

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

Design Tech Homes, Ltd.,	§	
	§	
Plaintiff,	§	
v.	§	Civil Action No. H-18-4268
	§	
RVision Homes, Ltd., RVision	§	
Remodels LLC, Ryan Rogers,	§	
Larry Gage, Leanne Gage	§	
	§	
Defendants.	§	

**Response of the Register of Copyrights
to Request Pursuant to 17 U.S.C. § 411(b)(2)**

On May 20, 2019, pursuant to 17 U.S.C. § 411(b)(2), the Court requested advice from the Register of Copyrights (the “Register”), on the following questions (the “Request”):

1. Design Tech Homes, LTD. (“DTH”) included three inaccuracies in its application for “The Timbergrove E—Elevation Base Plan,” which resulted in Copyright Registration No. VA 2-024-225.
 - DTH misstated that it created the architectural work in 2015, but the actual date of creation was in 2011.
 - DTH misstated that it published the architectural work in 2015, but the actual date of first publication was in 2011.
 - DTH omitted that “The Timbergrove E—Elevation Base Plan” is a derivative work of the San Saba C. (Registration No. VA 2-142-521.)

Would any of these inaccuracies, if known, have caused the Register of Copyrights to refuse Registration No. VA 2-024- 225?

2. DTH filed on March 19, 2019, a corrected application for “The Timbergrove E—Elevation Base Plan,” which resulted in Supplemental Registration No. VA 2-142-798.
 - DTH corrected the date of creation to 2011.
 - DTH corrected the date of first publication to 2011.
 - DTH identified “The Timbergrove E—Elevation Base Plan” as a derivative work of the San Saba C. (Registration No. VA 2-142-521.)

Does this cure the inaccuracies included in Certificate of Registration No. VA 2-024-225?¹

The Register hereby submits her response.

BACKGROUND

A review of the Copyright Office's records shows the following:

On August 5, 2016, the U.S. Copyright Office ("Copyright Office" or "Office") received an application to register an architectural plan and technical drawing, titled "The Timbergrove E – Elevation Base Plan" ("Timbergrove E"). The application identified Design Tech Homes, Ltd. ("DTH") as the work made for hire author of and copyright claimant for the work. The application stated that the work was created in 2015, and that it was published on March 18, 2015. The application did not identify the work as a derivative work or disclose that the work incorporated preexisting material. The Office registered the work with an effective date of registration² of August 11, 2016, and assigned registration number VA 2-024-225.

On March 13, 2019, DTH filed an application for a supplementary registration for Timbergrove E. In the application and subsequent correspondence with the Office, DTH indicated that the work's publication date was 2011 and the year of creation was October 4, 2011.³ The application also indicated that Timbergrove E was a derivative of "San Saba C," an earlier architectural work by the same author and that modifications had been made to the elevation and floor plans. The Office issued a supplementary registration that provided this information and an explanation of the corrections. On March 14, 2019, DTH submitted a

¹ Request at 2–3 (May 20, 2019).

² The effective date of registration is the date that the Office received a completed application, the correct deposit copy, and the proper filing fee. 17 U.S.C. § 410(d).

³ DTH reversed the creation date and year of creation in the supplementary registration application, but this error was corrected through correspondence between DTH and the Office.

copyright registration application for San Saba C, as an architectural work first created in 2001 as a work for hire and published on January 10, 2003, which the Office registered as VA 2-142-521.

ANALYSIS

An application for copyright registration must comply with the requirements of the Copyright Act set forth in 17 U.S.C. §§ 408(a), 409, and 410. Regulations governing applications for registration are codified in title 37 of the Code of Federal Regulations at 37 C.F.R. §§ 202.1 to 202.24. The principles that govern how the Office examines registration applications are found in the *Compendium of U.S. Copyright Office Practices* (“*Compendium*”). DTH filed its application to register Timbergrove E on August 5, 2016. The governing principles the Office would have applied at that time are set forth in *Compendium of U.S. Copyright Office Practices, Third Edition* (referred to as “*Compendium III (2014)*”), which was first released in December 2014. *Compendium III* was updated in 2017 and the updated version (referred to as “*Compendium III (2017)*”) was in effect at the time DTH filed its application for a supplementary registration.

To register a work, an applicant must identify “the year in which creation of the work was completed,” and if published, “the date and nation of its first publication.”⁴ As the *Compendium Third (2014)* noted, “[t]he year of creation is particularly important in the case of a work made for hire, . . . because this date may be used to calculate the term of the copyright.”⁵

⁴ 17 U.S.C. § 409(7)–(8).

⁵ U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 611 (3d ed. 2014) (“COMPENDIUM (THIRD) (2014)”) (citing 17 U.S.C. § 302(c)).

The Office will not ordinarily attempt to decide whether or not publication has occurred, but generally leaves this decision to the applicant.⁶

If the year of completion is inconsistent with or contradicted by other dates that appear in the registration materials, the registration specialist will communicate with the applicant to resolve the Office's concern.⁷ If there is a discrepancy or inconsistency in the publication date, the registration specialist will similarly communicate with the applicant.⁸

Additionally, the statutory requirements for copyright registration dictate that an application for registration shall "in the case of a compilation or derivative work," include "an identification of any preexisting work or works that it is based on or incorporates, and a brief, general statement of the additional material covered by the copyright claim being registered."⁹ The *Compendium Third (2014)* explained that "[a] claim should be limited if the work contains an appreciable amount of material that was previously published, material that was previously registered, material that is in the public domain, and/or material that is owned by an individual or legal entity other than the claimant who is named in the application,"¹⁰ and that "[i]f the work . . . contains an appreciable amount of unclaimable material,¹¹ the applicant should identify the unclaimable material that appears in that work and should exclude that material from the

⁶ *Id.* §§ 612.3, 1904.1.

⁷ *Id.* § 611.4.

⁸ *See id.* § 612.7(G)–(I).

⁹ 17 U.S.C. § 409(9).

¹⁰ COMPENDIUM (THIRD) § 621 (2014).

¹¹ Unclaimable material is "(i) previously published material; (ii) previously registered material; (iii) material that is in the public domain; and/or (iv) copyrightable material that is not owned by the claimant named in the application." *Id.* Glossary.

claim [by providing] . . . a brief, accurate description of the unclaimable material in the appropriate field/space of the application.”¹²

The Copyright Office will register a claim in a derivative work where the deposit material contains new authorship with a sufficient amount of original expression.¹³ In the case of derivative works, the “new authorship that the author contributed to the derivative work may be registered, provided that it contains a sufficient amount of original expression, meaning that the derivative work must be independently created and it must possess more than a modicum of creativity.”¹⁴ The amount of creativity required for a derivative work is the same as that required for a copyright in any other work. The author must have “contributed something more than a ‘merely trivial’ variation.”¹⁵ Thus, “the key inquiry is whether there is sufficient nontrivial expressive variation in the derivative work to make it distinguishable from the [preexisting] work in some meaningful way.”¹⁶ A claim to register a derivative work that adds only non-copyrightable elements, such as merely changing the size of the preexisting work, is not entitled to copyright registration.¹⁷ Ultimately, whatever the addition is, it must be independently protectable for the derivative work to be registered. A registration for a derivative work only

¹² *Id.* § 621.1.

¹³ *Id.* § 311.1 (citing H.R. REP. NO. 94-1476, at 57 (1976), *reprinted in* 1976 U.S.C.C.A.N. at 5670.).

¹⁴ *Id.* § 311.2 (citing *Waldman Publ’g Corp. v. Landoll, Inc.*, 43 F.3d 775, 782 (2d Cir. 1994)).

¹⁵ COMPENDIUM (THIRD) § 311.2 (2014) (citing *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102–03 (2d Cir. 1951)).

¹⁶ *Id.* (citing *Schrock v. Learning Curve Int’l, Inc.*, 586 F.3d 513, 521 (7th Cir. 2009)).

¹⁷ *Id.*

covers the new creative expression added by the author, not the expression in the preexisting work.¹⁸

The Copyright Office’s regulations require applicants to make “[a] declaration . . . that the information provided within the application is correct to the best of [the applicant’s] knowledge.”¹⁹ Generally, the Office “accepts the facts stated in the registration materials, unless they are contradicted by information provided elsewhere in the registration materials or in the Office’s records.”²⁰ The Office “generally does not compare deposit copy(ies) to determine whether the work for which registration is sought is substantially similar to another work.”²¹ Nor does the Office inquire about a work’s creation or publication dates without an apparent omission, inconsistency, or contradiction.

In responding to the Court’s questions, the Register applies the foregoing governing statutory and regulatory standards and examining principles. The Register notes that it is not unusual for an examiner to correspond with an applicant about factual assertions if the assertions appear to conflict with other information provided in the application materials.²² Accordingly, if the Office becomes aware of an error at the time of application, such as the omission of the statement regarding preexisting material or a date of creation or publication that is inconsistent with a deposit, or has questions about facts asserted in the application, it provides the applicant

¹⁸ *Id.*

¹⁹ 37 C.F.R. § 202.3(c)(3)(iii) (2019).

²⁰ COMPENDIUM (THIRD) § 602.4(D) (2014).

²¹ *Id.* § 604.2(C).

²² *Id.* § 602.4(D).

an opportunity to correct the error or verify the facts within a specified period of time.²³ If the applicant responds in a timely fashion to the satisfaction of the Office, the Office can proceed with the registration. The Register's response herein is thus premised on the fact that any errors were not identified, nor timely corrected through such a process.

The owner of a copyright may file an application for a supplementary registration to correct certain errors or to amplify information provided in a copyright registration.²⁴ A supplementary registration can be used to correct information regarding the year of completion and the date of publication.²⁵ A supplementary registration can also be used to correct information regarding any limitations of the copyright claim identified in the certificate of registration, including to identify any preexisting works on which the work is based.²⁶ If a copyright owner submits an application for supplementary registration to clarify that a work is based on a prior-registered work, the registration specialist who reviews the application will retrieve the deposit copy of the prior-registered work to determine if the new work contains a sufficient amount of new copyrightable authorship to be registrable.²⁷

²³ When a registration specialist corresponds with an applicant, the applicant currently is given forty-five calendar days to respond to the specialist's questions concerning issues in the application materials. U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 605.6(B), (D) (3d ed. 2017) ("COMPENDIUM (THIRD) (2017)"). Applicants were formerly given twenty calendar days to respond to emails and forty-five days to respond to physical letters. COMPENDIUM (THIRD) § 605.6(B), (D) (2014).

²⁴ COMPENDIUM (THIRD) §§ 1802, 1802.1 (2017).

²⁵ *Id.* § 1802.6(G), (I).

²⁶ *Id.* § 1802.6(J).

²⁷ *See id.*

REGISTER’S RESPONSE TO THE COURT’S REQUESTS

Based on the foregoing statutory and regulatory standards, and its examining practices, the Register responds to the Court’s questions as follows:

1) Had the Office been aware that Timbergrove E registered under VA 2-024-225 was actually created and published in 2011 and not its stated creation and publication year of 2015 or that the Timbergrove E was based on a preexisting architectural work that had not been disclosed, the Office would have refused to register the claim because the application failed to identify the correct creation date, the correct publication date, or the preexisting architectural work.

As noted above, however, it is not unusual for an examiner to correspond with an applicant about factual assertions in an application. If the Office had become aware of the inaccurate creation date, the inaccurate publication date, or the preexisting architectural work at the time of the application, or had questions about facts asserted in the application, it would have provided the applicant an opportunity to verify the creation and publication dates and identify and disclaim the preexisting architectural work. The Office would typically correspond with the applicant to resolve any such errors. The Register’s responses herein are based on the assumption that any errors identified in the application would not have been timely corrected through such a process.

2) The Court asks whether the supplemental registration of Timbergrove E (VA 2-142-521), which corrected the dates of creation and publication to 2011 and identified Timbergrove E as a derivative work of San Saba C “cure[s] the inaccuracies included in Certificate of Registration No. VA 2-024-225.”

As noted above, certain errors in a registration may be corrected post-registration using the supplementary registration option.²⁸ The Office may decline to issue a supplementary registration when it is aware that there is actual or prospective litigation involving a basic registration if the proposed change would be directly at issue in the litigation and if the proposed amendment may confuse or complicate the pending dispute.²⁹ In such cases, the Office typically stays its consideration of the application for a supplementary registration until the applicant confirms in writing that the dispute has been resolved.

Here, DTH filed an application for a supplementary registration in which it amended the publication and creation dates and indicated that the Timbergrove E was a derivative of San Saba C architectural work. The Office was unaware of the litigation involving the Timbergrove E basic registration and therefore reviewed DTH's application for supplementary registration and issued a supplementary registration. After comparing the Timbergrove E and San Saba C deposits, the Office believes that the additional architectural elements contained in Timbergrove E that are not contained in the San Saba C, namely the layout, elevation, and dimensions of the architectural design, constitute a sufficient amount of original authorship to warrant registration. Thus, the Office's supplementary registration of Timbergrove E effectively corrected the inaccuracies in the basic registration. Under the Office's practices, the effective date of the

²⁸ *Id.* § 1802.

²⁹ *Id.* § 1802.9(G). For example, if the identity of the author of a work was the main issue in a litigation, the Office would not want to issue a supplementary registration that that proposed to change the author identified in the basic registration.

supplementary registration is the date on which the Office received an acceptable application and filing fee.³⁰

Dated: August 29, 2019

A handwritten signature in blue ink, appearing to read "Karyn Temple", written over a horizontal line.

Karyn A. Temple
Register of Copyrights

³⁰ *Id.* § 1802.12.