



ANNOUNCEMENT

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

FINAL RULE

BERNE CONVENTION IMPLEMENTATION ACT; TECHNICAL AMENDMENTS

The following excerpt is taken from Volume 56, Number 38 of the Federal Register for Tuesday, February 26, 1991 (pp. 7814-7815)

37 CFR Parts 201 and 202

(Docket No. RM 89-1)

Berne Convention Implementation Act; Technical Amendments

AGENCY: Library of Congress, Copyright Office.

ACTION: Final rule.

SUMMARY: The Berne Convention Implementation Act of 1988 (Pub. L. 100-568, 102 Stat. 2853) which became effective March 1, 1989, amended the Copyright Act to conform United States law to the requirements of the Berne Convention. The Implementation Act eliminated the mandatory notice of copyright for works first published on or after March 1, 1989. The Copyright Office is amending any regulations affected by the Berne Implementation Act.

EFFECTIVE DATE: February 26, 1991.

FOR FURTHER INFORMATION CONTACT: Dorothy Schrader, General Counsel, Copyright Office, Library of Congress, Washington, DC 20559, Telephone (202) 707-8380.

SUPPLEMENTARY INFORMATION: On March 1, 1989 the United States became a member of the Berne Convention for the Protection of Literary and Artistic Works, as revised at Paris on July 24, 1971. The Berne Convention Implementation Act of 1988 (Pub. L. 100-568, 102 Stat. 2853; October 31, 1988), enacted to amend the Copyright Act to conform it to the requirements of the Berne Convention in order to permit the United States to adhere to Berne, also became effective on March 1, 1989. The

Copyright Office reviewed its existing regulations to determine which, if any, are affected by the Implementation Act. The Office has concluded that the Implementation Act requires only minimal, non-substantive changes in the Copyright Office regulations. The adjustments are described below.

1. Notice of Copyright for Contributions to Periodicals

Section 401 of the Copyright Act formerly provided that whenever a work protected under title 17 U.S.C. is published by authority of the copyright owner, a notice of copyright shall be placed on all publicly distributed copies from which the work can be visually perceived with or without the aid of a machine or device. The Berne Implementation Act made the use of a copyright notice voluntary for works first published on or after March 1, 1989. This statutory amendment impacts § 202.3(b)(5)(i)(D) of the regulations concerning group registration of contributions to periodicals. The existing regulation requires, as a condition to group registration, that each of the contributions must bear a separate copyright notice. The regulation also requires that the name of the owner of copyright in each work (or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner) must be the same in each notice. In view of its inconsistency with the amended statute, § 202.3(b)(5)(i)(D) is amended to provide that the notice requirement applies only to works first published before March 1, 1989.

2. Notice and Mandatory Deposit

Section 407(e) of the Copyright Act authorizes the Library of Congress to copy unpublished transmission programs off the air under limited conditions. Before March 1, 1989, if the transmission program was declared to be published in the United States and contained a notice of copyright, the Library of Congress was authorized to retain the copy in satisfaction of section 407 (a) and (b). In eliminating the notice requirement, the Berne Implementation Act makes all works published in the United States on or after March 1, 1989, in which copyright is claimed, subject to deposit in the Library of Congress, whether or not they bear a copyright notice. Subsections 202.22(c)(7) and 202.22(c)(8)(ii) of the regulations concerning retention of published transmission programs and conversion of a notice by the Library that a program is being copied off the air to a demand under subsections 407(a) and 407(b) when it is learned that the transmission program is published, were predicated on publication of the copies with notice of copyright. These subsections are being amended to remove all reference to notice of copyright.

3. Affixation of Notice

Section 201.20 of the regulations governs the methods of affixation of the notice and acceptable positions for placing the notice. This regulation was issued pursuant to section 401(c) of the Copyright Act of 1976, title 17 of the U.S. Code, which is unchanged by the Berne Implementation Act of 1988. That is, although the Berne Implementation Act transforms notice from a mandatory provision to an optional provision, if the copyright owner uses notice of

copyright, the owner must affix the notice in the statutory form and position to obtain an evidentiary benefit. As provided in the statute, the regulations issued by the Copyright Office governing affixation and position of the notice provide examples of acceptable notice, but the specifications of the regulation are not exhaustive.

The Office has determined therefore that no change need be made in § 201.20 of the regulations.

4. Jukebox Compulsory License

Section 201.16 of the regulations prescribes the procedures to be followed by operators of coin-operated phonorecord players ("jukeboxes") who seek to obtain a compulsory license, as applicable, under section 116 of the Copyright Act, title 17 of the U.S. Code. In the Berne Implementation Act of 1988, Congress adopted new section 116A that encourages the representatives of authors and jukebox operators to negotiate licenses or submit to arbitration, in lieu of resort to a compulsory license. If negotiations fail, the statute provides that the compulsory license provisions of section 116 would come into operation, based upon a finding by the Copyright Royalty Tribunal.

On March 28, 1990, the Copyright Royalty Tribunal announced the suspension of the jukebox compulsory license through December 31, 1999, based on a finding that a negotiated license is in effect covering a quantity of music not substantially smaller than the quantity of music performed on jukeboxes from March 1, 1988 to March 1, 1989, the last year of the compulsory license before the Berne Implementation Act took effect. The Copyright Office had earlier determined that it would not process any 1990 applications for a compulsory license, pending the decision of the Copyright Royalty Tribunal. Therefore, no compulsory licenses were issued in calendar 1990, and the suspension is in effect for 10 years. Jukebox operators must obtain a license from the copyright owner or the performing rights societies. Under the agreement between the Amusement and Music Operators of America (AMOA) -- and the three performing rights societies, the 1990 license fee was \$275 for the first jukebox, \$55 each for jukeboxes 2-10, and \$48 each for eleven or more jukeboxes. The license fee will be adjusted for 1991 and subsequent years under a formula that takes account of the number of jukeboxes licensed in relation to the "benchmark" royalty pool agreed to by the parties.

The Copyright Office is amending section 201.16 of the regulations to make clear that the compulsory license is suspended through December 31, 1999.

The regulations continue to govern procedures for jukebox operators belatedly seeking to comply with the compulsory license for calendar year 1989 and earlier, and the regulations may apply in the year 2000, depending on the finding of the Copyright Royalty Tribunal regarding the existence of voluntary licenses in sufficient quantities.

With respect to the Regulatory Flexibility Act, the Copyright Office takes the position that this Act does not apply to Copyright Office rulemaking. The Copyright Office is a department of the Library of Congress, which is part of the legislative branch. Neither the Library of Congress nor the Copyright Office is an "agency" within the meaning of the Administrative Procedure Act of June 11, 1946, as amended (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.¹

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

List of Subjects in CFR Parts 201 and 202:

Copyright registration.

Final Regulations

In consideration of the foregoing, parts 201 and 202 of 37 CFR chapter II are amended as follows:

PART 201—(AMENDED)

1. The authority citation for part 201 continues to read in part as follows:

Authority: Section 702, 90 Stat. 2541; 17 U.S.C. 702; * * * § 201.16 is also issued under 17 U.S.C. 116.

2. Section 201.16(a) is revised to read as follows:

§ 201.16 [Amended]

(a) *General.* This section prescribes the procedures to be followed by

¹ The Copyright Office was not subject to the Administrative Procedure Act before 1978, and it is now subject to it only in areas specified by section 701(d) of the Copyright Act (i.e. "all actions taken by the Register of Copyrights under this title [17], except with respect to the making of copies of copyright deposits" [17 U.S.C. 702(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.

operators of coin-operated phonorecord players who wish to obtain a compulsory license for the public performance of nondramatic musical works, and by the Copyright Office in issuing certificates, under section 116 of title 17 of the United States Code as amended by Public Law 94-553. The terms "operator" and "coin-operated phonorecord player" have the meanings given to them by paragraph (e) of that section. In calendar 1990 and thereafter through December 31, 1999, this compulsory license is suspended by decision of the Copyright Royalty Tribunal pursuant to section 116A of title 17 of the United States Code, as amended by the Berne Implementation Act of 1988, Public Law 100-568. During this period, operators of coin-operated phonorecord players who publicly perform nondramatic musical works must obtain a negotiated license from the copyright owner or duly authorized agent such as a performing rights society.

PART 202—(AMENDED)

3. The authority citation for part 202 is amended by adding the following citation:

Authority: Section 702, 90 Stat. 2541; 17 U.S.C. 702; * * * §§ 202.3 and 202.22 are also issued under 17 U.S.C. 407 and 408.

4. Section 202.3(b)(5)(i)(D) is revised to read as follows:

§ 202.3 [Amended]

(b) * * *
(5) * * *
(i) * * *

(D) Each of the works, if first published before March 1, 1989, bore a separate copyright notice, and the name of the owner of copyright in each work (or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner) was the same in each notice; and

5. Section 202.22(c) (7) and (8) are revised to read as follows:

§ 202.22 [Amended]

(c) * * *

(7) If it is declared that the program was published at the time of transmission, the Library of Congress is entitled under this section to retain the copy to satisfy the deposit requirement of section 407(a) of title 17 of the United States Code.

(8) The Library of Congress in making fixations of unpublished transmission programs transmitted by commercial broadcast stations shall not do so without notifying the transmitting organization or its agent that such activity is taking place. In the case of network stations, the notification will be sent to the particular network. In the case of any other commercial broadcasting station, the notification will be sent to the particular broadcast station that has transmitted, or will transmit, the program. Such notice shall, if possible, be given by the Library of

Congress prior to the time of broadcast. In every case, the Library of Congress shall transmit such notice no later than fourteen days after such fixation has occurred. Such notice shall contain:

(i) The identification, by title and time of broadcast, of the transmission program in question;

(ii) A brief statement asserting the Library of Congress' belief that the transmission program has been, or will be by the date of transmission, fixed and is unpublished, together with language converting the notice to a

demand for deposit under section 407 (a) and (b) of title 17 of the United States Code, if the transmission program has been published in the United States.

* * * * *

Dated: February 14, 1991.
Ralph Oman,
Register of Copyright.

Approved:
James H. Billington,
The Librarian of Congress.

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