

return) and is effective as of the date the allocation is filed. \* \* \*

\* \* \* \* \*

(e) *Effective Date.* Paragraphs (b)(2) and (b)(3), the third sentence of paragraph (b)(4)(i), the fourth sentence of paragraph (b)(4)(ii)(A), paragraph (b)(4)(iii), the first two sentences of paragraph (c)(1), and the fourth sentence of paragraph (d)(1) of this section, when published as final regulations, will apply as of July 13, 2004.

**Mark E. Matthews,**

*Deputy Commissioner for Services and Enforcement.*

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BILLING CODE 4830-01-P

## LIBRARY OF CONGRESS

### Copyright Office

#### 37 CFR Parts 202, 211 and 212

[Docket No. RM 2004-5]

#### Reconsideration Procedure

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

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** With a few modifications, this notice of proposed rulemaking continues procedures adopted by the U.S. Copyright Office in 1995 that permit copyright applicants to request reconsideration of its decisions to refuse registration. The purpose of this notice of proposed rulemaking is to amend those procedures and incorporate them into Copyright Office regulations. This proposal continues to give copyright applicants two opportunities to seek reconsideration of a Copyright Office decision to refuse registration. A significant modification is that the procedures are also made applicable to the Office's refusals to register mask works and vessel hull designs.

**DATES:** Comments are due by September 13, 2004. Reply comments are due by October 26, 2004.

**ADDRESSES:** If hand delivered by a private party, an original and five copies of any comment should be brought to: Room LM-401 of the James Madison Memorial Building and addressed as follows: Office of the General Counsel, U.S. Copyright Office, James Madison Memorial Building, Room LM-401, 101 Independence Avenue, S.E., Washington, D.C. 20559-6000. If delivered by a commercial, non-government courier or messenger, an original and five copies of any comment must be delivered to the Congressional

Courier Acceptance Site located at 2nd and D Streets, N.E. between 8:30 a.m. and 4 p.m. The envelope should be addressed as follows: Copyright Office General Counsel, Room LM-403, James Madison Memorial Building, 101 Independence Avenue, S.E., Washington, D.C. If sent by mail, an original and five copies of any comment should be addressed to: GC/I&R, P.O. Box 70400, Southwest Station, Washington D.C. 20024-0400. Comments may not be delivered by means of overnight delivery services such as Federal Express, United Parcel Service, etc., due to delays in processing receipt of such deliveries.

#### FOR FURTHER INFORMATION CONTACT:

Marilyn J. Kretsinger, Associate General Counsel, or Renee Coe, Senior Attorney. Telephone: (202) 707-8380. Telefax: (202) 707-8366.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

The Copyright Office is responsible for registering copyright claims submitted by authors or other copyright claimants. 17 U.S.C. 410(a). In fiscal year 2003, the Copyright Office issued 534,122 copyright registrations, many of which covered multiple works.

Although copyright protection is automatic, copyright law provides important benefits for enforcing rights that are only available to owners who register their claims. In fact, a suit for copyright infringement of a United States work cannot be instituted unless a copyright claimant has submitted an application to register the work with the Copyright Office. 17 U.S.C. 411(a). Even if the Copyright Office ultimately refuses to register the work, a copyright owner is entitled to institute an infringement action.

There are other benefits, too. When a certificate of registration contains an effective date that is either before publication or within five years after publication, a court is required to treat it as prima facie evidence of the validity of the copyright and the facts stated in the certificate. 17 U.S.C. 410(c). In an infringement suit, attorney's fees or statutory damages may not be awarded for an unpublished work if its effective registration date is after the commencement of the infringement, or for a published work if its effective registration date is after commencement of the infringement and more than three months after first publication of the work. 17 U.S.C. 412.

Subsections 410(a) and (b) of title 17 of the United States Code set forth the Copyright Office's role in examining and registering copyright claims,

including the authority to refuse registration:

(a) When, after examination, the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met, the Register shall register the claim and issue to the applicant a certificate of registration under the seal of the Copyright Office. The certificate shall contain the information given in the application, together with the number and effective date of the registration.

(b) In any case in which the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited does not constitute copyrightable subject matter or that the claim is invalid for any other reason, the Register shall refuse registration and shall notify the applicant in writing of the reasons for such refusal.

In fiscal year 2003, the Copyright Office refused to register 7,241 copyright claims, less than two percent of the number of registrations issued.

In 1995, the Copyright Office established interim procedures for reconsidering its refusals to register copyright claims. 60 FR 21983 (May 4, 1995). The interim procedures amended section 606.04 of the practices found in Compendium of Copyright Office Practices II (1984). Prior to 1995, an applicant had two opportunities to request that the Office reconsider its refusal to register a claim, but both requests were reviewed in the Examining Division. The 1995 interim procedures established a Board of Appeals to review second requests for reconsideration. The purpose of this notice is to amend the 1995 procedures and to incorporate them into title 37 of the U.S. Code of Federal Regulations.

##### II. Changes Proposed by the Notice of Proposed Rulemaking

This proposed rulemaking includes changing the name of the Copyright Office "Board of Appeals" to the "Review Board." The Office is proposing this name change to communicate more accurately the nature of the proceedings involved at the second level of reconsideration. This notice also provides that a decision by the Review Board constitutes final agency action.

Another significant change is to clarify that reconsideration proceedings are also available for requests to reconsider Copyright Office refusals to register claims in mask works and vessel hull designs each which have a unique

form of protection that is separate from copyright protection. The Copyright Office registers claims in mask works under chapter 9 of title 17 of the United States Code. Pub. L. No. 98-620, 98 Stat. 3335, 3347. It registers claims in vessel hull designs under chapter 13 of title 17 of the United States Code. Pub. L. No. 105-304, 112 Stat. 2860, 2905. As with copyright claims, the Copyright Office examines submissions to register mask works, 13 CFR part 211, and vessel hull designs, 13 CFR part 212, to determine whether they satisfy legal requirements for registration. If they do not, the Office may refuse registration.

In fiscal year 2003, the Copyright Office registered 397 mask works and 45 vessel hull designs; it refused to register seven claims in mask works and one claim in a vessel hull design.<sup>1</sup>

### III. Summary of Procedures

This notice of proposed rulemaking establishes procedures for applicants to request that the Copyright Office reconsider refusals to register copyright claims and claims in mask works or vessel hull designs. There are two opportunities for reconsideration of a refusal to register. At the first level of reconsideration, the Examining Division of the Copyright Office reviews its initial decision to refuse registration. At the second level, the Review Board will conduct the review of a refusal to register. The Review Board is composed of the Register of Copyrights, the General Counsel, and the Chief of the Examining Division, or their respective designees.

An applicant may make a first request for reconsideration after he or she receives a written notice from the Examining Division explaining why the Division initially refused to register the applicant's claim. The request must be in writing and set forth the reasons for the applicant's objections, including any legal considerations.

The applicable fee for a first request for reconsideration, as set forth in 37 CFR 201.3(d)(4), must accompany the written request for reconsideration. The written request must be received by the Copyright Office no later than three months from the date that appears in the written notice of its initial decision to refuse registration. The Examining Division bases its decision on all of an applicant's written submissions. It does not hear oral argument in support of the request for reconsideration.

If the Examining Division decides a work is entitled to be registered, it notifies the applicant in writing of that decision and the work is registered. However, if the Examining Division upholds its initial refusal to register, it sends the applicant a written notification stating the reasons for refusal within four months from the date the Division receives the first request for reconsideration. Failure by the Examining Division to issue a written notification within four months does not result in registration of the applicant's work.

Upon receiving written notice that the Examining Division has again refused registration, an applicant may seek a second reconsideration by submitting a written request to the Review Board. With minor differences, the procedures for the second reconsideration by the Board are similar to the procedures for the first.

The second request for reconsideration must also be in writing and set forth the reasons for the applicant's objections, including any legal considerations. The applicable fee for a second request, as set forth in § 201.3(d)(4), must accompany the written request for reconsideration. This request must be received by the Copyright Office no later than three months from the date that appears in the written notice of the Examining Division's decision to refuse registration in response to the first request for reconsideration. The Board will base its decision on an applicant's written submissions and will not hear oral argument in support of the second request for reconsideration.

If the Review Board decides a work is entitled to be registered, it will notify the applicant of that decision and the work will be registered. However, if the Board upholds the Examining Division's refusal to register, it will send the applicant a written notification stating the reasons for refusal. A decision by the Review Board constitutes final agency action.

This notice of proposed rulemaking provides addresses for hand delivery and mailing correspondence for both the first and second requests for reconsideration. The Copyright Office continues to experience delays in the delivery of mail whether sent through the U.S. Postal Service or a private carrier, such as Federal Express, due to procedures designed to mitigate security risks.

If a request for a reconsideration sent timely arrives after the proposed deadline, the Office will apply the regulation on postal disruptions, 37 CFR 201.8, to determine the timeliness of the

filing. However, claimants who wish to obtain prompt reconsideration of refusals to register would be well-advised to consider delivery by hand to the appropriate address given in this Notice.

To ensure delivery for any correspondence relating to both first and second requests for reconsideration, the address on the outside envelope should be the one provided in the proposed regulation for the Copyright R&P Division Office. That address should be used no matter how the correspondence is delivered, whether sent through the U.S. Postal Service, through another mail carrier or by hand delivery. To ensure correct routing and handling of correspondence within the Copyright Office, the regulation also requires that the word "RECONSIDERATION" must be clearly indicated on the first line of the address appearing on the envelope. For the cover letter accompanying a request for reconsideration, the subject line should indicate the Copyright Office control number assigned to applications and either "FIRST RECONSIDERATION" or "SECOND RECONSIDERATION," as appropriate.

### Regulatory Flexibility Act Statement

Although the Copyright Office, as a department of the Library of Congress and part of the Legislative Branch, is not an "agency" subject to the Regulatory Flexibility Act, 5 U.S.C. 601-612, the Register of Copyrights has considered the effect of the proposed amendment on small businesses. The Register has determined that the amendments would not have a significant economic impact on a substantial number of small business entities that would require a provision of special relief for them. The proposed amendments are designed to minimize any significant economic impact on small business entities.

### List of Subjects in 37 CFR Part 202

Copyright, Mask works, Reconsideration of refusal to register claims, Vessel Hulls.

### Proposed Regulations

In consideration of the foregoing, the Copyright Office proposes to amend parts 202, 211 and 212 of 37 CFR, chapter II in the manner set forth below:

### PART 202—REGISTRATION OF CLAIMS TO COPYRIGHT

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

**Authority:** 17 U.S.C. 702.

2. Add § 202.5 to read as follows:

<sup>1</sup> Five mask works were rejected because they were not eligible under the statute, and two were rejected because the two-year filing dead line was missed. The vessel hull design was rejected for failure to meet the filing deadline.

### § 202.5 Reconsideration Procedure for Refusals to Register.

(a) General. This section prescribes rules pertaining to procedures for administrative review of the Copyright Office's refusal to register a claim to copyright, a mask work, or a vessel hull design upon a finding by the Office that the application for registration does not satisfy the legal requirements of title 17 of the United States Code. If an applicant's initial claim is refused, the applicant is entitled to request that the initial refusal to register be reconsidered.

(b) First reconsideration. Upon receiving a written notification from the Examining Division explaining the reasons for a refusal to register, an applicant may request that the Examining Division reconsider its initial decision to refuse registration, subject to the following requirements:

(1) An applicant must request in writing that the Examining Division reconsider its decision. A request for reconsideration must include the reasons the applicant believes registration was improperly refused, including any legal arguments in support of those reasons and any supplementary information. The Examining Division will base its decision on the applicant's written submissions.

(2) The fee set forth in § 201.3(d)(4) of this chapter must accompany the first request for reconsideration.

(3) The first request for reconsideration and the applicable fee must be received by the Copyright Office no later than three months from the date that appears in the Examining Division's written notice of its initial decision to refuse registration. When the ending date for the three-month time period falls on a weekend or a federal holiday, the ending day of the three-month period shall be extended to the next federal work day.

(4) If the Examining Division decides to register an applicant's work in response to the first request for reconsideration, it will notify the applicant in writing of the decision and the work will be registered. However, if the Examining Division again refuses to register the work, it will send the applicant a written notification stating the reasons for refusal within four months of the date on which the first request for reconsideration is received by the Examining Division. When the ending date for the four-month time period falls on a weekend or a federal holiday, the ending day of the four-month period shall be extended to the next federal work day. Failure by the Examining Division to send the written

notification within the four-month period shall not result in registration of the applicant's work.

(c) Second reconsideration. Upon receiving written notification of the Examining Division's decision to refuse registration in response to the first request for reconsideration, an applicant may request that the Review Board reconsider the Examining Division's refusal to register, subject to the following requirements:

(1) An applicant must request in writing that the Review Board reconsider the Examining Division's decision to refuse registration. The second request for reconsideration must include the reasons the applicant believes registration was improperly refused, including any legal arguments in support of those reasons and any supplementary information, and must address the reasons stated by the Examining Division for refusing registration upon first reconsideration. The Board will base its decision on the applicant's written submissions.

(2) The fee set forth in § 201.3(d)(4) of this chapter must accompany the second request for reconsideration.

(3) The second request for reconsideration and the applicable fee must be received in the Copyright Office no later than three months from the date that appears in the Examining Division's written notice of its decision to refuse registration after the first request for reconsideration. When the ending date for the three-month time period falls on a weekend or a federal holiday, the ending day of the three-month period shall be extended to the next federal work day.

(4) If the Review Board decides to register an applicant's work in response to a second request for reconsideration, it will notify the applicant in writing of the decision and the work will be registered. If the Review Board upholds the refusal to register the work, it will send the applicant a written notification stating the reasons for refusal.

(d) (1) All mail, including any that is hand delivered, should be addressed as follows: RECONSIDERATION, Copyright R&P Division, P.O. Box 71380, Washington, DC 20024-1380. If hand delivered by a commercial, non-government courier or messenger, a request for reconsideration must be delivered between 8:30 a.m. and 4 p.m. to: Congressional Courier Acceptance Site, located at Second and D Streets, NE, Washington, DC. If hand delivered by a private party, a request for reconsideration must be delivered between 8:30 a.m. and 5 p.m. to: Room 401 of the James Madison Memorial

Building, located at 101 Independence Avenue, SE, Washington, DC.

(2) The first page of the written request must contain the Copyright Office control number and clearly indicate either "FIRST RECONSIDERATION" or "SECOND RECONSIDERATION," as appropriate, on the subject line.

(e) For any particular request for reconsideration, the provisions relating to the time requirements for submitting a request under this § 202.5 may be suspended or waived, in whole or in part, by the Register of Copyrights upon a showing of good cause. Such suspension or waiver shall apply only to the request at issue and shall not be relevant with respect to any other request for reconsideration from that applicant or any other applicant.

(f) Composition of the Review Board. The Review Board shall consist of the Register of Copyrights, the General Counsel, and the Chief of the Examining Division, or their respective designees.

(g) Final Agency Action. A decision by the Review Board in response to a second request for reconsideration constitutes final agency action.

### PART 211—MASK WORK PROTECTION

3. The authority citation for part 211 continues to read as follows:

**Authority:** 17 U.S.C. 702 and 908.

4. Add § 211.7 to read as follows:

#### § 211.7 Reconsideration procedure for refusals to register.

The requirements prescribed in § 202.5 of this chapter for reconsideration of refusals to register copyright claims are applicable to requests to reconsider refusals to register mask works under 17 U.S.C. chapter 9, unless otherwise required by this part.

### PART 212—PROTECTION OF VESSEL HULL DESIGNS

5. The authority citation for part 212 continues to read as follows:

**Authority:** 17 U.S.C. chapter 13.

6. Add § 212.7 to read as follows:

#### § 212.7 Reconsideration procedure for refusals to register.

The requirements prescribed in § 202.5 of this chapter for reconsideration of refusals to register copyright claims are applicable to requests to reconsider refusals to register vessel hull designs under 17 U.S.C. chapter 13, unless otherwise required by this part.

Dated: July 8, 2004.

Marybeth Peters,

Register of Copyrights.

[FR Doc. 04-15853 Filed 7-12-04; 8:45 am]

BILLING CODE 1410-33-S

## LIBRARY OF CONGRESS

### Copyright Office

#### 37 CFR Part 270

[Docket No. RM 2002-1F]

#### Notice and Recordkeeping for Use of Sound Recordings Under Statutory License

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

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Copyright Office of the Library of Congress is proposing to amend its regulations to provide for the reporting of uses of sound recordings performed by means of digital audio transmissions pursuant to statutory license for the period October 28, 1998, through March 31, 2004.

**DATES:** Comments are due no later than August 12, 2004.

**ADDRESSES:** If hand delivered by a private party, an original and five copies of any comment should be brought to: Room LM-401 of the James Madison Memorial Building and addressed as follows: Office of the General Counsel, U.S. Copyright Office, James Madison Memorial Building, Room LM-401, 101 Independence Avenue, S.E., Washington, D.C. 20559-6000. If delivered by a commercial, non-government courier or messenger, an original and five copies of any comment must be delivered to the Congressional Courier Acceptance Site located at 2nd and D Streets, N.E. between 8:30 a.m. and 4 p.m. The envelope should be addressed as follows: Copyright Office General Counsel, Room LM-403, James Madison Memorial Building, 101 Independence Avenue, S.E., Washington, D.C. If sent by mail, an original and five copies of any comment should be addressed to: GC/I&R, P.O. Box 70400, Southwest Station, Washington D.C. 20024-0400. Comments may not be delivered by means of overnight delivery services such as Federal Express, United Parcel Service, etc., due to delays in processing receipt of such deliveries.

**FOR FURTHER INFORMATION CONTACT:**

David O. Carson, General Counsel, or William J. Roberts, Jr., Senior Attorney, P.O. Box 70977, Southwest Station, Washington, DC 20024. Telephone:

(202) 707-8380; Telefax: (202) 252-3423.

**SUPPLEMENTARY INFORMATION:**

**Background**

The Copyright Act grants copyright owners of sound recordings the exclusive right to perform their works publicly by means of digital audio transmissions subject to certain limitations and exceptions. Among the limitations placed on the performance right for sound recordings is a statutory license that permits certain eligible subscription, nonsubscription, satellite digital audio radio, and business establishment services to perform those sound recordings publicly by means of digital audio transmissions. 17 U.S.C. 114.

Similarly, copyright owners of sound recordings are granted the exclusive right to make copies of their works subject to certain limitations and exceptions. Among the limitations placed on the reproduction right for sound recordings is a statutory license that permits certain eligible subscription, nonsubscription, satellite digital audio, and business establishment services to make ephemeral copies of those sound recordings to facilitate their digital transmission. 17 U.S.C. 112(e).

Both the section 114 and 112 licenses require services to, among other things, report to copyright owners of sound recordings on the use of their works. Both licenses direct the Librarian of Congress to establish regulations to give copyright owners reasonable notice of the use of their works and create and maintain records of use for delivery to copyright owners. 17 U.S.C. 114(f)(4)(A) and 17 U.S.C. 112(e)(4). The purpose of this notice and recordkeeping requirement is to ensure that the royalties collected under the statutory licenses are distributed to the correct recipients.

On March 11, 2004, the Copyright Office published interim regulations specifying notice and recordkeeping requirements for use of sound recordings under the section 112 and 114 licenses. See 69 FR 11515 (March 11, 2004).<sup>1</sup> Those interim regulations, however, apply only prospectively to

<sup>1</sup> Those regulations did not apply to preexisting subscription services, which are defined in section 114 as services that perform sound recordings by means of noninteractive audio-only subscription digital audio transmissions which were in existence and were making such transmissions to the public for a fee on or before July 31, 1998. 17 U.S.C. 114(j)(11). Requirements for preexisting subscriptions services were announced in 1998, See 64 FR 34289 (June 24, 1998), and will not be affected by the rules proposed in this notice.

the use of sound recordings commencing during the second calendar quarter of 2004, leaving the question of what records of use must be prescribed for uses of sound recordings from October 28, 1998 (the date the statutory licenses first became available for services other than preexisting subscription services), to March 31, 2004 (the "historic period").<sup>2</sup>

The task of crafting regulations to govern records of prior use is complicated by the fact that many services have maintained few or, in many instances, no records of such use. As a result, the Office published a notice of inquiry seeking public comment on the form and content that such regulations should take. 68 FR 58054 (October 8, 2003). Specifically, the Office sought comment on the following: how it should deal with the problem of incomplete or absent records for prior uses; whether licensees should be required to report actual performance data for the historical period, if available, so that copyright owners and performers whose works were performed could be identified; and whether any proxies could be used in lieu of incomplete or missing prior records, taking into account the attendant costs and who should bear such costs. *Id.*

Before discussing the comments filed in response to the notice of inquiry, the Office notes that as a threshold matter, the National Association of Broadcasters ("NAB") argues that the Office is without authority to conduct this phase of the rulemaking as any resultant rule would apply retroactively. NAB asserts that neither the "general rulemaking power of the Copyright Office nor the recordkeeping rulemaking authority provided in Sections 112 or 114 provides" the express authority to promulgate retroactive rules as required under *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), and *Motion Picture Association of America, Inc. v. Oman*, 969 F.2d 1154 (D.C. Cir. 1992). NAB comment at 2. Furthermore, if the Office were to promulgate such a rule, it would be unenforceable "as the Copyright Office cannot retroactively turn licensed performances into infringement." Accordingly, NAB argues that "as a matter of law and as a matter of policy," the Office should

<sup>2</sup> The Office noted that the interim regulations also did not address the format in which records of use should be preserved because of the highly technical nature of delivery of data in an electronic format and the widespread disagreement among SoundExchange and the users of the statutory licenses over formatting. See 69 FR at 11517, n.7. As stated on March 11, the Office will deal with such requirements in the future.