This section prescribes the procedures for submission of Notices of Intent to Enforce a restored copyright under the Uruguay Round Agreements Act, as required in 17 U.S.C. 104A(a). On or after May 1, 1996, and approximately every four months thereafter, the Copyright Office will publish in the Federal Register a list of works for which Notices of Intent to Enforce have been filed. It will maintain a list of these works. The Office will also make a more complete version of the information contained in the Notice of Intent to Enforce available on its automated database, which can be accessed over the Internet.

(b) Definitions.

(1) Restored work means an original work of authorship that--

(i) Is protected under 17 U.S.C. 104A(a);

(ii) Is not in the public domain in its source country through expiration of term of protection;

(iii) Is in the public domain in the United States due to--

(A) Noncompliance with formalities imposed at any time by United States copyright law, including failure of renewal, lack of proper notice, or failure to comply with any manufacturing requirements;

(B) Lack of subject matter protection in the case of sound recordings fixed before February 15, 1972; or

(C) Lack of national eligibility; and

(iv) Has at least one author or rightholder who was, at the time the work was created, a national or domiciliary of an eligible country, and if published, was first published in an eligible country and not published in the United States during

the 30-day period following publication in such eligible country.

(2) *Source country* of a restored work is--

(i) A nation other than the United States;

(ii) In the case of an unpublished work--

(A) The eligible country in which the author or rightholder is a national or domiciliary, or, if a restored work has more than one author or rightholder, the majority of foreign authors or rightholders are nationals or domiciliaries of eligible countries; or

(B) If the majority of authors or rightholders are not foreign, the nation other than the United States which has the most significant contacts with the work; and

(iii) In the case of a published work--

(A) The eligible country in which the work is first published, or

(B) If the restored work is published on the same day in two or more eligible countries, the eligible country which has the most significant contacts with the work.

(3) *NAFTA work* means a work restored to copyright on January 1, 1995, as a result of compliance with procedures contained in the North American Free Trade Agreement Implementation Act of December 8, 1993, Pub. L. No. 103-182.

(c) *Forms*. The Copyright Office does not provide forms for Notices of Intent to Enforce filed with the Copyright Office. It does suggest that filers follow the format set out in the Appendix (found in the preamble) and give all of the information listed in (d) below. Notices of Intent to Enforce should be typed or printed by hand legibly in dark, preferably black, ink, on 8 1/2 by 11 inches white paper, with at least a 1 inch (or 3 cm) margin.

(d) *Requirements for Notice of Intent to Enforce a copyright restored under the Uruguay Round Agreements Act*.

(1) Notices of Intent to Enforce should be sent to the following address:

[Address to be given in the final rule]

(2) The document should be clearly designated as "Notice of Intent to Enforce a Copyright Restored under the Uruguay Round Agreements Act";

(3) Notices of Intent to Enforce must include:

(i) Required information:

(A) The title of the work, or if untitled, a brief description of the work;

(B) An English translation of the title if title is in a foreign language;

(C) Alternative titles if any;

(D) Name of the copyright owner of the restored work, or of an owner of an exclusive right therein;

(E) The address and telephone number where the owner of copyright or the exclusive right therein can be reached;

(F) The following certification signed and dated by the owner of copyright, or

the exclusive right therein, or authorized agent:

I hereby certify that for each of the work(s) listed above, I am the copyright owner, or the owner of an exclusive right, or the owner's authorized agent and that the information given herein is true and correct to the best of my knowledge.

Signature _____

Name (printed or typed) _____

As agent for (if applicable) _____

Date: _____

(ii) Optional information:

(A) Type of work (painting, sculpture, music, motion picture, sound recording, book, etc.);

(B) Name of author(s);

(C) Source country;

(D) Approximate year of publication;

(E) Additional identifying information (director, leading actors, subject/content, etc.);

(F) Rights for which the Notice of Intent to Enforce is being filed (translation, screenplay, etc.);

(G) Telefax number at which owner, exclusive rights holder, or agent thereof can be reached.

(4) Notices of Intent to Enforce may cover multiple works provided that each work is identified by title, all the works have the same author, all the works are owned by the identified copyright owner or owner of an exclusive right, and the rights for which the notice is being filed are the same. In the case of Notices of Intent to Enforce covering multiple works, the notice will separately designate for each work covered the title of the work, or if untitled, a brief description of the work; an English translation of the title if the title is in a foreign language; alternative titles, if any; the type of work; the source country; the approximate year of publication; and additional identifying information.

(5) Notices of Intent to Enforce may be submitted to the Copyright Office on or after January 1, 1996.

(e) *Fee*.

(1) *Amount*. The fee for recording Notices of Intent to Enforce is \$30 for notices covering one work. For notices covering multiple works as described in paragraph (d)(4) of this section, the fee is \$30, plus \$1 for each additional work covered beyond the first designated work. (For example, the fee for a Notice of Intent to Enforce covering 3 works would be \$32.)

(2) *Method of Payment*. (i) Checks, money orders, or bank drafts. The Copyright Office will accept checks, money orders, or bank drafts made payable to the Register of Copyrights. Remittances must be redeemable without service or exchange fees through a United States institution, must be payable in United States dollars, and must be imprinted with American

Banking Association routing numbers. International money orders, and postal money orders that are negotiable only at a post office are not acceptable. Currency will not be accepted.

(ii) Copyright Office deposit account. The Copyright Office maintains a system of Deposit Accounts for the convenience of those who frequently use its services. The system allows an individual or firm to establish a Deposit Account in the Copyright Office and to make advance deposits into that account. Deposit Account holders can charge copyright fees against the balance in their accounts instead of sending separate remittances with each request for service. For information on Deposit Accounts please write: Register of Copyrights, Copyright Office, Library of Congress, Washington, DC 20559. Request a copy of Circular 5, "How to Open and Maintain a Deposit Account in the Copyright Office."

(iii) Credit cards (for use only in filings under the Uruguay Round Agreements Act). The Copyright Office will accept VISA, MasterCard, and American Express. A filer using a credit card must provide a separate cover letter stating the name of the credit card he or she wishes to use, the credit card number, the expiration date of the credit card, and his or her signature authorizing the Office to charge the fees to his or her account. Debit cards cannot be accepted for payment. To protect the security of the credit card number, the filer must not write his or her credit card number on the Notice of Intent to Enforce.

(f) *Public online access*.

(1) Almost all of the information contained in the Notice of Intent to Enforce may be secured online through the Internet. This information may be secured in the Copyright Office History Documents (COHD) file through the Library of Congress electronic information system LC MARVEL.

(2) Alternative ways to connect through Internet are: a) telnet to locis.loc.gov or the numeric address 140.147.254.3, or b) telnet to marvel.loc.gov, or the numeric address 140.147.248.7 and log in as marvel, or c) use a Gopher Client to connect to marvel.log.gov, (use port 70), or d) use the Library of Congress World Wide Web at: <http://lcweb.loc.gov>, or <http://www.loc.gov>.

(3) Information available online: The title or brief description if untitled; an English translation of the title; the alternative titles if any; the name of the copyright owner or owner of an exclusive right; the author; the type of work; the date of receipt of the NIE in the Copyright Office; the date of publication in the **Federal Register**; the rights covered by the notice; and the address, telephone and telefax number (if given) of the copyright owner.

(4) Online records of Notice of Intent to Enforce will be searchable by the title, the copyright owner or owner of an exclusive right, and the author.

(g) *NAFTA work.* The copyright owner of a work restored under NAFTA by the filing of a NAFTA Statement of Intent to Restore with the Copyright Office prior to January 1, 1995, is not required to file a Notice of Intent to Enforce under this regulation.

PART 202—REGISTRATION OF CLAIMS TO COPYRIGHT

4. The authority citation for part 202 is revised to read as follows:

Authority: 17 U.S.C. 702.

5. A new § 202.12 is added to read as follows:

§202.12 Restored copyrights.

(a) *General.* This section prescribes rules pertaining to the registration of foreign copyright claims which have been restored to copyright protection under section 104A of 17 U.S.C., as amended by the Uruguay Round Agreements Act, Pub. L. No. 103-465.

(b) *Definitions.* (1) For the purposes of this section, restored copyright has the same meaning as set forth in 17 U.S.C. 104A(h), as amended by the URAA.

(2) *Descriptive statement for a computer program* is a statement consisting of the following elements: the title of the computer program; a description of the purpose and function of the program; an identification of size of the program [i.e. quantity of lines, pages, or bytes in the programming code]; the language in which the program is written; and the operating system, platform or computer environment in which the program functions.

(3) *Descriptive statement for a database* is a statement consisting of the following elements: title of the database; name and content of each separate file of the database, including a description of its subject matter; origin of its data or contents; an estimate of the total number of pages or data records.

(4) *Reliance party* means any person who--

(i) With respect to a particular work, engages in acts, before the source country of that work becomes an eligible country, which would have violated 17 U.S.C. 106 if the restored work had been subject to a copyright protection and who, after the source country becomes an eligible country, continues to engage in such acts;

(ii) Before the source country of a particular work becomes an eligible country, makes or acquires one or more copies of phonorecords of that work; or

(iii) As the result of the sale or other disposition of a derivative work, covered under the new 17 U.S.C. 104A(d)(3), or of

significant assets of a person, described in the new 17 U.S.C. 104A(d)(3)(A) or (B), is a successor, assignee, or licensee of that person.

(c) *Registration.* (1) *General.* Application, deposit, and fee for registering a copyright claim in a restored work under section 104A, as amended, may be submitted to the Copyright Office on or after January 1, 1996. The application, fee, and deposit should be sent in a single package to the following address: (Address to be given in final rule).

(2) *GATT Form.* Application for registration for single works restored to copyright protection under URAA should be made on Form GATT. Application for registration for a group of works published under a single series title and published within the same calendar year should also be made on Form GATT. Finally, application for a group of up to 10 individuals, and related works as described in paragraph (c)(5)(ii) of this section, should be made on Form GATT/GROUP.

These forms may be secured from the Copyright Office after October 1, 1995. Requests for these forms may also be made by calling the Copyright Office Hotline anytime after October 1 at (202) 707-9100 and leaving a message. In addition, legible photocopies of this form are acceptable if reproduced on good quality, 8 1/2 by 11 inch white paper, and printed head to head so that page two is printed on the back of page one.

(3) *Fee.*

(i) *Amount.* The fee for registering a copyright claim in a restored work is \$20. The fee for registering a group of multiple episodes under a series title under paragraph (c)(5)(i) of this section is also \$20. The fee for registering a group of related works under paragraph (c)(5)(ii) of this section is \$10 per individual work.

(ii) *Method of payment.*

(A) Checks, money orders, or bank drafts. The Copyright Office will accept checks, money orders, or bank drafts made payable to the Register of Copyrights. Remittances must be redeemable without service or exchange fees through a United States institution, must be payable in United States dollars, and must be imprinted with American Banking Association routing numbers. In addition, international money orders, and postal money orders that are negotiable only at a post office are not acceptable. Currency will not be accepted.

(B) Copyright Office deposit account; The Copyright Office maintains a system of Deposit Accounts for the convenience of those who frequently use its services. The system allows an individual or firm to establish a Deposit Account in the Copyright Office and to make advance deposits into that account. Deposit

Account holders can charge copyright fees against the balance in their accounts instead of sending separate remittances with each request for service. For information on Deposit Accounts please write: Register of Copyrights, Copyright Office, Library of Congress, Washington, DC 20559. Request a copy of Circular 5, "How to Open and Maintain a Deposit Account in the Copyright Office."

(C) Credit cards (for use only in filings under the Uruguay Round Agreements Act). The Copyright Office will accept VISA, MasterCard, and American Express Cards. A filer using a credit card needs to provide a separate cover letter stating the name of the credit card he or she wishes to use, the credit card number, the expiration date of the credit card, and his or her signature authorizing the Office to charge the fees to his or her account. Debit cards cannot be accepted for payment. To protect the security of the credit card number, the filer must not write his or her credit card number on the registration application.

(4) *Deposit.*

(i) *General.* The deposit for a work registered as a restored work under the amended section 104A, except for those works listed in paragraph (c)(4)(ii) through (v) of this section, should consist of one copy or phonorecord which best represents the copyrightable content of the restored work. In descending order of preference, the deposit should be:

(A) The work as first published;

(B) A reprint or re-release of the work as first published;

(C) A photocopy or identical reproduction of the work as first published;

(D) A revised version which includes a substantial amount of the copyrightable content of the restored work with an indication in writing of the percentage of the restored work appearing in the revision.

(ii) *Computer programs.* The deposit requirements for computer programs in descending order of preference are as follows:

(A) A machine-readable copy of the program and a descriptive statement of the computer program;

(B) An eye-readable printout of 10 representative pages of the program, preferably source code, and a descriptive statement of the computer program;

(C) A descriptive statement of the computer program.

(iii) *Literary works embodied solely in machine-readable format.* The deposit of literary works embodied solely in machine-readable format shall consist of any 10 representative pages (printout or transcription) of the contents of the work.

(iv) *Databases.* The deposit requirements of databases in descending order of preference are as follows:

(A) Any 10 representative pages (printout or transcription) or records of the contents of the database and a descriptive statement of the database;

(B) A descriptive statement of the database.

(v) *Visual arts*. With the exception of 3-dimensional works of art, the general deposit preferences specified under paragraph (4)(i) of this section shall govern. For 3-dimensional works of art, the preferred deposit is one or more photos, preferably in color.

(vi) *Special relief*. An applicant who is unable to deposit any of the preferred deposits may seek an alternative deposit under special relief. 37 CFR 202.20(d). In such a case, the applicant should indicate in writing why the deposit preferences cannot be met, and submit alternative identifying materials clearly showing some portion of the copyrightable contents of the restored work which is the subject of registration.

(vii) *Motion pictures*. If the deposit is a film print (16 or 35 mm), call the ** Performing Arts Section of the Examining Division for delivery instructions. (202) 707-6040 or fax (202) 707-6048.

(5) *Group registration*. Copyright claims in multiple restored works may be registered as a group in the following circumstances:

(i) *Single series title*. Works published under a single series title in multiple episodes, installments, or issues during the same calendar year may be registered as a group, provided the owner of U.S. rights is the same for all episodes, installments, or issues. The Form GATT should be used and the number of episodes or installments should be indicated in the title line. The fee for registering a group of such works is \$20. In general, the deposit requirements applicable to restored works will be applied to the episodes or installments in a similar fashion. In the case of weekly or daily television series, applicants should first request guidance as to the proper deposit from the Performing Arts Section of the Examining Division.

(ii) *Group of related works*. A group of related works may be registered on the Form GATT/GROUP, provided the following conditions are met: the author is the same for all works in the group; the owner of all United States rights is the same for all works in the group; all works must have been published in the same calendar year; all works must fit within the same subject matter category [*i.e.* literary works, musical work, motion picture, etc.]; and there must be at least two and not more than 10 individual works in the group submitted. Applicants registering a group of related works must file for

registration on the Form GATT/GROUP.

The fee for registering a group of related works is \$10 per individual work.

(d) *Works excluded*. Works which are not copyrightable subject matter under title 17 of the U.S. Code, other than sound recordings fixed before February 15, 1972, should not be registered as restored copyrights.

Dated: July 3, 1995

Marilyn J. Kretsinger
Acting General Counsel

Approved by:

James H. Billington
The Librarian of Congress
Billing Code: 1410-30-P

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** Error; line should read:
"film print (16 or 35mm), call the"