Compendium of U.S. Copyright Office Practices, Third Edition

WEBINAR | APRIL 10, 2019

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The Process

Court decisions, regulatory amendments, practice changes prompt amendment

Amendments vetted by interdivisional committee

Approved text cleared by Register Karyn Temple

Draft Compendium released for public comment
Public Draft for the Compendium of U.S. Copyright Office Practices

Acting Register Karyn Temple has released a revised draft of the Compendium of U.S. Copyright Office Practices, Third Edition. This draft proposes changes to the current version of the Compendium, which was released on September 29, 2017. This update is the result of a careful review of the Office’s practices and procedures, as well as recent changes in the law. Read more.

The Copyright Office will be holding a webinar to review proposed revisions and hold a Q&A session on April 10, 2019, at 2:00 PM. You may register here. Questions may be submitted prior to the webinar to web@copyright.gov.

The deadline for submitting public comments on this draft is May 14, 2019. The September 29, 2017, version of the Compendium remains in effect until the Office receives and considers public comment and releases the final version of this update.

The Office has prepared a complete list of the sections that have been added, amended, revised, or removed in this release.

The Copyright Office is using the regulations.gov system for the submission and posting of public comments for this draft of the Compendium. All comments are to be submitted electronically through regulations.gov. If you are unable to file comments electronically or have a question about the submission process, please contact the Copyright Office as indicated in the Federal Register notice.

Please carefully read and comply with the following instructions for posting comments via the regulations.gov comment form. A link to the comment form is provided at the bottom of the page.

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Instructions for the First Name, Last Name, Contact Information, and Organization Name Fields

Individual Commenters:

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Covering today:

1. Updates in light of *Star Athletica v. Varsity Brands*.

2. Practice changes to reduce correspondence and processing times.

3. Updates for recent rulemakings.

4. New examples of publication.
Star Athletica
Through the years, courts and scholars have proposed or used the following approaches to conceptual separability.

1. The Copyright Office’s Approach
2. The Primary-Subsidiary Approach
3. The Objectively-Necessary Approach
4. The Ordinary-Observer Approach
5. The Design-Process Approach
6. The Stand-Alone Approach
7. The Likelihood-of-Marketability Approach
8. Patry’s Approach
9. The Subjective-Objective Approach
To determine whether the design of a useful article may be eligible for copyright protection, the U.S. Copyright Office applies a two-step test.

1. Are there any features that
   - Can be perceived as a two- or three dimensional work of art
   - Separate from the useful article.

   This is known as the “Separate-identification” requirement.

2. Can the feature
   - Qualify as a protectable pictorial, graphic, or sculptural work
   - Either on its own or fixed in some other tangible medium of expression
   - If imagined separately from the useful article

   This is known as the “independent-existence” requirement.
EXAMPLES OF RECENTLY CONSIDERED USEFUL ARTICLES
WORKS THAT ARE NOT USEFUL ARTICLES
• An artistic design may make a useful article more useful, but it will still be protected.
• Copyright does not protect the overall shape of a useful article, even if aesthetically pleasing.
• All of the artistic features of a useful article are considered one work.
• If the exact same feature appears on multiple useful articles, applicants may pick one representative item for registration.
• If different artistic features appear on multiple useful articles, applicants would need to submit a separate application for each item.

Also in the draft:
• Guidance on how to assert a claim in the separable features of a useful article
• Appropriate deposits
• Certificate annotations
CLIP THIS COUPON
MAIL OR PHONE ORDERS FILLED PROMPTLY
California Modern
TABLE LAMPS
as long as they last!
$18.95
2 for $35.00
HIGHLAND FURNITURE CO.
417-19-21 S. HIGHLAND AVE. EA. 1047
HIGHLAND at EASTERN AVE.
Open Thursday, Friday & Saturday Till 9 P.M.
GROOM FOR MONDAY ONLY
An artistic design may make a useful article more useful, but it will still be protected.
Copyright does not protect the overall shape of a useful article, even if aesthetically pleasing.
All of the artistic features of a useful article are considered one work.
If the exact same feature appears on multiple useful articles, applicants may pick one representative item for registration.
If different artistic features appear on multiple useful articles, applicants would need to submit a separate application for each item.

Also in the draft:
- Guidance on how to assert a claim in the separable features of a useful article
- Appropriate deposits
- Certificate annotations
Reducing Correspondence and Processing Times
# Current Processing Times

## Claims that DO NOT Require Correspondence

<table>
<thead>
<tr>
<th>Method</th>
<th>Percentage of All Applications</th>
<th>Average Time</th>
<th>Range</th>
</tr>
</thead>
<tbody>
<tr>
<td>Web Claims</td>
<td>Approximately 73 percent</td>
<td>4 months</td>
<td>1 – 7 months</td>
</tr>
<tr>
<td>Mail Claims</td>
<td>Approximately 2 percent</td>
<td>7 months</td>
<td>1 – 18 months</td>
</tr>
</tbody>
</table>

## Claims WITH Correspondence

<table>
<thead>
<tr>
<th>Method</th>
<th>Percentage of All Applications</th>
<th>Average Time</th>
<th>Range</th>
</tr>
</thead>
<tbody>
<tr>
<td>Web Claims</td>
<td>Approximately 22 percent</td>
<td>7 months</td>
<td>1 – 15 months</td>
</tr>
<tr>
<td>Mail Claims</td>
<td>Approximately 2 percent</td>
<td>14 months</td>
<td>1 – 28 months</td>
</tr>
</tbody>
</table>
Current Practice

• Immaterial variances: disregard and proceed with registration

• Material variances:
  1. Disregard
  2. Add a note to online public record
  3. Annotate
  4. Communicate

Proposed Practice

• Immaterial variances: no change

• Material variances:
  Numerous:
  1. Return claim to applicant
  2. Refuse

  Choose annotation:
  1. When claimant information is missing, but found elsewhere on application
  2. When authorship claim is inaccurate, but deposit clarifies
  3. When there are title discrepancies
Registration will be refused if an applicant submits an unacceptable file type.
Registration will be refused if:

• Applicant files a Single Application where Standard is required.
• Applicant uses a Standard Application to submit a group of
  • Newspapers
  • Newsletters
  • Serials
  • Photographs
  • Contributions to periodicals
  • Unpublished works
Rulemakings
• Deposit Requirements for Certain Literary Works and Musical Compositions
• Group Registration of Photographs
• Group Registration of Newspapers
• Group Registration of Newsletters and Serials
• Group Registration of Unpublished Works

• Regulation on Copyright Notice: non-substantive technical change to the regulations governing the affixation and position of copyright notice
**Literary Monographs**: a literary work published in one volume or a finite number of volumes.

- This category does not include serials, nor does it include legal publications that are published in one volume or a finite number of volumes that contain legislative enactments, judicial decisions, or other edicts of government.

- One complete copy of the best edition.

- The Office reserves the right to demand a second copy under the mandatory deposit provision.
<table>
<thead>
<tr>
<th>Format Musical Composition Published in the United States</th>
<th>Deposit Requirement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Print copies only</td>
<td>One complete copy of the best edition of the printed work</td>
</tr>
<tr>
<td>Digital copies only</td>
<td>One complete copy of the digital work</td>
</tr>
<tr>
<td>Physical and digital sheet music</td>
<td>One complete copy of the best edition of the physical format</td>
</tr>
<tr>
<td>Physical recording only</td>
<td>One complete phonorecord</td>
</tr>
<tr>
<td>Digital recording only</td>
<td>One complete phonorecord</td>
</tr>
<tr>
<td>Both print copies and recordings</td>
<td>One complete copy of the best edition of the printed work</td>
</tr>
<tr>
<td>Both digital copies and recordings</td>
<td>One complete copy of the best edition of the digital work</td>
</tr>
</tbody>
</table>
Applications must be submitted through the Office’s electronic registration system.

All the works in the group must be photos.

All photos must be either published or unpublished.

All the photos must have been created by the same author; Copyright claimant for each photo must be the same person/organization.

Include up to 750 photographs.

“Unpublished Collection” option and “Pilot Program” eliminated.
Basic Requirements
• Applications must be submitted through the Office’s electronic registration system.
• Each newspaper issue must be a new collective work and a work made for hire.
• The author and copyright claimant for each issue must be the same person or organization.

Scope of Protection
• Group registration covers:
  1. each issue in the group, and
  2. articles, photographs, illustrations, or other contributions first published within each issue, if fully owned by the copyright claimant.
**Requirements:**
- Online application
- Upload digital copy
- Separate mandatory deposit

**Eliminated Newsletter Requirements:**
- Work made for hire
- Three month deadline

**Clarified Serial Requirements:**
- At least two issues per application
- One week or longer publication interval
- Publication dates in the application and issue dates on deposit do not need to match
- Each issue is “all new” collective work

The Office will accept paper applications and deposits for serials until December 30, 2019.
Effective March 15, 2019

Benefits: more detailed public record
- Each work is listed on application
- Each work considered separately during examination

Requirements
- Online application
- Digital upload
- $55 filing fee

Notable eligibility changes:
- Ten works (for sound recordings: ten + underlying works if all owned by same author/claimant)
- Author/claimant is the same for each work
- Each work is registered in the same category
Publication and Making Available
BACKGROUND

WIPO Internet Treaties

Affirmed author’s ability to authorize the “making available to the public of works in such a way that members of the public may access those works from a time and a place individually chosen by them.”

Copyright Making Available Study

Focus: how exclusive rights of distribution, public performance, and public display collectively meet and adequately provides for making available right.
Offering a work directly to the public constitutes publication where offeror has completed all steps necessary for distribution.

**Not publication:**
Online advertisement offering to sell an ebook, but ad does not make ebook available for download

**Publication:**
Copyright owner offers an app on a public website for purchase and direct download

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Organizational Commenters:
Organizations must provide an individual’s first and last name in the “First name” and “Last name” fields. The individual’s name must be the name of the organization’s representative who is authorized to file this comment. If you are filing comments as an organization, you must provide a contact person’s name in the “Contact person” field. The contact person should be someone who will have ongoing involvement with this commenting process. You must indicate whether this individual may provide the organization’s contact information in the “I want to provide my contact information” field.

www.copyright.gov/comp3/draft/comment-submission
Guidance from the Copyright Office

Our Public Information Office is here for you!
(202) 707–3000
copyinfo@copyright.gov

Copyright.gov has:
- Numerous Circulars (pamphlets on specific topics)
- Policy studies
- Rulemakings
- Briefs and legal opinions