



# ANNOUNCEMENT

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

## NOTICE OF REGISTRATION DECISION

### COPYRIGHT REGISTRATION FOR COLORIZED VERSIONS OF BLACK AND WHITE MOTION PICTURES

The following excerpt is taken from Volume 52, Number 119 of the Federal Register for Monday, June 22, 1987 (pp.23443-23446).

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#### LIBRARY OF CONGRESS

#### Copyright Office

#### 37 CFR Part 202

[Docket No. RM 86-1A]

#### Copyright Registration for Colorized Versions of Black and White Motion Pictures

**AGENCY:** Copyright Office, Library of Congress.

**ACTION:** Notice of registration decision.

**SUMMARY:** This notice of a registration decision is issued to inform the public that the Copyright Office of the Library of Congress has determined that claims to copyright in certain computer-colored versions of black and white motion pictures may be registered. The notice gives guidance to the public about the standards and practices governing registration of computer-colored motion pictures. The notice also confirms the validity of existing regulation 37 CFR 201.1(a), prohibiting 1 copyright registration for mere variations of coloring.

**FOR FURTHER INFORMATION CONTACT:** Dorothy Schrader, General Counsel, Copyright Office, Library of Congress, Washington, DC 20559. Telephone (202) 287-8380.

#### SUPPLEMENTARY INFORMATION:

#### Registration of Colorized Black and White Motion Pictures As Derivative Works

##### 1. Background

The Copyright Act, title 17 of the U.S. Code, defines a derivative work as "a work based upon one or more preexisting works such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a "derivative work." 17 U.S.C. 101 (emphasis added).

The Copyright Act also spells out that copyright protection in a derivative work "extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material." 17 U.S.C. 103(b) (emphasis added).

An existing Copyright Office regulation provides that "mere variations of . . . coloring" are not subject to copyright. 37 CFR 202.1(a). This does not preclude registration where the work contains some other elements of originality such as an original arrangement or combination of colors. Courts have held that while color *per se* is uncopyrightable and unregistrable, arrangements or combinations of colors may warrant copyright protection.<sup>1</sup>

Between 1985 and 1986, several parties submitted the colorized versions of ten motion pictures and one television program to the Copyright Office for registration of the colorized version as a derivative work. The Copyright Office did not register any of these works. Because of the unusual nature of the claimed authorship and to obtain information about the process of creating the colorized versions from persons other than the claimants, on September 15, 1986, the Copyright Office published a Notice of Inquiry in the Federal Register (51 FR 32665) asking for comments in four specific areas.

1. Which steps, if any, in the colorization processes involve individual creative human authorship?
2. Who are the authors of the copyrightable elements, if any, in colorized film?

<sup>1</sup> See also 1 Nimmer on Copyright § 2.14 (1985).

1 Error: line should read;  
"regulation 37 CFR 202.1(a),  
prohibiting"

3. With specific reference to the role of computer programs in colorization processes:

(a) How are colors selected? How are colors made available for selection? What factors influence color selection? How wide is the range of choice?

(b) In addition to coloring in the strict sense, are other cinematographic contributions, such as animation or other hand or computer assisted effects, utilized in colorizing?

4. Are all colorization processes intended solely to create videotapes in color? Are any methods now available or under development that would permit the commercially feasible colorization of 35mm prints of a quality that would permit theatrical distribution?

The Copyright Office explained that it was interested in this information in order to come to a determination of whether the coloring of black and white motion pictures is subject to copyright registration; furthermore, the Copyright Office specified that aesthetic or moral arguments about the propriety of coloring black and white film did not, and could not, form any part of its inquiry.<sup>2</sup>

## 2. Summary of the Comments

In all 46 comments (43 original and three reply) were filed with the Copyright Office. Despite the Copyright Office's caveat against arguments regarding aesthetic considerations, many of the comments filed related simply to the question of whether or not the commentator found the colorized motion picture aesthetically pleasing. And most did not. Other comments attempted to respond to the four question areas set out in the Notice of Inquiry.

a. *The colorization processes.* The Copyright Office noted the existence of two different types of processes in which color is added to a black and white film. One ("chromoloid") involves a color-retrieval process and the other ("colorization") adds color to individual scenes and then the entire film. The second system is the one used by both the Color Systems Technology, Inc. of Hollywood, and Colorization, Inc. of Toronto, Canada.

(1) *The chromoloid process.* In this process a fine grained black and white positive print is first reproduced by an optical printer in three distinct prints:

red, blue, and green. Then a subsequent printing process combines the three prints into a single full color film. This process was not described in any of the comments, and no films colored by this process have been submitted to the Copyright Office for registration.

(2) *The colorization process.* Both the Canadian firm, Colorization, Inc. that is associated with Hal Roach Studios, and Color Systems Technology use separately developed processes that basically involve colorization of one frame by a computer operator and then colorization of each succeeding frame in the entire scene by the computer.

The first step of the colorization process is to transform a pristine black and white print to a videotape. This videotape is then broken down into discrete scenes and sequences. A color plan is developed for each scene as well as the entire videotape. The spectrum of colors initially available is virtually unlimited,<sup>3</sup> but colors are generally selected to convey a particular time period, to create a certain mood, and to be faithful where possible to the coloring of the actors and actresses involved.

Next an artist uses a computer controlled graphics tablet and an electronic palette to hand-color key frames. Then a high-speed computer is directed to color the intervening frames, gearing adjustments to variations in the luminosity of the black and white original.

Each color converted scene is reviewed and revisions are made where necessitated, e.g., where dictated by a change in one of the intervening frames not consistent with the hand-colored key frame.

b. *Original authorship.* Although the general public response was against copyright registration on aesthetic grounds, the consensus of those who responded regarding the legal issue of original authorship was that colorized versions of black and white motion pictures satisfied the copyright law's standard for copyright subject matter. They based this argument on the position that the creation of a computer color version is a process that involves individual creative human authorship and requires an amount of technical or artistic judgment that meets copyright law standards of original, creative expression. One justification was that all of the steps involved in colorization involve human authorship since the

process is directed by human operators who follow the dictates of a human art director. The more prevalent justification is that the selection, coordination and application of color, and the review of the final product amount to "individual creative human authorship."

Those opposed to copyright registration asserted that colorizing is a technical process that does not have sufficient human authorship to merit copyright protection. This commentator examined three steps involved in the process: color selection, the data base, and the computer program and argued that none justify registration of colorized films under the following tests for derivative works claims:

(1) Are they based on more than ideas or mere facts and

(2) If so, are they based on more than trivial variations in the actual expression of an underlying work, these being both

(a) Attributable to original authorship and

(b) Representing a modicum of creativity.

As to color selection the opponents claimed that an artist's selection of palette is an idea that has not as yet produced any copyrightable expression. As to the "data base," this party noted that copyright does not cover the factual content of a work and contended that it is the color facts in the data base which are integrated into a preexisting visual pattern of the black and white film that is being reprocessed. These patterns, it was argued, serve as the actual expression in the new video product, which merely organizes the facts previously compiled in a different order. Furthermore, the opponents argued that "the protectible forms in which the facts were once compiled, that is, expressed and organized, say, as a computer-readable data base, will, in the final video product, be quite simply left behind. . . ." Finally, the opponents asserted that copyright in a computer program cannot also support a claim in the product or output of the program—in this case the color-recorded film.

Several commentators raised the issue of whether only the handcolored scenes and not those done by computer are copyrightable. Another related issue is even if sufficient human authorship exists given today's colorization technology, what happens to a copyright claim when the complete coloring process is done by a computer program?

## 3. Appropriate Judicial Standard

Proponents and opponents would probably agree that whether or not a derivative work will support a copyright depends upon whether it is a distinguishable variation or merely a trivial variation. See *L. Batlin and Son v.*

<sup>2</sup> Copyright registration determinations cannot be made on aesthetic grounds. Original works of authorship that meet the legal and formal requirements of the Copyright Act are entitled to registration, irrespective of their artistic worth. Moreover, the present federal copyright law does not extend protection to the so-called "moral right" of an author to prevent the distortion or mutilation of the work, after transfer of the copyright.

<sup>3</sup> The comment of Colorization, Inc. alleges that selections are made from a palette of 16 million colors, from which 4,096 colors are selected for each movie and 64 colors for each scene.

*Snyder*, 536 F.2d 486 (2d Cir. 1976), cert. denied, 429 U.S. 857 (1976). The disagreement between the two sides centers on what makes a variation distinguishable and also on whether a higher standard is required for a derivative work, especially if it is based on a work that is already in the public domain.

The second circuit held in the *Batlin* case that a higher standard exists for determining copyrightability of contributions to public domain works. Later this same court said that copyright for derivative works is subject to two related and important limitations:

1. To support a copyright the original aspects of a derivative work must be more than trivial.

2. The scope of protection afforded a derivative work must reflect the degree to which it relies on the preexisting material and must not in any way affect the scope of any copyright in this preexisting material.

*Durham Industries, Inc. v. Tomy Corporation*, 630 F.2d 905, 909 (2d Cir. 1980).

The seventh circuit has also indicated that a higher standard of originality is required in derivative works in order to prevent the first creator of a derivative work from interfering with the right of subsequent authors to depict the underlying work without fear of copyright problems. *Gracen v. Bradford Exchange*, 698 F.2d 300 (7th Cir. 1983).

Proponents of copyright for computer-colored films assert that the *Gracen* case is a misreading of *Batlin*, that *Batlin* grapples with the problem of substantial similarity in the case of works grounded in common antecedents, and that the ruling does not deny copyright registrability to colored motion pictures which meet the tests of original authorship as set out in *Batlin* and other cases.

Opponents of copyright in computer-colored films argue that coloring a film does not meet the *Batlin* test for authorship in derivative works. They interpret *Batlin* as distinguishing between human contributions that require sustained "artistic skill and effort" and those that exhibit only "physical skill" or technical competence. The former could be copyrightable; the latter would not.

Before the *Batlin* case was decided, a district court upheld the copyrightability of a compilation of colors on the basis of color selection which the court found to require "careful consideration of numerous artistic factors including the aesthetic attributes of each shade and its use in the commercial art field." *Pantone Inc. v. A. J. Friedman Inc.*, 294 F.Supp. 545, 547 (S.D.N.Y. 1968).

#### 4. Registration Decision

After studying the comments

responsive to the questions listed above, the Copyright Act, and the case law, the Copyright Office has concluded that certain colorized versions of black and white motion pictures are eligible for copyright registration as derivative works. The Office will register as derivative works those color versions that reveal a certain minimum amount of individual creative human authorship. This decision is restricted to the colorized films prepared through the computer-colorization process described above. No comments were received regarding the chromoloid process, and no claims are pending before the Copyright Office. The record before us does not contain sufficient information to make a decision regarding chromoloid films.

The Copyright Office finds that the issue of copyright in computer-colored films requires a difficult determination of the presence of original authorship. The policy of the existing regulation prohibiting registration for "mere variations . . . of coloring" is sound and fully supported by case law. *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 286 F.2d 541, 544-545 (2d Cir. 1959); *Manes Fabric Co., Inc. v. The Acadia Co.*, 139 U.S.P.Q. 339, 340 (S.D.N.Y. 1960); *Christianson v. West Publishing Co.*, 53 F. Supp. 454, 455 (N.D. Calif. 1944), aff'd 149 F.2d 202 (9th Cir. 1945). The regulation is applied by the Copyright Office to deny registration when the only authorship claimed consists of the addition of a relatively few number of colors to an existing design or work. The regulation also prohibits registration of multiple colored versions of the same basic design or work. Registration is not precluded, however, where the work consists of original selection, arrangement, or combinations of a large number of colors, or where the lines of an original design are fired by gradations of numerous colors. The Copyright Office finds that these registration practices are consistent with the standards of original authorship set by the Copyright Act, and we affirm the validity of the existing regulation.

The Office concludes that some computer-colored films may contain sufficient original authorship to justify registration, but our decision is a close, narrow one based on the allegations that the typical colorized film is the result of the selection of as many as 4000 colors, drawn from a palette of 16 million colors. The Office does not consider registration would be justified based on a claimed "arrangement" or "combination" of the colors because the original black and white film predetermines the arrangement of colors. The Office is concerned about implications of registering a claim to

copyright in public domain films based on coloring, and we address that point below. Our decision is also limited to existing computer-coloring technology. We will monitor technological developments, and may reconsider the issue if the role of the computer in selecting the colors becomes more dominant.

The general standard for determining whether the color added to a black and white motion picture is sufficient to merit copyright protection is the statutory standard that already applies to all derivative works, i.e. "modifications" to a preexisting work "which, as a whole, represent an original work of authorship." 17 U.S.C. 101. In determining whether the coloring of a particular black and white film is a modification that satisfies the above standard, the Office will apply the following criteria:

(1) Numerous color selections must be made by human beings from an extensive color inventory.

(2) The range and extent of colors added to the black and white work must represent more than a trivial variation.

(3) The overall appearance of the motion picture must be modified; registration will not be made for the coloring of a few frames or the enhancement of color in a previously colored film.

(4) Removal of color from a motion picture or other work will not justify registration.

(5) The existing regulatory prohibition on copyright registration based on mere variations of color is confirmed.

When registration is warranted, the copyright will cover only the new material, that is, the numerous selections of color that are added to the original black and white film. The copyright status of the underlying work is unaffected. The black and white film version will remain in the public domain or enter the public domain as dictated by its own copyright term. When an underlying work is in the public domain, another party is free to use that work to make a different color version which may also be eligible for copyright protection.

#### List of Subjects in 37 CFR Part 202

Claims, Claims to copyright, Copyright registration.

A proposed rule on deposit of computer-colored films will be published separately.

Dated: June 11, 1987.

Ralph Oman,

Register of Copyrights.

Approved by:

Daniel J. Boorstin,

The Librarian of Congress.

[FR Doc. 87-14001 Filed 6-19-87; 8:45 am]

BILLING CODE 1410-07-M

# NOTICE OF PROPOSED RULEMAKING

## COPYRIGHT REGISTRATION FOR COLORIZED VERSIONS OF BLACK AND WHITE MOTION PICTURES; PROPOSED RULEMAKING

The following excerpt is taken from Volume 52, Number 121 of  
the Federal Register for Wednesday, June 24, 1987 (pp23691-23692)

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### LIBRARY OF CONGRESS

#### Copyright Office

#### 37 CFR Part 202

[Docket No. RM 86-1B]

#### Copyright Registration for Colorized Versions of Black and White Motion Pictures; Proposed Rulemaking

**AGENCY:** Copyright Office, Library of  
Congress

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This notice of proposed  
rulemaking is issued to inform the public  
that the Copyright Office of the Library  
of Congress has determined that claims  
to copyright in certain computer-  
colorized versions of black and white  
motion pictures may be registered upon  
compliance with proposed new deposit  
requirements. The notice informs the  
public and invites comment with respect  
to proposed regulations that would  
require the deposit of a black and white  
print along with a copy of the computer-  
colorized version in order to register a  
claim to copyright in the selection of  
colors.

**DATES:** Written comments should be  
received on or before July 24, 1987.

**ADDRESSES:** Ten copies of written  
comments should be addressed, if sent  
by mail, to: Library of Congress,  
Department 100, Washington, DC 20540;  
if delivered by hand, copies should be  
brought to: Office of the General  
Counsel, U.S. Copyright Office, James  
Madison Memorial Building, Room 407,  
Washington, DC.

**FOR FURTHER INFORMATION CONTACT:**  
Dorothy Schrader, General Counsel,  
Copyright Office, Library of Congress,  
Washington, DC 20559. Telephone (202)  
287-8380.

#### **SUPPLEMENTARY INFORMATION:**

**Registration of Colorized Black and  
White Motion Pictures As Derivative  
Works**

#### *1. Background*

An existing Copyright Office  
regulation provides that "mere  
variations of coloring" are not subject to  
copyright. 37 CFR 202.1(a). This does not  
preclude registration where the work  
contains some other elements of  
originality such as an original  
arrangement or combination of colors.  
Courts have held that while color *per se*  
is uncopyrightable and unregistrable,  
arrangements or combinations of colors  
may warrant copyright protection.<sup>1</sup>

Between 1985 and 1986, several  
parties submitted the colorized versions  
of ten motion pictures and one television  
program to the Copyright Office for  
registration of the colorized version as a  
derivative work. The Copyright Office  
did not register any of these works.  
Because of the unusual nature of the  
claimed authorship and to obtain  
information about the process of  
creating the colorized versions from  
persons other than the claimants, on  
September 15, 1986, the Copyright Office  
published a Notice of Inquiry in the  
**Federal Register** (51 FR 32665) and  
invited public comment regarding the  
registrability of colorized films.

In all 46 comments (43 original and  
three reply) were filed with the  
Copyright Office. After studying the  
comments, the Copyright Act, and the  
case law, the Copyright Office  
concluded that certain colorized  
versions of black and white motion  
pictures are eligible for copyright  
registration as derivative works. On  
June 22, 1987 the Copyright Office  
published its decision regarding  
registration for computer-colored films  
at 52 FR 23443. We stated that proposed  
deposit requirements for registration of  
computer-colored films would be  
published separately. The purpose of  
this Notice is to propose such rule and 1  
invite public comment on them.

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<sup>1</sup> See also 1 NIMMER ON COPYRIGHT § section  
2.14 (1985).

1 Error: line should read;  
"this Notice is to propose such  
rules and "

#### *2. Deposit of Black and White Version*

To facilitate examination of the claim  
to copyright in the computer-colored  
version, at least one commentator  
suggested that the Copyright Office  
should require the deposit of a black  
and white version as well as a colorized  
copy. Authority for this requirement  
exists under the general rulemaking  
authority of 17 U.S.C. 702. In addition,  
the Register of Copyrights is specifically  
authorized to specify by regulation, the  
"nature of the copies or phonorecords to  
be deposited in the various classes  
specified." 17 U.S.C. 408(c)(1).

The Copyright Office has decided to  
propose regulations that would require  
claimants of copyright in computer-  
colorized versions of motion pictures to  
deposit one copy each of the colorized  
version and of the black and white print  
from which the colorized version was  
prepared. Comparison of both copies  
will enable an examiner to determine  
better whether the colorized version  
satisfies the applicable standards for  
copyright registration. Deposit of the  
black and white version will also enrich  
the collections of the Library of  
Congress since in many cases the older  
black and white films were never  
registered or otherwise deposited with  
the Library.

#### *3. Regulatory Flexibility Act Statement*

With respect to the Regulatory  
Flexibility Act, the Copyright Office  
takes the position that this Act does not  
apply to Copyright Office rulemaking.  
The Copyright Office is a department of  
the Library of Congress and is a part of  
the legislature branch. Neither the  
Library of Congress nor the Copyright  
Office is an "agency" within the  
meaning of the Administrative  
Procedure Act of June 11, 1946, as  
amended (Title 5 Chapter 5 of the U.S. 2  
Code, Subchapter II and Chapter 7). The  
Regulatory Flexibility Act consequently

2 Error: line should read;  
"amended (title 5 Chapter 5 of  
the U.S."

does not apply to the Copyright Office 3 since that Act affects only those entities of the Federal Government that are agencies as defined in the 4 Administrative Procedure Act.<sup>2</sup>

<sup>2</sup> The Copyright Office was not subject to the Administrative Procedure Act before 1976, and it is now subject to it only in areas specified by section 701(d) of the Copyright Act (i.e., "all actions taken by the Register of Copyrights under this title [17], except with respect to the making of copies of copyright deposits); [17 U.S.C. 706(b)]. The Copyright Act does not make the Office an "agency" as defined in the Administrative 5 Procedure Act. For example, personnel actions taken by the Office are not subject to APA-FOIA requirements.

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

#### List of Subjects in 37 CFR Part 202

Claims, Claims to copyright, Copyright 6 registration.

#### Proposed Regulations

In consideration of the foregoing, the Copyright Office proposes to amend Part 202 of 37 CFR, Chapter II.

1. The authority citation for Part 202 would continue to read as follows:

Authority: Copyright Act, Pub. L. 94-553, 90 Stat. 2541 [17 U.S.C. 702].

2. Section 202.20(c)(2)(ii) would be amended by adding the following sentence at the end thereof:

§ 202.20 Deposit of copies and phonore 7 cards for copyright registration.

(c) \* \* \*  
(2) \* \* \*

(ii) *Motion pictures.* \* \* \* In the case of colorized versions of motion pictures made from pre-existing black and white 8 motion pictures, in addition to the deposit of one complete copy of the colorized motion picture and the separate description of its contents as specified above, the deposit shall consist of one complete print of the black and white version of the motion picture from which the colorized version was prepared.

Dated: June 18, 1987.

Ralph Oman,

Register of Copyrights.

Approved by:

Daniel J. Boorstin,

The Librarian of Congress.

[FR Doc. 87-14342 Filed 6-23-87; 8:45 am]

BILLING CODE 1410-03-M

3 Error: line should read;  
"does not apply to the Copyright Office"

4 Error: line should read;  
"agencies as defined in the"

5 Error: line should read;  
" "agency" as defined in the Administrative"

6 Error: line should read;  
"Claims, Claims to Copyright, Copyright Registration"

7 Error: line should read;  
" § 202.20 Deposit of copies and phonorecords for copyright registration"

8 Error: line should read;  
"made from pre-existing black and white"