



ANNOUNCEMENT

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

NOTICE OF PROPOSED REGULATIONS

CANCELLATION OF COMPLETED REGISTRATIONS

The following excerpt is taken from Volume 50, Number 159 of the Federal Register for Friday, August 16, 1985 (pp. 33065-33068)

LIBRARY OF CONGRESS

Copyright Office

17 CFR Part 201

Docket No. RM 85-3]

Cancellation of Completed Registrations

AGENCY: Copyright Office, Library of Congress.

ACTION: Proposed regulations.

SUMMARY: This notice is issued to advise the public that the Copyright Office of the Library of Congress is considering adoption of a new regulation with respect to cancellation practices and procedures under the Copyright Act of 1976. The effect of the proposed regulation is to specify the conditions under which the Copyright Office will cancel a completed registration form.

DATE: All comments should be received on or before September 16, 1985.

ADDRESSES: Interested persons should submit ten copies of their written comments to: Office of the General Counsel, Copyright Office, Library of Congress, Department DS, Washington, D.C. 20540, or if by hand, to: Office of the General Counsel, Copyright Office, James Madison Memorial Building, Room 407, First and Independence Ave., Washington, D.C. 20540.

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

SUPPLEMENTARY INFORMATION:

Cancellation is an action taken by the Copyright Office to expunge an already completed registration. Section 410(b) of the Copyright Act of 1976 provides authority for the Register of Copyrights to refuse registration when he or she determines the material deposited does not constitute copyrightable subject matter or that the claim is invalid for any other reason. Section 410(b) also provides authority for the Register to cancel a completed registration that was made in error or which was made in the wrong classification.

1. Background and Present Practice

Cancellation of registrations of claims in works that are not subject to copyright was established under the 1909 Act, and has continued under the 1976 Act.

In Copyright Office Supplementary Practice No. 15, entitled, "Cancellation Cases," a cancellation case is defined as:

One in which the number assigned to a completed registration will not be used for that particular work, and an accounting action is therefore necessary. The case may involve either:

- (a) Complete elimination of any registration for the work in question; or
- (b) A new registration for the work under a different class and number.¹

¹ Compendium of Copyright Office Practices (Compendium I), Supplementary Practice No. 15, p. S-48 (1966) [hereinafter Supplementary Practice No. 15]. This administrative staff manual, although available previously for inspection and copying, was first available through the Superintendent of Documents of the Government Printing Office in 1970.

As an illustration of (a) above, the practice provides:

Where it is discovered only after registration that the notice for a published work is fatally defective, the fee is refunded or recredited.²

Cancellation Under the 1909 Act

In the past, members of the public have requested the Office to cancel registrations—their own and those made by others—where it was not clear that the registration was invalid. As a result, nearly thirty years ago the Office issued regulations to inform the public of the conditions under which corrections of the record, including cancellations could be made. That regulation, entitled "No Cancellations," provided that—

No correction or cancellation of a Copyright Office registration or other record will be made [other than a registration or record provisional upon receipt of fee as provided in Section 201(6)] after it has been completed if the facts therein stated agree with those supplied the Office for the purpose of making such record. However, it shall be within the discretion of the Register of Copyrights to determine if any particular case justifies the placing of an annotation upon any record for the purpose of clarification, explanation, or indication that there exists elsewhere in the records, indexes or correspondence files of the Office, information which has reference to the facts as stated in such record.³ (Emphasis added.)

² *Id.* The fee is no longer refunded, however, because Pub. L. No. 97-366, 96 Stat. 1759 (October 25, 1982) changed the nature of the copyright fees from a registration service fee to a filing fee.

³ 37 CFR 201.5(a) (1957) (amended 1978). Also see, generally, *Advisers, Inc. v. Weisen-Hart, Inc.*, 238 F.2d 708 (6th Cir. 1956), *cert. denied*, 353 U.S. 949 (1957) (regulation is cited, corrective registration presumed valid).

This language was interpreted by the Office in a Report which forms a part of the legislative history of the 1976 Act:

The present Copyright Office Regulations (37 CFR 201.5(a)) allow correction or cancellation of a completed registration only if "the facts therein stated" do not "agree with those supplied to the Office for the purpose of making such record"—in other words, if the Copyright Office itself made an error in registering the claim or failed to catch an error that should have been apparent during its examination of the claim.⁴

The Copyright Office takes seriously the matter of changing completed registration records. And it regards cancellations as the most serious of those changes.⁵ In implementing the 1976 Act, the Office continued the cancellation practices in effect under the 1909 Act in substantially the same manner.

Cancellations Under the 1976 Act

Section 201.5(a)(2) issued pursuant to the 1976 Act follows the same approach as the former regulation in distinguishing between corrections requested by members of the public and corrections of errors made by the Copyright Office. It provides that:

No correction or amplification of the information in a basic registration will be made except pursuant to the provisions of this § 201.5. As an exception, where it is discovered that the record of a basic registration contains an error that the Copyright Office itself should have recognized at the time registration was made, the Office will take appropriate measures to rectify its error.⁶

The Office has applied the language "appropriate measures to rectify [the Copyright Office's] error" to include the cancellation practices followed under the 1909 Act. If registration should not have been made at all, because the work is not copyrightable subject matter or the other legal requirements have not been satisfied, the "appropriate measure" is to simulate the action which would have been taken but for the erroneous registration. If the error had not been made, or the erroneous information had not been submitted, registration would have been refused. In such cases, cancellation, operating as a kind of refusal to register, appears the only appropriate measure to take where the Register believes registration is not permitted by law. In *Bouve v. Twentieth Century Fox Film Corp.*, the court said, "it seems obvious, also, that the Act

establishes a wide range of selection within which discretion must be exercised by the Register in determining what he has no power to accept."⁷

Compendium II of the Copyright Office Practices, issued under the 1976 Act,⁸ provides that when it is apparent that the basic registration should not have been made, registration will be cancelled, giving the following as an example:

The basic registration states that the work was first published in 1979. The Applicant now asserts that the work as actually first published in 1977. Since copies as first published are required for work first published before 1978, an application for a basic registration accompanied by the required deposit should be submitted. If, however, the work was first published without an acceptable copyright notice, the basic registration will be cancelled.⁹

As it did under the 1909 Act, the Office cancels registrations where the registration fee has not been paid,¹⁰ and where the claim is patently invalid for substantive reasons. The Office additionally cancels registration numbers, as opposed to claims, where the claim has been numbered in the wrong series—for example, an unpublished number (VAu 123-456) is given to a published claim (VA 123-456).¹¹

2. Authority to Cancel

Cancellation of registrations for works that are not the subject matter of copyright or that fail to satisfy other legal requirements seems required by section 410 of the Copyright Act. That section requires the Register to refuse to register a claim to copyright in a work that does not constitute copyrightable subject matter, or satisfy the other legal and formal requirements of the Copyright Act.

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.¹²

Because the Register has no authority to register works in the public domain, there is no alternative except to cancel where the Office discovers such an error only after registration has been made.¹³

Moreover, the current statute accords the certificate of registration prima facie evidence of the validity of the copyright.¹⁴ Unless erroneous registrations are expunged from the records, the integrity of copyright registration records would be seriously compromised, and the justification for the court's reliance on those records would be destroyed.

... [I]f the Copyright Office were to register claims and issue certificates without regard to the copyrightability of the material, the result would be to mislead the applicant and the public. What materials are copyrightable is a rather esoteric question on which the general public is not well informed. Many applications are received in the Copyright Office for the registration of uncopyrightable materials such as titles, names, ideas, mechanical devices, tools, toys and almost anything imaginable, usually under a misapprehension by the applicant of the copyright law. . . . Registration of a copyright claim in such material would lull the applicant into a false sense of security in believing he had copyright protection, instead of seeking advice and other means of protecting his interests; and the public would often be given the false impression that the material is copyrighted. Further consequences also seem evident: the registration records and certificates would be cluttered with unfounded claims; registration records and certificates would be unreliable and would lose much of their probative value for copyright claimants, for other persons dealing with them, and for the courts; and many unfounded claims would probably be the source of litigation.¹⁵

In the same way, it appears that to refuse to cancel invalid registrations would erode the certificate's presumption of validity, mislead the public, and vex the courts.

3. Proposed Regulations

Although the authority of the Copyright Office to cancel invalid registrations has been exercised since 1909, the regulations of the Office do not, and never have, described the cancellation practice in detail. In order to inform the public more explicitly of the cancellation practices, the Office proposes to adopt regulations that describe the nature of cancellations and codify the practices under which

⁷ *Bouve v. Twentieth Century Fox Film Corp.*, 122 F.2d 51 (D.D.C. 1941).

⁸ Compendium of Copyright Office Practices, Chapter 15, Corrections and Amplifications of Copyright Office Records, Supplementary Registrations (1984) (Compendium II).

⁹ Compendium II, 1507.06(d), 1500-19 (1984).

¹⁰ The Office's initial uncollectible check policy (under the new law) was later amended and notice thereof was published in its commentary issued with the amended regulation. The Office notifies the remitter by letter that the registration is being cancelled because of an uncollectible check. 37 CFR 201.6 (1981), 46 F.R. 30221 (June 5, 1981).

¹¹ Cancelled numbers represent the majority of the cancellations made. Altogether (except for one class of claims, serials) the Office has cancelled approximately 4300 registrations since Jan. 1, 1976. Of these, it has cancelled at least 130 claims for lack of substantive validity.

¹² 17 U.S.C. 410 (b)(1976).

¹³ See generally, Berger, Authority of the Register of Copyrights To Reject Applications For Registration, Copyright Law Revision Study No. 18, 86th Cong., 2d Sess. (Comm. Print 1960) (hereafter, "Berger, Study No. 18").

¹⁴ 17 U.S.C. 410(c)(1976).

¹⁵ Berger, Study No. 18 at 95.

⁴ Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 1965 Revision Bill, Copyright Law Revision, Part 6, 89th Cong., 1st Sess. 120 (Comm. Print 1965) [hereinafter cited as "1965 Supplementary Report of the Register"].

⁵ For example, only Section Heads and higher ranking Copyright Office officials can authorize cancellation of a registration.

⁶ 37 CFR 201.5(a)(2)(1976).

completed registrations will be cancelled. The proposed regulations also provide that the copyright claimant will be given 30 days to present arguments against cancellation, where the proposed action is based on substantive grounds (i.e., the work is not copyrightable subject matter or fails to satisfy the legal and formal requirements of the Act). Where cancellation is required on the ground of an uncollectible check, the Office will inform the claimant that the claim has been cancelled for failure to pay the statutory fee.¹⁶ Cancellation of registration numbers and reassignment of another number, to correct classification errors will also be taken without prior notification, but the copyright claimant will receive a corrected certificate of registration.

As a rule, a cancellation action will be initiated solely because the Office itself has discovered a material error in the registration, which should have been noticed by the examiner before registration. By this regulation, the Office intends to confirm existing practices. It does not intend to establish a new procedure for adversarial review of completed registrations. The overwhelming bulk of registrations are made free from error and are entitled to prima facie evidentiary weight if made before or within five years of first publication. The Office does not invite, and will generally not respond favorably to requests to cancel a completed registration by a party other than the owner of copyright.

With respect to the Regulatory Flexibility Act, the Copyright Office takes the position this Act does not apply to Copyright Office rulemaking. The Copyright Office is a department of the Library of Congress and is part of the legislative branch. Neither the Library of Congress nor the Copyright Office is an "agency" within the meaning of the Administrative Procedure Act of June 11, 1946, as amended (title 5, Chapter 5 of the U.S. Code, Subchapter II and Chapter 7). The Regulatory Flexibility Act consequently does not apply to the Copyright Office since that Act affects only those entities of the Federal Government that are agencies as defined in the Administrative Procedure Act.¹⁷

¹⁶ Because copies or phonorecords deposited from registration are the property of the United States Government [17 U.S.C. 704(a)], they are not returned if the registration is cancelled.

¹⁷ The Copyright Office was not subject to the Administrative Procedure Act before 1978, and it is now subject to it only in areas specified by section 701(d) of the Copyright Act (i.e., "all actions taken by the Register of Copyrights under this title [17].") It is not subject with respect to the making of copies of copyright deposits. [17 U.S.C. 706(b)]. The Copyright Act does not make the Office an "agency" as defined in the Administrative Procedure Act. For example, personnel actions taken by the Office are not subject to APA-FOIA requirements.

Alternatively, if it is later determined by a court of competent jurisdiction that the Copyright Office is an "agency" subject to the Regulatory Flexibility Act, the Acting Register of Copyrights has determined that this proposed regulation will have no significant impact on small businesses.

List of Subjects in 37 CFR Part 201

Claims to copyright, Copyright.

Proposed Regulations

PART 201—[AMENDED]

In consideration of the foregoing, the Copyright Office proposes to amend Part 201 of 37 CFR, Chapter II.

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

Authority: Sec. 702, 90 Stat. 2541, 17 U.S.C. 702; § 201.7 also issued under 17 U.S.C. 408, 410.

2. By adding a new § 201.7, to read as follows:

§ 201.7 Cancellation of completed registrations.

(a) *Definition.* Cancellation is an action taken by the Copyright Office where, in order to correct an error of the Office, either the registration for the work is eliminated on the ground the registration is invalid as a matter of law, or the registration number is eliminated and a new registration is made for the work under a different class and number.

(b) *General policy.* The Copyright Office will cancel a completed registration only in those cases where: (1) it is clear that no registration should have been made because the work does not constitute copyrightable subject matter or fails to satisfy the other legal and formal requirements for obtaining copyright; (2) registration may be authorized but the application, deposit material, or fee does not meet the requirements of the law and Copyright Office regulations, and the Office is unable to get the defect corrected; or, (3) an existing registration in the wrong class is to be replaced by a new registration in the correct class.

(c) *Circumstances under which a registration will be cancelled.* (1) Where the Copyright Office becomes aware after registration that a work is not copyrightable, either because the authorship is de minimis or the work does not contain authorship subject to copyright, the registration will be cancelled. The copyright claimant will be notified by correspondence of the proposed cancellation and the reasons therefor, and be given 30 days, from the date the Copyright Office letter is mailed, to show cause in writing why the cancellation should not be made. If the claimant fails to respond within the 30 day period, or if the Office, after considering the response, determines

that the registration was made in error and not in accordance with title 17 U.S.C., Chapters 1 through 8, the registration will be cancelled.

(2) When a check received in payment of a registration fee is returned to the Copyright Office marked "insufficient funds" or is otherwise uncollectible, the Copyright Office will immediately cancel any registration(s) for which the dishonored check was submitted and will notify the remitter the registration has been cancelled because the check was returned as uncollectible.

(3) Where registration is made in the wrong class, the Copyright Office will cancel the first registration, replace it with a new registration in the correct class, and issue a corrected certificate.

(4) Where registration has been made for a work which appears to be copyrightable but after registration the Copyright Office becomes aware that, on the administrative record before the Office, the statutory requirements have apparently not been satisfied, or that information essential to registration has been omitted entirely from the application or is questionable, or correct deposit material has not been deposited, the Office will correspond with the copyright claimant in an attempt to secure the required information or deposit material or to clarify the information previously given on the application. If the Copyright Office receives no reply to its correspondence within 30 days of the date the letter is mailed, or the response does not resolve the substantive defect, the registration will be cancelled. The correspondence will include the reason for the cancellation. The following are instances where a completed registration will be cancelled unless the substantive defect in the registration can be cured:

(i) Eligibility for registration has not been established;

(ii) A work was registered more than 5 years after the date of first publication and the deposit copy or phonorecord does not contain a statutory copyright notice;

(iii) The deposit copies or phonorecords of a work published before January 1, 1978 do not contain a copyright notice or the notice is defective;

(iv) A renewal claim was registered after the statutory time limits for registration had apparently expired;

(v) The application and copy(s) or phonorecord(s) do not match each other and the Office cannot locate a copy or phonorecord as described in the application elsewhere in the Copyright Office or the Library of Congress;

(vi) The application for registration does not identify a copyright claimant or it appears from the transfer statement on the application or elsewhere that the

² Error; line should read:
"16 Because copies or phonorecords deposited for"

"claimant" named in the application does not have the right to claim copyright;

(vii) A claim to copyright is based on material added to a preexisting work and a reading of the application in its totality indicates that there is no copyrightable new material on which to base a claim;

(viii) A work subject to the manufacturing provisions of the Act of 1909 was apparently published in violation of those provisions;

(ix) For a work published after January 1, 1978 the only claimant given on the application was deceased on the date the application was certified;

(x) A work is not anonymous or pseudonymous and statements on the application and/or copy vary so much that the author cannot be identified; and

(xi) Statements on the application conflict or are so unclear that the claimant cannot be adequately identified.

(d) *Minor substantive errors.* Where a registration includes minor substantive errors or omissions which would generally have been rectified before registration, the Copyright Office will attempt to rectify the error through correspondence with the remitter. Except in those cases enumerated in paragraph (c) of this section, if the

Office is unable for any reason to obtain the correct information or deposit copy the registration record will be annotated to state the nature of the informality and show that the Copyright Office attempted to correct the registration.

Dated: August 6, 1985.

Donald C. Curran,
Acting Register of Copyrights.

Approved:

Daniel J. Boorstin,
The Librarian of Congress.

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