



ANNOUNCEMENT

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

PROPOSED REGULATIONS WITH REQUEST FOR COMMENTS

REGISTRATION OF CLAIMS TO COPYRIGHT, GROUP REGISTRATION OF PHOTOGRAPHS

The following excerpt is taken from Volume 60, Number 232 of the *Federal Register* for Monday, December 4, 1995 (pp. 61657-61660)

NEW

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 202

[Docket No. RM 95-7]

Registration of Claims to Copyright, Group Registration of Photographs

AGENCY: Copyright Office, Library of Congress.

ACTION: Proposed regulations with request for comments.

SUMMARY: The Copyright Office of the Library of Congress is proposing regulations that permit group registration of unpublished or published photographs without the deposit of copies of the works. These proposed regulations would enable photographers and photography businesses to seek the benefits of registration by making it less burdensome for them to register a claim to copyright in a large number of photographs taken by a single photographer or photography business. The Office seeks comment on the proposed regulations.

DATES: Comments on the proposed regulation should be in writing and received on or before January 18, 1996. Reply comments should be received February 2, 1996.

ADDRESSES: If sent **BY MAIL**, fifteen copies of written comments should be addressed to Marilyn J. Kretsinger, Acting General Counsel, Copyright GC/IR, P.O. Box 70400, Southwest Station, Washington, D.C. 20024. Telephone: (202) 707-8380. Telefax: (202) 707-8366. If **BY HAND**, 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.

FOR FURTHER INFORMATION CONTACT: Marilyn J. Kretsinger, Acting General Counsel, Telephone: (202) 707-8380 or Telefax (202) 707-8366.

SUPPLEMENTARY INFORMATION: Section 408 of 17 U.S.C. provides that a copyright owner may obtain registration of a copyright claim by delivering to the Copyright Office a deposit, an application and a fee. With respect to the deposit, the nature of the copy to be deposited is set out in general terms, e.g., one complete copy of an unpublished work. However, broad authority is granted to the Register to provide for alternative forms of deposit. Section 408(c)(1) provides that the Register may require or permit the deposit of identifying material in lieu of an actual copy of the work. Congress' intent is reflected in the various legislative reports that accompanied the enactment of the copyright law. Congress instructed the Office to keep the deposit provisions flexible "so that there will be no obligation to make deposit where it serves no purpose, so that only one copy or phonorecord may be deposited where two are not needed, and so that reasonable adjustments can be made to meet practical needs in special cases." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 151 (1976); S. Rep. No. 473, 94th Cong., 1st Sess. 134 (1975). The law also authorizes the Register to require or permit "a single registration of a group of related works."

Registration can be made at any time. Section 412 of 17 U.S.C. prohibits the

awarding of statutory damages and attorney's fees where the work has not been registered before an infringement* occurs.¹ Although actual damages as well as injunctions are always available remedies, the Copyright Office recognizes the significant benefits of early registration.

Registration concerns raised by photographers

During the congressional hearings on the Copyright Reform Act of 1993, photographers complained that they were unable to take advantage of the benefits of registration because the Copyright Office practices were exceedingly burdensome. Photographers stated that it required a tremendous amount of time and effort to submit a copy of each image included in a collection and was financially burdensome. Prior to 1993, the Office revised its practices in an attempt to make registration easier for photographers. However, a copy of each image continued to be required. These changes did not sufficiently ease the burdens, and few photographers have registered their works. Consequently, photographers urge that they have been given a clear legal right by the copyright law, but no effective remedy; and this reality encourages infringers to continue unlawful conduct. See also Copyright Reform Act of 1993: Hearings on H.R.897 Before the Subcomm. on Intellectual Property and Judicial

*Error; line should read: "been registered before an infringement"

¹ A three month grace period, measured from the date of first publication, is provided for published works.

Administration of the House Comm. on the Judiciary, 103d Cong., 1st Sess. 370 (1993). See also Copyright Reform Act of 1993: Hearing on S.373 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary, 103d Cong., 1st Sess. 169 (1993). (Testimony of Andrew Foster, Executive Director of the Professional Photographers of America, Inc.)

In June 1993, the Librarian of Congress appointed an Advisory Committee on Registration and Deposit (ACCORD). That Committee recommended that the Copyright Office "greatly expand the use of group registration and optional deposit to reduce the present burdens" and "consult more actively and frequently with present and potential registrants to hear their problems and to respond to them whenever possible." Library of Congress, Advisory Committee on Copyright Registration and Deposit 31 (1993).

For the past year the Office has met with photographers and their representatives who have urged that the nature of photography, where thousands of images may be created with only a few, if any, being published makes registration difficult. At the time registration may be sought, the photographer does not know which photographs, if any, will be published. The definition of publication was also cited as problematic; in many cases it is unclear whether a photograph has been published. Even when it is clear that a photograph has been published, the photographer may be unaware of the publication. Finally, photographers and their representatives noted that often the film is turned over to the photographer's client for processing and use, thus leaving the photographer with nothing to deposit with the Copyright Office.

Photographs are generally copyrightable; an individual selects a camera, lens, film, and an image to capture taking into consideration choices such as lighting and composition. Since photographs are usually entirely new works, for examination purposes there is no issue with respect to whether or not a photograph is copyrightable. Therefore, it is possible to consider registration without an actual deposit of the work. Moreover, in the past the Library of Congress has not relied on the copyright registration system as a source for its photography collections. This is not the case with works such as music, motion pictures, plays, poems, choreography or novels. If the Library depended on the copyright deposits for its photograph collections, the Copyright Office would not be able to consider registration without a deposit of a copy of the work. In proposing this regulation, the Office is

not waiving the Library's rights to receive photographs that are registered. The Library may select from five to ten photographs from each registered group of photographers.

Recognizing the difficulties that photographers face in registering their works and desiring to ameliorate these problems, the Office is seeking a workable solution for photographers which does not cause unforeseen problems for publishers, photofinishers and other users of photographs. To this end, under the authority granted in 17 U.S.C. 408(c)(1), the Office is proposing regulations that permit a single registration for a group of unpublished and published related works and also permit registration with identifying material in place of actual photographs.

We believe that those who use photographs should not be adversely affected. The Office already will register a claim in an unlimited number of photographs as an unpublished collection; that collection would bear only a collective title, and the deposit would consist of contact sheets or a videotape. There would be no individual identifiers for individual images contained in the collection.

Guidelines for group registration of photographs

The proposed regulations permit **group registration of unpublished and published photographs on a single application with a fee of \$40, and a deposit of identifying material, if certain conditions are met.** The conditions are that the photographs **must be by a single author, be owned by the same copyright claimant (who need not be the author), be created on or after March 1, 1989, be created during a single calendar year, and bear a title which identifies the group as a whole.** Published works, whose exact date of publication is known may be included in a collection as long as the dates of publication do not exceed a three month period. For example, in one collection a photographer may include both unpublished photographs created in 1995, and photographs that are known to have been published between March 1, 1995, and May 31, 1995.

The approximate number of photographs in the group must be indicated on the application and in the identifying material; where the collection contains clearly published works, the approximate number of such photographs must be included in the identifying material. Where a group contains both unpublished and published photographs, the Copyright Office will assign a registration number, VAu (for unpublished works) or VA (for published works) based on the

preponderant status of the photographs as indicated in the identifying material.

Identifying material

The identifying material **must contain the following information: name of the author; the name and address of the claimant; the title given to the group as a whole; the approximate number of photographs included in the group, and, if the group includes photographs known to be published, an approximate number of the works that have been published. It must also contain the range of dates (month, year) during which the photographs were created (taken)—i.e., the earliest and the latest; the range of dates of first publication (month, day, year) for those photographs that have been published; a general description of the subject matter captured by the photographs; where more than one subject is included, a general description of each, with particular emphasis on newsworthy subjects, e.g., bombing of Federal Building in Oklahoma City, April 1995; ghost towns of Arizona; Million Man March in Washington, D.C., October 1995. The identifying material must include the name of the person to contact about using the work if that information is not already given.**

It **also contain any additional identifiers, such as an identification coding that is used to administer rights.** Since the deposit will not be a copy of each photograph and a question could arise as to whether or not a particular photograph has been registered, it is in the claimant's best interest to include as much information as possible to describe the photographs covered by the registration.

Other group registration possibilities

The Office already permits or requires a single registration for a number of works. These include the following: contributions to periodicals by the same author who is an individual (not an employee for hire) which are published in a twelve month period. For this, a basic application, for example Form VA for photographs, must be submitted with an adjunct application, Form GR/CP. All component parts of a multipart work that are owned by the same claimant and that are part of the unit of publication should be registered together on a single application. A single registration may be made for all categories of unpublished works as unpublished collections if certain conditions are met. The deposit must contain the entire copyrightable content of each work included in the collection. 37 CFR 202.20

Separate registration for an individual photograph

Individual photographs may be separately registered. To make a separate registration for an individual photograph, an applicant should submit a Form VA, a fee of \$20, and a copy of the photograph which complies with the existing deposit requirements found at 37 CFR 202.20.

Selection of archival prints for the collections for the Library of Congress

One of the conditions of this proposed group registration procedure is that the Library of Congress be able to select between five to ten photographs from each registration for its collections. Within six months of registration, the Library of Congress will determine whether it wishes to consider certain photographs for its collections. Generally, the Library is interested in photographs covering newsworthy events by specific photographers, and it does not anticipate making a large number of requests for samples or archival quality prints.

Submission of sample, if requested

In order for the Library of Congress to determine whether it wishes to make a selection, it will need to examine a sample of the photographs included in the registration. The Library will first review the application and identifying material which identify the photographs included in the group registration. The Library may then request that the photographer or photography business send a sample of from fifty to one hundred images of the photographs in the format that is the least expensive, but will still facilitate the Library's selection process, e.g., slides, contact prints in black and white or in color, or good quality photocopies in black or white. For registrations of up to five thousand photographs, fifty images may be requested as a sample; for registrations of over five thousand photographs, another ten images may be requested for each additional one thousand photographs covered in the registration. A maximum of one hundred images may be requested for registrations covering over ten thousand photographs.

Deposit of archival quality photographs

After reviewing the sample, the Library of Congress may request from five to ten archival quality photographs, depending on the number of photographs included in the group registration. The Library's guidelines for deposit of photographs are included in the new proposed Copyright Office regulation found at 37 CFR 202.20(c)(2)(xx).

The number of photographs that the Library may select depends on the number of photographs covered in one group registration. For any group registration of up to five thousand photographs, the Library may select five photographs for its collections; for each additional one thousand photographs included in a group registration up to ten thousand, the Library may select another photograph. For any group over ten thousand, the deposit would remain ten, archival quality photographs.

Effective date

The proposed regulations permitting group registration of photographs will be effective upon publication of an interim or final rule. They may be used to register photographs created on or after March 1, 1989, the effective date of the Berne Convention Implementation Act of 1988. Prior to March 1, 1989, the copyright law required that a copyright notice be placed on all copies of published works; however, for works published after that date, use of the notice is optional. Therefore, these regulations cover only photographs where the use of a copyright notice is not an issue.

Further Public Comment

The Office has met with various parties, and has been made aware both of certain concerns and also the guidelines agreed upon by The Board of Directors of the American Society of Media Photographers, the Professional Photographers of America, Photo Marketing Association International, the Association of Professional Color Laboratories, the Professional School Photographers Association International and the Coalition for Consumers' Picture Rights. One of that group's agreements is to work to eliminate the 17 U.S.C. 412 requirement as a precondition for statutory damages and attorneys fees for photographers. The Office takes no position on this particular proposal but observes that photographers need real relief now; we believe the proposed rule offers that relief.

The Copyright Office seeks comment on these proposed rules. Following review of all comments, the Office will adopt interim or final regulations. The Copyright Office is interested in receiving information based on actual experience, if possible, including answers to the following questions.

1. How have courts dealt with deposits consisting of only identifying material rather than a complete copy of the work?
2. Have such registrations been accorded prima facie evidentiary effect with respect to copyrightability as well

as to the facts in the certificate?

3. How would the problems of photographs registered under this regulation differ from those of other registered collections, e.g., in collections where there are no individual identifiers for the works but the Copyright Office has a copy of each work included in the collection?

4. How does this proposed group registration differ from a group registration for a database covering a three month period of time where the deposit consists of only a small sample of the copyrightable authorship from a representative day?

5. What problems would be caused by registrations made under these proposed regulations that include both unpublished and published works?

6. Will inclusion of information about the agent or licensing entity be helpful?

7. What might be the abuses, if any?

8. Is the Office proposing too many photographs to be registered on one application? If yes, what number would be more appropriate?

9. Are there other identifiers that could assist in identifying the registered works?

Conforming amendments

The Copyright Office also is proposing to amend 37 CFR 202.3(b)(3)(ii) and footnote 6 to 37 CFR 202.3(c)(2) to conform to the addition of new 37 CFR 202.3(b)(9).

List of Subjects in 37 CFR Part 202

Claims, Copyright.

Proposed Rule

In consideration of the foregoing, the Copyright Office proposes to amend 37 CFR part 202 in the manner set forth below:

PART 202 — REGISTRATION OF CLAIMS TO COPYRIGHT

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

Authority: 17 U.S.C. 408, 702.

§202.3 [Amended]

2. Section 202.3(b)(3)(ii) is amended by removing "(b)(8)" and adding "(b)(9)."

3. In §202.3, paragraph (b)(9) is redesignated as paragraph (b)(10) and a new paragraph (b)(9) is added to read as follows:

§202.3 Registration of copyright

* * * * *

(b) * * *

(9) Group registration of photographs.

(i) Pursuant to the authority granted by 17 U.S.C. 408(c)(1), and without waiving any rights of the Library of Congress to review and acquire copies of

individual photographs, the Register of Copyrights has determined that, on the basis of a single application, and a single filing fee of \$40, a single registration may be made for a group of photographs, if the following conditions are met:

(A) The group bears a single title identifying the group as a whole;

(B) All of the photographs were created by the same author;

(C) All of the photographs have the same copyright claimant;

(D) All of the photographs were created on or after March 1, 1989;

(E) All of the photographs were created, and if published, were both created and published during the same year; and

(F) All photographs known to be published were published within a three month span, e.g., from January 1 - March 31, from February 1 - April 30.

(ii) Identifying material must consist of:

(A) The name of the author;

(B) The name and address of the claimant;

(C) The title given to the group as a whole;

(D) The approximate number of photographs included in the group;

(E) If the group includes published photographs, an approximate number of the works that have been published;

(F) The range of dates (month, year) during which the photographs were created (taken) - i.e., the earliest and the latest;

(G) The range of dates of first publication (month, day, year) for those photographs that have been published;

(H) A general description of the subject matter captured by the photographs; where more than one subject is included, a general description of each, with particular emphasis on newsworthy subjects, for example, "Bombing of Federal Building in Oklahoma City, April, 1995;" "Ghost Towns of Arizona;" "Million Man March in Washington, D.C., October, 1995;" and

(I) The identifying material may also contain any additional identifiers, for example, the identification coding that is used to administer rights in the photographs.

(iii) The application for group registration must include:

(A) At line 1 of the VA form, a title that identifies the group as a whole;

(B) Following the title at line 1, the approximate number of photographs

included in the group;

(C) Where all the published works included in the group were published on the same day, the exact date of first publication; alternatively, the span of time during which all the published works were first published, e.g., June 1, 1995 through August 31, 1995; and

(D) If the claimant listed in space 4 is not the agent or licensing entity for all or some of the photographs in the group, the name, addresses, telephone and fax numbers of such person or entity. Space 4 should state "Licensing Information," followed by the name, etc.

(iv) If the Library of Congress wishes to review a collection for possible inclusion of photographs in its collection, the claimant of record must supply the appropriate material.

(A) The Library may request a maximum of fifty sample images for the first five thousand photographs covered by one group registration, and ten more sample images for each additional one thousand photographs covered, with a maximum of one hundred images for a group registration covering more than ten thousand or more photographs.

(B) The Library may then select between five and ten specified photographs to be supplied in prints from each group registration. For registrations of fewer than five thousand photographs, no more than five photographs may be selected, and for registrations of ten thousand or more, no more than ten photographs may be selected.

(C) When photographs from a requested sample have been selected, the photographer or photography business must provide archival quality copies of the selected photographs, meeting Library guidelines in accordance with the deposit requirements of §202.20(c)(2)(xx).

(D) If any photographer or photography business registering photographs under this regulation does not provide the required samples and archival quality copies as requested by the Library, the Copyright Office may rescind that party's privilege of making further group registrations under this section.

(v) The fee is \$40.

4. Footnote 6 to §202.3(c)(2) is revised to read as follows:

"In the case of applications for group registration of newspapers, contributions to periodicals, newsletters, and photographs,

under paragraphs (b)(6), (b)(7), (b)(8) and (b)(9) of this section, the deposits and fees shall comply with those specified in the respective paragraphs.

5. Section 202.20 is amended by adding a new paragraph (c)(2)(xx) to read as follows:

§202.20 Deposit of copies and phonorecords for copyright registration

* * * * *

(c) * * *

(2) * * *

(xx) Group registration of photographs. For group photographs registered under §202.3(b)(9), works selected for acquisition by the Library of Congress must consist of prints that:

A. Measure at least 8" x 10" and do not exceed 20" x 24";

B. Are made on fiber-based paper and archivally processed;

C. Are not mounted in any way; and

D. Are marked as follows: Titles or caption information may be written lightly on the back of photographs with a #1 soft lead pencil or (preferably) supplied on a separate sheet of paper and keyed to the prints. Archival ink, supplied by the Library, may be used on the back of the print, if desired, for copyright stamps and photographer identification. Adhesive labels, pressure-sensitive tapes, and ballpoint ink should never be applied to the backs of the photographs. Photographs should be mailed flat between two sturdy pieces of cardboard.

§202.21 [Amended]

6. In §202.21(a), remove "and (g)" and add ", (g) and (i)."

7. In §202.21, add a new paragraph to read as follows:

§202.21 Deposit of identifying material instead of copies.

* * * * *

(i) For purposes of group registration of photographs under §202.3(b)(9), identifying material may consist of titles, descriptions, or lists identifying the photographs included in the registration.

Dated: November 22, 1995
Marybeth Peters,
Register of Copyrights.

Approved by:
James H. Billington,
The Librarian of Congress.
[FR Doc. 95-29293 Filed 12-1-95; 8:45 am]

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