

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 202

[Docket No. 2012–3]

Registration of Copyright: Definition of Claimant

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Copyright Office proposes to amend its regulations governing the definition of a “claimant” for purposes of copyright registration by eliminating the footnote to the definition of a “claimant” in § 202.3(a)(3)(ii). The footnote currently extends the definition of a claimant to include individuals or entities that have obtained the contractual right to claim legal title to copyright in an application for copyright registration. This amendment would clarify that the copyright claimant must be either the author of the work, or a person or organization that has obtained ownership of all of the exclusive rights initially belonging to the author. The Copyright Office believes that the footnote creates considerable legal uncertainty while offering no clear benefits to the registration system. Removing it will foster the use of other available registration options that create a more meaningful public record.

DATES: Written comments are due July 16, 2012. Reply comments are due August 15, 2012.

ADDRESSES: The Copyright Office strongly prefers that comments be submitted electronically. A comment page containing a comment form is posted on the Copyright Office Web site at <http://www.copyright.gov/docs/claimantfn/>. The online form contains fields for required information including the name and organization of the commenter, as applicable, and the ability to upload comments as an attachment. To meet accessibility standards, all comments must be uploaded in a single file in either the Adobe Portable Document File (PDF) format that contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned document). The maximum file size is 6 megabytes (MB). The name of the submitter and organization should appear on both the form and the face of the comments. All comments will be posted publicly on the Copyright Office Web site exactly as they are received,

along with names and organizations. If electronic submission of comments is not feasible, please contact the Copyright Office at 202–707–8125 for special instructions.

FOR FURTHER INFORMATION CONTACT:

Robert Kasunic, Deputy General Counsel, Copyright Office, GC/I&R, P.O. Box 70400, Washington, DC 20024. Telephone: (202) 707–8380. Fax: (202) 707–8366.

SUPPLEMENTARY INFORMATION: The Copyright Act specifies certain conditions and requirements for copyright registration. See generally, 17 U.S.C. 408 and 409. Among the requirements of section 409 is that an application for registration must identify the name and address of the copyright claimant. The Copyright Act does not define the term “claimant.”

On January 5, 1978, the Copyright Office published interim regulations that include a definition of copyright “claimant” for purposes of copyright registration. 43 FR 965 (January 5, 1978) (hereinafter, “Interim Regulation”). Section 202.3(a)(3) states:

For the purposes of this section, a copyright *claimant* is either:

- (i) The author of the work;
- (ii) A person or organization that has obtained ownership of all rights under the copyright initially belonging to the author.

The Interim Regulation also included a footnote at the end of this definition that stated: “This category includes a person or organization that has obtained, from the author or from an entity that has obtained ownership of all rights initially belonging to the author, the contractual right to claim legal title to the copyright in an application for copyright registration.”

Unfortunately, neither the Interim Regulation nor the **Federal Register** notice announcing it provided an explanation for the footnote and one can therefore only speculate as to the reason it was crafted. Moreover, the right to register a work is not one of the section 106 exclusive rights that would entitle a person or entity to be considered an owner of a copyright. That said, viewed in context, it is at least possible that the footnote was designed to accommodate registration problems that could occur under the new principle of divisibility of copyright embraced by the Copyright Act of 1976.

The 1909 Act was silent on the divisibility of copyright rights, although it used the singular form when addressing both “copyright” and “copyright proprietor.” See, e.g., 17 U.S.C. 2, 3, 9, 10, and 11 (1909 Act), available at: <http://www.copyright.gov/>

history/1909act-1973.pdf. Courts interpreted the bundle of exclusive rights under the 1909 Act to be indivisible, *i.e.*, individual rights (such as the right to copy a work or the right to perform a work publicly) could not be assigned to different persons or entities. See, e.g., *Goldwyn Pictures Corp. v. Howells Sales Co.*, 282 F. 9 (2d Cir. 1922); *M. Witmark & Sons v. Pastime Amusement Co.*, 298 F. 470 (E.D.S.C. 1924); *New Fiction Publishing Co. v. Star Co.*, 220 F. 994 (S.D.N.Y. 1915). The reality that copyrights could be assigned in whole but not in part led to a strained and illogical marketplace: An author could (and frequently did) disaggregate his copyright for the benefit of multiple parties if licensing rights on a nonexclusive basis, but could not do so when assigning or otherwise offering his rights on an exclusive basis. Moreover, the legitimate rights of licensees were often confused or inadequate in the context of litigation. Former Register of Copyrights Abraham Kaminstein highlighted the issue in 1960 in a Copyright Office Study for the Copyright Revision Process:

Every major bill to revise the copyright law first enacted in 1909 has included provisions for divisibility as one of the three or four crucial issues. For a time, authors believed divisibility so vital to their interests that they made it their most important legislative goal.

Kaminstein, *Divisibility of Copyrights*, Copyright Off. Study No. 11 (1960), available at: <http://www.copyright.gov/history/studies/study11.pdf>.

Indeed, the revised law, the Copyright Act of 1976, represented a sea change, as the “first explicit statutory recognition of the principle of divisibility of copyright in our law.” Copyright Law Revision, H.R. Rep. 94–1476 at 123 (1976). Under section 201(d)(1) of the 1976 Act, Congress specified that “copyright ownership may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.” 17 U.S.C. 201(d)(1) In subsection 201(d)(2), Congress further stated that “[a]ny of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified in section 106, may be transferred as provided by clause (1) and owned separately. The owner of any exclusive right is entitled, to the extent of that right, to all of the protection and remedies afforded to the copyright owner by this title.” 17 U.S.C. 201(d)(2). See also, 17 U.S.C. 101 “copyright owner” (“Copyright owner, with respect to any one of the exclusive

rights comprised in a copyright, refers to the owner of that particular right”) and “transfer of copyright ownership” (“A “transfer of copyright ownership” is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license”).

Implementing the principle of divisibility into the registration system of the Copyright Office presented its own set of challenges, both conceptual and practical. For example, should an owner of an individual right be entitled individually to register a claim to that particular right? How many registrations should be available for any particular work? See, Notice of Inquiry on Applications for Registration of Claim of Copyright under Revised Copyright Act, 42 FR 48944 (September 26, 1977) (raising these and other questions).

The 1978 interim regulations resolved many of these questions. They established a general rule that there should be only one registration per work and that the transfer of ownership of exclusive rights could be adequately addressed through the Office’s recordation system. Interim Regulation, 43 FR 965 (January 5, 1978). However, neither the 1977 Notice nor the Interim Regulation explained the inclusion of the footnote. In fact, the Interim Regulation acknowledged that a claimant should be defined *narrowly*:

Prompted by the implications of that Notice, several comments, including a persuasive practical and legal analysis prepared by the Authors League of America, Inc. strongly urged that the copyright “claimant” to be identified in an application and registration under section 409(c) of the Act not be equated with the owner of one or more, but less than all, of the rights under a copyright. We agree with the view expressed in these comments; we do not believe that the concept of “divisibility of copyright” was intended to allow the owner of an individual right or rights to claim, or appear to claim, on our records, ownership of the entire copyright. As pointed out in the comments, such a result would lead to a misleading and inaccurate public record, and subvert the purpose of the registration system. Accordingly, interim § 202.3(a)(3) makes clear that the copyright “claimant” for purposes of copyright registration is the author of the work for which registration is sought, or a person or organization that has obtained all rights under the copyright initially belonging to the author.

Id.

The contradiction between the above passage and the footnote is difficult to explain. Conceivably, there was concern that when an author possessing the

initial unified bundle of rights fails to register a work before transferring ownership in one or more of those exclusive rights (or a subpart of an exclusive right), it might appear that a proper claimant could not exist—the author, having divested his or her interest in an exclusive right would no longer own all rights, and the owner of a single exclusive right would not be eligible to be a claimant under the regulatory definition. However, this view is incorrect, because an author may always be named as a proper claimant in a work, even when an author no longer owns all of the exclusive rights in a copyright. This is true even if an author transfers *all* rights in a work, because an author may always have a reversionary or beneficial interest in the work. See *e.g.*, 17 U.S.C. 304(c) and 203. Where an author transfers an exclusive right, either the author or the owner of an exclusive right may submit an application for registration listing the author as both the author and the claimant in the work.¹ See 37 CFR 202.1(a)(3).² Once a work listing the author and a proper claimant is registered, the work as a whole is registered, including all of the divisible exclusive rights (and subparts therein) previously or later transferred. Regardless of when the disaggregation of the exclusive rights occurs—either before or after registration—the author may always be listed as a proper copyright claimant in an application for registration.³ After registration for the work has occurred, any document relating to that registered work, such as

¹ Where the owner of an exclusive right submits a claim listing the author as author and claimant, the owner of the exclusive right would list himself or herself (or his or her agent) as the correspondent or person certifying the application. See, 37 CFR 202.1(c)(2)(i). Moreover, to provide a public record of the transfer of one or more exclusive rights from the author/claimant to the transferee, the owner of the exclusive right could record the document transferring rights with the Copyright Office. See, 17 U.S.C. 205.

² “(3) For the purposes of this section, a copyright claimant is either:

- (i) The author of a work;
- (ii) A person or organization that has obtained ownership of all rights under the copyright initially belonging to the author.”

(Emphasis in original; footnote omitted.)

³ In discussions with former Copyright Office staff members involved in the rulemaking that led to the Interim Regulations, the Office has heard two theories as to why the footnote was included: To address issues involving publishers of periodicals who wished to register claims in the periodical as well as the articles included in the periodical, and/or to address issues involving registration of musical compositions for which nonexclusive rights had been granted to performing rights organizations. The Office has found no evidence to support these theories, but welcomes comments from the public that may shed light on the reasons for the inclusion of the footnote.

a transfer of an exclusive right, may be recorded with the Copyright Office.

Thus, the existence of the footnote cannot be justified by reference to cases where the original author no longer owns all (or any) of the rights in the work. However, the footnote may have been rooted in another, more complicated situation faced by the authors of collective works. Where an author of a contribution to a collective work assigns one (or perhaps a few) of the exclusive rights to the publisher of a collective work, such as an article contributed to a serial issue, how could the collective work author register its copyright interest in the contribution? If the publisher registers the collective work, the registration could cover the selection and arrangement of the articles, along with the articles authored by the collective work author, and those works for which the collective work author owns all of the exclusive rights. But the registration would not extend to those works contained in the collective work for which the collective work author owns less than all rights. See, *e.g.*, *Morris v. Business Concepts, Inc.*, 259 F.3d 65, 70 (2d Cir. N.Y. 2001). As the Second Circuit makes clear in *Morris*, the fact that a registration of a collective work does not cover every work contained in that collective work in no way precludes protection for, or registration of, a component work for which all rights were not transferred. Either the author of the component work or the collective work author, filing on behalf of the author/claimant, would simply be required to register such component works in a separate registration. *Id.*, at 71–72.

Although separate registration is available for unregistered contributions to works for which less than all rights have been transferred, the collective work author would likely find it preferable to submit one application to cover every unregistered work contained in the collective work. Under the rule stated in the footnote, collective work authors may accomplish this if they received the contractual right to claim legal title for purposes of registration.

The principal problem with this approach is that it would seem to allow a person or entity to claim title for purposes of copyright registration even if such a person or entity was not in fact the owner of *any* exclusive rights. While an argument could be made that the 1976 Act allows the owner of an exclusive right to claim the copyright as a copyright owner,⁴ there is no clear

⁴ 17 U.S.C. 101 (definition of “copyright owner”: “Copyright owner, with respect to any one of the

foundation in the statutory language for allowing a person or organization with less than a copyright ownership interest in an exclusive right to be considered a owner of copyright or a valid claimant of a claim to copyright. The bald right to register a work is not one of the section 106 exclusive rights. Only the owner of an exclusive right (or subdivision thereof) is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by title 17. *See*, 17 U.S.C. 201(d)(2).⁵

The above discussion poses more than a theoretical problem. While the Office recognizes that transfers may be limited in time and duration, *see*, *Bean v. Littell*, 669 F. Supp.2d 1031 (D. Ariz. 2008), recent court decisions have questioned what it means to claim legal title to copyright when in fact the “claimant” does not in fact own any section 106 rights or may technically own those rights, but does not have the ability to exercise any of the exclusive rights.⁶ At least one court has held that the standing to sue for copyright infringement is absent when underlying agreements distort or misrepresent such claimants’ interests in and to the ownership of exclusive rights. “If the plaintiff is not a proper owner of the copyright rights, then it cannot invoke copyright protection stemming from the exclusive rights belonging to the owner, including infringement of the copyright.”⁷ While the Copyright Office does not believe that all transfers relying on the footnote necessarily misrepresent who is a valid copyright claimant, there exists the real possibility that the

exclusive rights comprised in a copyright, refers to the owner of that particular right”). However, the concept of a copyright “owner” need not be congruent with the concept of a copyright registration “claimant.” As explained *supra*, if an owner of an exclusive right could register a work, there would either be multiple registrations for particular works, thus violating the general rule of only one registration per work, or one registration by the first owner to register, thus leading to a misleading and inaccurate public record.

⁵ That provision may also be interpreted to distinguish an owner of an exclusive right from a “copyright owner” in the broader sense of the owner of all rights.

⁶ *Righthaven LLC v. Mostofi*, 2011 U.S. Dist. LEXIS 75810 (D. Nev. July 13, 2011). *See also*, *Silvers v. Sony Pictures Entertainment, Inc.*, 402 F.3d 881 (9th Cir. 2005), cert. den’d 546 U.S. 827 (2005) (The right to sue for an accrued claim for infringement is not an exclusive right under 17 U.S.C.S. 106. Moreover, the bare assignment of an accrued cause of action is impermissible under 17 U.S.C.S. 501(b).)

⁷ *Righthaven LLC v. Mostofi*, 2011 U.S. Dist. LEXIS 75810 (D. Nev. July 13, 2011), quoting, *Silvers v. Sony Pictures Entertainment, Inc.*, 402 F.3d 881 (9th Cir. 2005), quoting, 4 Business and Commercial Litigation in Federal Courts, at 1062 § 65.3(a)(4) (Robert Haig ed.). *Accord*, *Righthaven LLC v. Inform Techs., Inc.*, 2011 U.S. Dist. LEXIS 119379 (D. Nev. Oct. 14, 2011).

footnote fosters questionable claims of ownership due to its ambiguous language.

The elimination of the footnote would leave numerous options for registering works to authors and copyright owners, including the owners of a single exclusive right. As noted above, the owner of an exclusive right may always register a claim in the work by listing the author as the claimant. Any authorized agent of the author, the owner of all rights, or the owner of an exclusive may similarly file an application for registration on behalf of a valid claimant by filling out the application and certifying their relationship to the claimant.

In the case of collective works, the author of articles contributed to a number of periodicals may avail himself or herself to the group registration option for contributions to periodicals established pursuant to section 408(d) of the Copyright Act. *See*, 37 CFR 202.3(b)(8). A number of other group registration options exist for other types of works, such as for unpublished collections and for published photographs. *See*, 37 CFR 202.3(a)(4) and 202.3(b)(10).

In light of the concerns raised about the footnote and the alternative registration options available to claimants, the owners of one or more exclusive rights, and agents of such persons or entities, the Office believes that elimination of the footnote is warranted. The Office believes that the elimination of the footnote would have no discernable adverse effect on the ability to register works, would foster a more accurate and meaningful record of authorship and ownership, and would reduce the possibility of fraudulent or misleading claims. Removal of the footnote would also reduce the occurrence of litigation over the validity of misleading transfers by creating a bright line rule, consistent with the rationale expressed for the original Interim Regulation, for determining who may assert a claim of copyright. The Copyright Office seeks public comment on this intended amendment to the definition of a “claimant.”

List of Subjects in 37 CFR Part 202

Copyright, Registration.

Proposed Regulation

In consideration of the foregoing, the Copyright Office proposes to amend part 202.3(a)(3) as follows:

PART 202—PREREGISTRATION AND REGISTRATION OF CLAIMS TO COPYRIGHT

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

Authority: 17 U.S.C. 408, 409, 702.

2. Amend sec. 202.3 paragraph (a)(3)(ii) as follows:

a. In paragraph (ii), remove footnote 1.

Dated: May 10, 2012.

Maria A. Pallante,
Register of Copyrights.

[FR Doc. 2012–11879 Filed 5–16–12; 8:45 am]

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LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 385

[Docket No. 2011–3 CRB Phonorecords II]

Adjustment of Determination of Compulsory License Rates for Mechanical and Digital Phonorecords

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Proposed rule.

SUMMARY: The Copyright Royalty Judges are publishing for comment proposed regulations that set the rates and terms for the section 115 statutory license for the use of musical works in physical phonorecord deliveries, permanent digital downloads, ringtones, interactive streaming, limited downloads, limited offerings, mixed service bundles, music bundles, paid locker services and purchased content locker services.

DATES: Comments and objections, if any, are due no later than June 18, 2012.

ADDRESSES: Comments and objections may be sent electronically to crb@loc.gov. In the alternative, send an original, five copies, and an electronic copy on a CD either by mail or hand delivery. Please do not use multiple means for transmission. Comments and objections may not be delivered by an overnight delivery service other than the U.S. Postal Service Express Mail. If by mail (including overnight delivery), comments and objections must be addressed to: Copyright Royalty Board, P.O. Box 70977, Washington, DC 20024–0977. If hand delivered by a private party, comments and objections must be brought between 8:30 a.m. and 5 p.m. to the Copyright Office Public Information Office, Library of Congress, James Madison Memorial Building, Room LM–401, 101 Independence Avenue SE., Washington, DC 20559–6000. If delivered by a commercial courier,