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The Copyright Office and the Formal Requirements of Registration of Claims to Copyright

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THE COPYRIGHT OFFICE AND THE FORMAL REQUIREMENTS OF REGISTRATION OF CLAIMS TO COPYRIGHT

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I. INTRODUCTION

The Copyright Office (the "Office") is one of the major departments of the Library of Congress; as such, it is in the legislative rather than the executive branch of the federal government. It is located in the Madison Building at 101 Independence Ave. S.E. on Capitol Hill in Washington, D.C. There are over 500 employees, and the Office occupies approximately three-quarters of the fourth floor and one-fifth of the fifth floor of the building. In the middle of the fourth floor is the catalog of copyright entries. It consists of cataloging information on all of the registrations that have been made between 1870 and the present and information about transfers and other documents pertaining to copyright that have been recorded in the Copyright Office. There are records of many millions of copyright claims. In 1991, we registered more than 650,000 claims to copyright and recorded almost 17,000 documents that contained more than 345,000 titles.

There are five major divisions of the Copyright Office. They are the Examining Division, the Receiving and Processing Division, the Cataloging Division, the Information and Reference Division and the Licensing Division. In addition, there is the Register's Office which includes the Office of the General Counsel.

The principal functions of the Copyright Office are:

(1) Registering claims to copyright as well as recording documents that pertain to copyrights; these documents include assignments and other transfers of copyright ownership, wills, mortgages, security interest and the like;[1]

(2) Preparing and maintaining records, files and indexes that deal with copyright registrations and documents that have been recorded;[2]

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1. 37 C.F.R. § 201.4(c) (1991).

2. 17 U.S.C. § 705 (1988). The Copyright Office's records consist of 41 million cards covering the period of 1870 through 1977; registrations made from January 1, 1978, are available online.

(3) Acquiring works for the collections of the Library of Congress;[3]

(4) Furnishing, for a fee, information which requires a search in the indexes and records of the Office and assisting outside searchers in the use of the Office's records;[4]

(5) Supplying information about Copyright Office practices and procedures and about provisions of the law;[5] and

(6) Advising and giving testimony before committees of Congress dealing with proposed amendments to the copyright law, preparing studies that Congress requests on difficult and controversial areas of copyright law, and collaborating and assisting the State Department and other executive branch agencies about matters concerning international copyright.

II. EXAMINATION OF CLAIMS

The focus of this paper is the registration process. Section 410(a) of Title 17, the copyright law of the United States, directs the Register of Copyrights to register any claim to copyright that constitutes copyrightable subject matter and meets the other legal and formal requirements of the Copyright Act.[6] Section 410(b) provides that "[i]n any case in which the Register of Copyrights determines that . . . 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."[7] Examination of claims to copyright entails studying (1) the copies, phonorecords or identifying material of works submitted for registration,[8] (2) the application itself,[9] and (3) all other material and correspondence submitted with the claim.

Regardless of the nature of the work that is submitted for registration, the same standard is applied to all. The questions that an examiner asks are: (1) does the material fall within the subject matter of

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3. *Id.* § 704(b). In 1990, the Copyright Office transferred almost 500,000 items that were deposited for registration and almost 350,000 items that were deposited under section 407 of the copyright law (the mandatory deposit section). *Cf. id.* § 407. The estimated value of these materials was almost 11 million dollars.

4. *Id.* § 705(c); 37 C.F.R. § 201.2(a)(1) (1991).

5. 37 C.F.R. § 201.2(a)(1) (1991). However, the regulations of the Copyright Office prohibit employees from giving specific legal advice on the rights of persons, whether in connection with particular uses of copyrighted works, cases of alleged foreign or domestic copyright infringement, contracts between authors and publishers, or other matters of a similar nature. *Id.* § 201.2(a)(3).

6. 17 U.S.C. § 410(a) (1988).

7. *Id.* § 410(b).

8. *Id.* § 408(b).

9. *Id.* § 409.

copyright? and (2) if the material is potentially copyrightable subject matter, does it represent an original work of authorship?[10] That is, is the work original in the sense that it has not been copied from another, and is there an appreciable amount of creative authorship to justify registration?

There are a number of guidelines that are available to examiners who make these decisions. First, pursuant to section 702 of the copyright law,[11] the Copyright Office has promulgated regulations covering registration of original works of authorship.[12] The Copyright Office has also developed a manual of examining practices for the use of its staff in making determinations about copyright registration—the *Compendium of Copyright Office Practices*.[13] These volumes contain the Office's interpretation of the copyright law and set forth basic practices in accordance with its interpretation of the law regarding registration.

In addition, each section of the Examining Division has detailed practices relating to its subject matter. These practices are generally not made available to the public. However, the Office does publish information circulars on different categories of works, e.g., Circular 65, "Copyright Office Registration for Automated Databases."

Of course, it is ultimately for a court to decide whether a work is protected under the copyright law. However, a certificate of registration is given great weight,[14] and an applicant who has had his claim denied faces an uphill battle in the courts. Therefore, the practices of the Office become very important.

In the registration of claims, a fundamental objective of the Copyright Office is to establish a "clear, accurate, easily understandable public record" and to exclude from that record any unjustified or otherwise insufficient claims.[15] The Office takes its responsibility seriously in part because the law states "[i]n any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity

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10. *See id.* § 102(a).

11. *Id.* § 702.

12. 37 C.F.R. § 202 (1991).

13. *See generally* LIBRARY OF CONGRESS COPYRIGHT OFFICE, I COMPENDIUM OF COPYRIGHT OFFICE PRACTICES (1973) [hereinafter I COMPENDIUM]; LIBRARY OF CONGRESS COPYRIGHT OFFICE, II COMPENDIUM OF COPYRIGHT OFFICE PRACTICES (1984) [hereinafter II COMPENDIUM]. Volume II of the *Compendium* is available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402-9371. Volume I may be obtained from the National Technical Information Service, U.S. Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161.

14. *See* 17 U.S.C. § 410(c) (1988).

15. 53 Fed. Reg. 21,919 (1988).

of the copyright and of the facts stated in the certificate."[16] This provision alone requires the Office to maintain a standard of accuracy with regard to both the registrability of the work and as to whether the other formal and legal requirements of the law have been met.

III. GENERAL STANDARD OF COPYRIGHTABILITY

In determining whether a claim can be registered, the Copyright Office applies established standards of copyrightability. Although the present law substantially changed the copyright system in the United States, it did not change the standards of copyrightability. Copyright protects "original works of authorship."[17] The legislative reports state:

> The two fundamental criteria of copyright protection—originality and fixation in tangible form—are restated in the first sentence of this cornerstone provision. The phrase "original works of authorship," which is purposely left undefined, is intended to incorporate *without change* the standard of originality established by the courts under the present [1909] copyright statute. This standard does not include requirements of novelty, ingenuity, or aesthetic merit, and there is no intention to enlarge the standard of copyright protection to require them.[18]

Section 103 complements section 102 and provides that "[a] compilation or derivative work is copyrightable if it represents an 'original work of authorship.' "[19] Compilations of fact, including databases, fall within the section 103 subject matter; they are works that result "from a process of selecting, bringing together, organizing, and arranging previously existing material of all kinds, regardless of whether the individual items in the material have been or ever could have been subject to copyright."[20] Compilations are generally considered "literary works." "The term 'literary works' does not connote any criterion of literary merit or qualitative value: it includes . . . compilations of data."[21] Section 101 of the law provides that a compilation is copyrightable if the work is "formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."[22] Thus, the standards for both section 102 and section 103 works are the same.

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16. 17 U.S.C. § 410(c) (1988).
17. *Id.* § 102(a).
18. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 51 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664 [hereinafter H.R. REP. NO. 1476] (emphasis added).
19. *Id.* at 57, *reprinted in* 1976 U.S.C.C.A.N. at 5670.
20. *Id.*
21. *Id.* at 54, *reprinted in* 1976 U.S.C.C.A.N. at 5667.
22. 17 U.S.C. § 101 (1988).

"Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity . . . . [T]he requisite level of creativity is extremely low . . . ."[23] Facts, of course, are not copyrightable because they do not owe their origin to an act of authorship.[24] These standards are reflected in the *II Compendium*, which states, to be copyrightable a work must be an original work of authorship; thus, it must contain at least a certain minimum of original creative expression.[25]

With respect to compilations, it states that a compilation is registrable if its selection, coordination, or arrangement as a whole constitutes an original work of authorship, and that

> the greater the amount of material from which to select, coordinate, or order, the more likely it is that the compilation will be registrable. Where the compilation lacks a certain minimum amount of original authorship, registration will be refused. Any compilation consisting of less than four selections is considered to lack the requisite original authorship.[26]

The *II Compendium* lists two examples: (1) the selection and ordering of twenty of the best short stories of O. Henry would be registrable as a compilation; and (2) where all three of an author's plays were previously published and the present publication, and therefore the present claim, is based on a compilation of the three plays, no registration is possible.[27]

The *Compendium* contains two other relevant sections:

(1) *Telephone books, directories, price lists, and the like.* Telephone books, directories, price lists, and the like may be registered if they contain sufficient authorship in the form of compilation or other copyrightable material.[28]

(2) *Coordination and arrangement.* Reference to "coordinated" or "arranged," as used in the definition of a "compilation" in 17 U.S.C. section 101, does not refer to format, but to the original ordering or grouping of the items.[29]

The Copyright Office applies the same standards of originality to all kinds of authorship submitted for registration. Like works in other

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23. Feist Publications, Inc. v. Rural Tel. Serv. Co., 111 S. Ct. 1282, 1287 (interim ed. 1991) (citation omitted).

24. *Id.* at 1289.

25. II COMPENDIUM, *supra* note 13, § 202.02.

26. *Id.* § 307.01.

27. *Id.*

28. *Id.* § 307.02.

29. *Id.* § 307.03.

categories that do not contain sufficient copyrightable material, literary works (including compilations of data) submitted for registration that do not contain sufficient copyrightable authorship are denied registration.[30] In examining claims, the Office may take notice of matters of general knowledge, and it may use such knowledge to question applications that appear to contain inaccurate or erroneous information.[31] Additionally, the Copyright Office has the "rule of doubt" standard incorporated into its practice. "The Copyright Office will register the claim even though there is a reasonable doubt about the ultimate action which might be taken under the same circumstances by an appropriate court" with respect to whether the material deposited for registration constitutes copyrightable subject matter.[32]

Before the Supreme Court's decision in *Feist Publications, Inc. v. Rural Telephone Service Co.*,[33] the Copyright Office had registered white pages of telephone directories and several similar type compilations under its "rule of doubt." This was because a number of courts had upheld the copyrightability of some factual compilations on the theories of "sweat of the brow" or "industrious collection."[34] Thus, for example, in September, 1985 after much debate, the Copyright Office registered a claim in a database that consisted of the National Republican Congressional Committee's donor lists which the Federal Election Campaign law requires to be filed with the Federal Election Committee. This list consisted of all those who donated more than $250; it was arranged sequentially by zip code order and alphabetically within a zip code. In issuing the certificate for that compilation, the Copyright Office noted its "uncertainty" and noted its desire for judicial guidance on the copyrightability of compilations of data. The *Feist* decision has provided that guidance.

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30. The cases that the Copyright Office uses as authority include: *Bailie v. Fisher*, 258 F.2d 425 (D.C. Cir. 1958); *MyIntyre v. Double-A Music Corp.*, 179 F. Supp. 160 (S.D. Cal. 1959); *Smith v. George E. Muehlebach Brewing Co.*, 140 F. Supp. 729 (W.D. Mo. 1956); *E.H. Tate Co. v. Jiffy Enters.*, 16 F.R.D. 571 (E.D. Pa. 1954).

31. II COMPENDIUM, *supra* note 13, § 108.05(b).

32. *Id.* § 108.07.

33. 111 S. Ct. 1282 (interim ed. 1991).

34. *See, e.g.*, Jeweler's Circular Publishing Co. v. Keystone Publishing Co., 281 F. 83 (2d Cir. 1922).

> The right to copyright a book upon which one has expended labor in its preparation does not depend upon whether the materials which he has collected consist or not of matters which are publici juris, or whether such materials show literary skill or originality, either in thought or in language, or anything more than industrious collection. The man who goes through the streets of a town and puts down the names of each of the inhabitants, with their occupations and their street number, acquires material of which he is the author.

Id. at 88.

The practices of the Copyright Office state that there must be at least a modicum of originality on the part of the compiler in the selection and/or arrangement of the material comprising the compilation. "Selection" in this context may refer to the choice of less than all of the data in a given body of relevant material, regardless of whether it is taken from one source or from multiple sources. "Arrangement" or "coordination" refers to the ordering or grouping of data into lists or categories that go beyond the mere mechanical grouping of data, such as, for example, the alphabetical, chronological, or sequential listings of data. "Moreover, even if there is sufficient selection and/or arrangement authorship, the extent or size of the resulting compilation must be ample enough to justify registration. A de minimis compilation, albeit one that represents original selection and/or arrangement authorship, is not registrable."[35] Even before the *Feist* decision, certain compilations were rejected; these included such things as simple membership lists that were arranged alphabetically, mere lists of prices, standard organizational charts, and mere transcriptions of public records.

After the *Feist* decision, the Copyright Office established a committee to consider the impact of that decision on existing policies and practices. The committee initially established certain guidelines, and, as works that present additional questions are submitted, the committee reconvenes. The immediate result is that the Copyright Office is no longer registering any claims limited to the white pages of telephone directories; similar works are also rejected. Thus, directories that contain only names, addresses and telephone numbers will not be registered. However, if there are an appreciable number of added features, registration may be possible.

The Copyright Office is also concerned about how a claim is described, and authorship statements that describe the claim as "listings," "revised listings," or "updated data" and the like, even when the compilation as a whole may represent copyrightable authorship, will be refused. This is because mere listing of contents or ingredients have been held to be uncopyrightable because they are forms of expression dictated solely by functional considerations.[36] The Office also relies on *Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc.*[37] where the court held that the language on an envelope was like a listing of ingredients and therefore was not protectable in accordance with Copyright Office regulations. The court noted that the phrases printed on

35. Literary Section Practices. These are drafted by the two Literary Section Heads and issued with approval of the Chief of the Examining Division (unpublished) (on file with author).

36. Kitchens of Sara Lee v. Nifty Foods Corp., 266 F.2d 541 (2d Cir. 1959); *see also* 37 C.F.R. § 202.1(a) (1991).

37. 634 F. Supp. 1699 (W.D. Pa. 1986).

the envelopes were generic in nature and lacked the minimal degree of creativity necessary for copyright protection.[38] In *Ashton-Tate Corp. v. Ross*,[39] the court held that a one-page handwritten list of user commands that were incorporated as part of the user interface was not a copyrightable part of the computer program. "The list simply does not qualify for copyright protection."[40]

In general, as Justice O'Connor suggested, most compilations will still be protected by copyright, and the Copyright Office is not finding large categories of works that are no longer registrable. There are exceptions to this general rule: (1) street directories where only minimal additional information such as cross streets have been added; (2) business directories arranged numerically by standard industrial classification code, then alphabetically by company name within each code, where each entry includes only the company name, address, phone number, plus the number of employees; and (3) annual cumulations where the compilation is only information or data from previously published editions (e.g., monthly or quarterly editions of the same work), and (4) exhaustive listings of parts and catalogs of inventories.

In many cases, the Copyright Office will not know whether the compilation meets the *Feist* test. In such cases, the Office will write to the applicant asking whether there is copyrightable authorship upon which to base a claim. The typical letter would include the following language:

> Until recently . . . the requirement for originality had been blurred by some courts to include not only the traditional concept of originality (i.e., not copied from someone else's work and representing an appreciable amount of original creative expression) but also the so-called "sweat of the brow" theory, referring to works that result from an author's hard work or industriousness in collecting the materials (even though the resulting compilation might be mechanical in nature). . . .
>
> In March, 1991, the Supreme Court . . . held that the "sweat of the brow" theory was not an appropriate test for copyrightability: the mere collection of facts is not copyrightable, regardless of how much time or effort may have been required in putting a work together. Instead, copyright protection is available only if there is sufficient originality in the way the material is selected, coordinated, or arranged so that the resulting compilation is "an original work of authorship" within the meaning of the copyright statute. Thus, listings that are exhaustive and that are arranged in a mechanical fashion (e.g., alphabetical or chronological arrangements) are not copyrightable. The Court concluded . . .

38. *Id.* at 772.

39. 916 F.2d 516 (9th Cir. 1990), *aff'g* 728 F. Supp. 597 (N.D. Cal. 1989).

40. *Id.* at 522.

that originality, not "sweat of the brow," is the touchstone of copyright protection in directories and other fact based works.

As far as your work is concerned, it is not clear whether the selection and/or arrangement of entries meets the requirements of original compilation authorship. If you believe the work contains copyrightable compilation authorship . . . please explain how the work was created and on what basis you believe it is copyrightable:

(1) Describe any selection authorship inherent in the creation of this compilation—

(a) Is this an exhaustive listing of all items available, or were some used here and others not included?

(b) If some items were excluded, what factors determined whether an item was included?

(2) Is there some particular originality in the way these entries are arranged? Is there a conscious system in the presentation or order . . .?

IV. Effect of Refusal by the Copyright Office

When a claim to copyright is rejected by the Office, the applicant may appeal the Office's decision. The head of the appropriate section will review the request for reconsideration and make a determination on whether the rejection was appropriate. The Chief of the Examining Division makes the final determination. Appeals for reconsideration must be in writing. The Office's refusal to register is subject to review under the Administrative Procedure Act where the standard for review is abuse of discretion. A mandamus action to compel registration is not possible.[41]

Except for Berne Convention works whose country of origin is not in the United States, registration or refusal by the Copyright Office is a prerequisite to an infringement action. The Office's refusal to register is generally held to be entitled to great weight. A refusal that has completed the administrative review process has been held by some courts to be afforded greater weight. For example, in *Jon Woods Fashions, Inc. v. Curran*,[42] the court stated the Register's decision was entitled to "heightened deference" where the Register had reviewed the same application twice.

41. Nova Stylings v. Ladd, 695 F.2d 1179, 1181 (9th Cir. 1983).

42. 1987-88 Copyright L. Dec. (CCH) ¶ 26,264 (S.D.N.Y. 1988).

APPENDIX

REGISTRATION PROCEDURES FOR DATABASES

I. Registration of databases
   A. Under the current Copyright Act, registration is generally permissive and may be made at any time during the term of copyright[43]
      1. Inducements to registration
         a. Prerequisite of filing an infringement suit
            Except for Berne Convention works whose country of origin is not the United States, a work must usually be registered before an action for copyright infringement can be instituted.[44]
         b. Prerequisite to certain remedies—statutory damages and attorney's fees
            Unless a work had been registered before a particular act of infringement occurred, the copyright owner cannot recover statutory damages and attorney's fees for that infringement. However, there is a three month grace period beginning on the date of publication and if an infringement occurs during that three month period and if registration is made before the end of the three months, the copyright owner is still eligible for statutory damages and attorney's fees.[45]
         c. Value of certificate of registration.
            For registrations made before or within five years after publication, the court is obliged to treat the certificate of registration as "prima facie evidence of the validity of the copyright and of the facts stated in the certificate."[46] For registrations made later, the court is free to give the certificate any evidentiary weight it chooses.[47]

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43. 17 U.S.C. § 408(a) (1988). For works published with the required notice of copyright before 1978, registration within 28 years of publication is necessary in order to file a renewal claim to secure the second copyright term of 47 years. *Id.* § 304(a). For pre-1978 copyrights, renewal registration must be made to obtain the second term. *Id.*

44. *Id.* § 411. *See, e.g.*, International Trade Management v. United States, 553 F. Supp. 402 (Cl. Ct. 1982); Proulx v. Hennepin Technical Ctrs. Sch. Dist. No. 287, 1981-83 Copyright L. Rep. (CCH) ¶ 425,389 (D. Minn. Dec. 31, 1981).

45. *See* Tannock v. Review Trading Corp., 231 U.S.P.Q. (BNA) 798 (D.N.J. 1986).

46. 17 U.S.C. § 410(c) (1988).

d. Constructive notice of transfers of ownership and other documents

For a document recorded by the Copyright Office to be given constructive notice, registration must have been made for the work to which the document pertains.[48] No document of transfer will be given priority in a conflict situation unless the work has been registered.[49]

e. Omissions of copyright notice on works published between January 1, 1978 and March 1, 1989

Where the copyright notice was omitted from more than a few copies of a published work, to preserve the copyright the copyright owner *must* register the work within five years of the date the work was published with the notice omitted and a reasonable effort must be made to add the proper notice to all copies distributed to the public in the United States after the omission has been discovered.[50] For works reproduced in machine-readable copies (such as magnetic tapes, disks, ROMs, PROMs and the like), the following are examples of acceptable methods of affixation and position of the notice: "(1) A notice embodied in the copies in machine-readable form in such a manner that on visually perceptible printouts it appears either with or near the title, or at the end of the work; (2) A notice that is displayed at the user's terminal at sign on; (3) A notice that is continuously on terminal display; or (4) A legible notice reproduced durably, so as to withstand normal use, on a gummed or other label securely affixed to the copies or to a box, reel, cartridge, cassette, or other container used as a permanent receptacle for the copies."[51]

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48. *Id.* § 205(c).

49. *Id.* § 205(d).

50. *Id.* § 405(2).

51. 37 C.F.R. § 201.20(g) (1991). For works first published on or after March 1, 1989, the use of a copyright notice is voluntary. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853. However, use of a proper copyright notice is recommended. After March 1, 1989, the effective date of the Berne implementing legislation, if a proper notice is used on published copies to which a defendant had access, the court is directed to give "no weight" to an attempt to reduce damages on the grounds of innocent infringement. (There is a limited exception for libraries, educational institutions and public broadcasters).

f. Practical advantages
There are circumstances involving licensing, collection of royalties, keeping pirated goods out of the country, and other business transactions where it is convenient, if not essential, to have a copyright certificate.

B. Mechanics of registration[52]
1. What to send
In the same package or envelope send the following three elements to the Copyright Office, Library of Congress, Washington, D.C. 20559:
a. A properly completed application form;
b. The appropriate deposit material;
c. The required filing fee, which is currently twenty dollars.[53]
2. Which form to submit
Databases are considered literary works and should be registered on Form TX.[54]
3. Who may submit an application
Authors, claimants and owners of exclusive rights[55]

C. Deposit requirements
The law generally requires the deposit of two complete copies of the best edition for published works and one complete copy for unpublished works. The Copyright Office has issued very detailed regulations on deposit.[56] In certain instances the regulations allow the deposit of only one copy and in others they require or permit the deposit of identifying material. Deposit material is available for public inspection.[57]
1. Databases published in conventional formats are governed by the general deposit requirements.
2. Unpublished databases fixed in a CD-ROM format
The deposit should consist of one complete copy of the database in the CD-ROM format.
3. Databases published in a CD-ROM format
The deposit should consist of one complete copy of the

52. Registration of a claim to copyright is distinct from recordation of documents affecting allocation of rights in a work. *Compare* 17 U.S.C. § 408 (1988) *with* 17 U.S.C. § 205 (1988).
53. 37 C.F.R. § 202.3(b)(2), (b)(4)(ii) (1991).
54. *See id.* § 202.3(b)(4)(ii)(A).
55. *Id.* § 202.3(c)(1).
56. *See id.* § 202.20-.21.
57. 17 U.S.C. § 705(b) (1988).

entire CD-ROM package, including a complete copy of any accompanying operating software and any instructional manual, and a printed version of the work, if the work is published in print as well.

4. Databases fixed or published, only in the form of machine-readable copies other than CD-ROMs (e.g., floppy disks, magnetic tape, punched cards, chips, and the like)

The deposit should consist of one copy of identifying material.[58] Acceptable identifying material consists of one copy of the first and last twenty-five pages or equivalent units in visually perceptible form (e.g., a printout).[59] If the work contains separate and distinct files, representative portions of each file should be deposited—i.e., fifty data records or the entire file, whichever is less. Where the deposit consists of representative portions of separate files a separate descriptive statement giving additional information is required.[60] In the case of revised versions or updated databases, the deposit should include representative data records which have been added or modified. A description or reproduction of the copyright notice, if any, is also required.[61]

D. Group registration for automated databases

In general, registration for a published database extends only to the material first published on the date given as the date of publication on the application. Effective March 31, 1989, the Copyright Office significantly liberalized its registration requirements for automated databases, including their updates and revisions. Three months worth of revisions or updates may be registered on the basis of a single application, deposit, and filing fee if they constitute original works of authorship *and* if certain conditions are met.[62]

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58. *See* 37 C.F.R. § 202.20(c)(2)(viii)(A) (1991).

59. *See id.* § 202.20(c)(2)(viii)(E).

60. *See id.* § 202.20(c)(2)(viii)(B).

61. Database deposits should be humanly intelligible, preferably printouts written in a natural language. If the deposit is encoded, it should include a key or explanation of the code so that the examiner can determine whether there is copyrightable subject matter. When no key or explanation is provided, registration will be made under the rule of doubt upon receipt of a written confirmation that the work contains copyrightable authorship.

62. Registration of Claims to Copyright Registration and Deposit of Databases, 54 Fed. Reg. 13,177 (1989).

1. The conditions for group registration: "[a] All of the updates or other revisions are owned by the same copyright claimant; [b] All of the updates or other revisions have the same general title; [c] All of the updates or other revisions are similar in their general content, including their subject; [d] All of the updates or other revisions are similar in their organization; [e] Each of the updates or other revisions as a whole, if published before March 1, 1989, bears a statutory copyright notice as first published 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; [f] Each of the updates or other revisions if published was first published, or if unpublished was first created, within a three-month period in a single calendar year . . . ."[63]
2. The deposit for revised or updated versions of a database consists of fifty representative pages or equivalent units, or representative data records which have been marked to disclose (or do in fact disclose solely) the new material added on one representative publication date if published, or on one representative creation date, if unpublished.[64] A descriptive statement including the following is also required: "[i] The title of the database; [ii] A subtitle, date of creation or publication, or other information, to distinguish any separate or distinct data files for cataloging purposes; [iii] The name and address of the copyright claimant;"[65] "[iv] For each separate file, its name and content, including its subject, the origin(s) of the data, and the approximate number of data records it contains; [v] In the case of revised or updated versions . . ., information as to the nature and frequency of changes in the database and some identification of the location within the database or separate data files of the revisions;"[66] [vi] If the work bears a copyright notice which is embodied in the database in machine-

63. *Id.* at 13,181.
64. *Id.*
65. *Id.*
66. *Id.* at 13,182.

readable form, the content of the notice (as it appears in visually perceptible form), and the "manner and frequency with which it is displayed (e.g., at user's terminal only at sign-on, or continuously on terminal display, or on printouts, etc.);"[67] and [vii] If a visually perceptible notice is placed on any copies of the work or on any containers, a sample of such notice.[68]

For a group registration, the application must be on Form TX and must be completed in accordance with the "Special Instructions for Group Registration of Automated Databases" and its updates or revisions.[69]

E. Special relief from the deposit requirements.

1. In general

Special relief is a procedure which allows the Register of Copyrights to grant the requestor the option of depositing less than or other than that which is required under the general deposit provisions.[70] It was devised because it is impossible to establish exemptions or alternatives to cover all cases where the general deposit provisions of the statute might cause unnecessary hardship. Special relief is intended to respond to the legislative directive that deposit provisions be kept flexible "so that there will be no obligation to make deposits 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."[71]

2. Procedure

Requests for special relief must be made in writing to the Chief of the Examining Division and must be signed by or on behalf of the applicant. The request should set forth the specific reasons why special relief should be granted—e.g., confidentiality, financial burden, unavailability of the required deposit; it should also include the form of relief desired.[72]

3. Criteria for granting

The decision whether to grant special relief is based

67. *Id.*
68. *Id.*
69. *Id.* at 13,180. *See generally* 54 Fed. Reg. 13,177-82 (1989).
70. *See* 37 C.F.R. § 202.20(d) (1991); *see also* 17 U.S.C. §§ 407(c), 408(c) (1988).
71. H.R. REP. NO. 1476, *supra* note 18, at 151, *reprinted in* 1976 U.S.C.C.A.N. at 5767.
72. 37 C.F.R. § 202.20(d) (1991).

on the acquisition policies of the Library of Congress in force at the time the request is made and the examining and archival requirements of the Copyright Office. If denied, the applicant will be notified in writing of the reasons for the denial. When special relief is granted, the application is annotated as follows: "Special relief granted under 37 C.F.R. 202.20(d)."[73]

F. Deposit retention policy

The Copyright Office announced that a study of available storage space led the Librarian of Congress and the Register of Copyrights to modify the policy concerning the retention of copyright deposits. Under the modified policy, copies of published works that are deposited for copyright registration, with the exception of visual arts, will be retained no longer than five years from the date of deposit. Works of the visual arts will be kept ten or more years, if possible. "Unpublished deposits will continue to be kept for the term of copyright, . . . unless a facsimile reproduction has been made."[74]

II. Special handling of copyright applications

"Special handling" is a procedure established within the Copyright Office to reduce the length of time required to process an application for registration; it is granted at the discretion of the Register of Copyrights in a limited number of cases as a service to copyright applicants who have compelling reasons for expedited issuance of a certificate of registration.

A. Fee

The fee for this service is $200 for each application (plus a filing fee of $20 for copyright claims); the payment must be made payable to the Register of Copyrights.[75]

B. Procedure

Requests for special handling may be made in person in the Public Information Office or by mail. A special handling form or a letter containing answers to the following questions is required: Why is there an urgent need for special handling? If it is because of litigation, is the litigation

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73. *Id.*

74. 48 Fed. Reg. 12,862 (1983). To request full term retention of copyright deposits, see 37 C.F.R. § 202.23 (1991).

75. *See* 49 Fed. Reg. 39,741—39,742 (1984). Where there are multiple applications only one of which requires special handling and there is a *single* deposit for all of the applications, a fee of $50.00 per application will be assessed for the additional claims. To avoid such additional charges, separate deposits should be submitted.

actual or prospective? Are you or your client the plaintiff or defendant? What are the names of the parties and the name of the court where the action is pending or expected? It is also necessary to certify that the answers to these questions are correct to the best of your knowledge. Mailed requests *and any later correspondence concerning a special handling application* should be sent to:

Library of Congress
Department 100
Washington, D.C. 20540

The outside of the envelope and the letter inside should clearly indicate that it is a request for special handling. The request must be accompanied by a completed application, the required deposit material and fees.

III. Dealing with the Copyright Office on copyright claims

A. The scope of the Copyright Office's examination

The Copyright Office generally examines a work to see if it falls within the subject matter of copyright and to see if there is a sufficient amount of authorship present in the deposit material. The examiner also determines whether other legal formalities have been met. These include whether the deposit regulations have been complied with and whether the application has been completed properly. The examiner also looks for a copyright notice; if the work was published before 1978 without a copyright notice, the examiner will refuse registration.

B. Correction of errors and changes of certain information in earlier registration—supplementary registration

A supplementary registration may be made to correct certain errors or to amplify the information given in a copyright registration. To apply for a supplementary registration, a correctly completed Form CA should be submitted with a filing fee of $20.[76] Supplementary registrations cannot be used to reflect changes in ownership, division, allocation or licensing of rights in a work, or to correct errors in statements or notices appearing on copies or phonorecords of a work, or to reflect changes in the work itself. Supplementary registrations are not appropriate in adverse claim situations.

C. Refusal and appeals

If the Copyright Office refuses registration, an appeal to

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[76] See 17 U.S.C. § 408(d) (1988); 37 C.F.R. § 201.5 (1991).

the appropriate Section Head and ultimately the Chief of the Examining Division is possible. Appeals must be submitted in writing.

D. Failure to reply to Copyright Office correspondence
Failure to reply in a timely manner to a Copyright Office telephone call or letter may result in the case being closed without registration. If registration is then desired, a new application, deposit and fee will be required.

E. Cancellations
The Copyright Office will cancel a registration where it is clear that no registration should have been made.[77]

[77] Such circumstances are set forth in 37 C.F.R. § 201.7(c) (1991).