

Dated: October 8, 2004.

Peter J. Boynton,

Captain, U.S. Coast Guard, Captain of the Port, Long Island Sound.

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LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 202

[Docket No. RM 2004-3A]

Acquisition and Deposit of Unpublished Audio and Audiovisual Transmission Programs

AGENCY: Copyright Office, Library of Congress.

ACTION: Final rule.

SUMMARY: This final rule amends the regulations of the Copyright Office to extend the Library of Congress' recording of unpublished transmission programs that have been fixed in a tangible medium of expression, which currently involves the recording of unpublished television programs, to include the recording of unpublished radio and other audio and audiovisual transmission programs.

EFFECTIVE DATE: November 26, 2004.

FOR FURTHER INFORMATION CONTACT:

David Carson, General Counsel, or Charlotte Douglass, Principal Legal Advisor, Office of the Copyright General Counsel, Copyright GC/I&R, PO Box 70400, Southwest Station, Washington, DC 20024-0400. Telephone: (202) 707-8380; Fax: (202) 707-8366.

SUPPLEMENTARY INFORMATION: On August 5, 2004, the Copyright Office published a notice of proposed rulemaking seeking comment on a proposed amendment to its regulation codified at 37 CFR 202.22. Section 407(e)(1) of the Copyright Act provides that the Librarian of Congress may record unpublished transmission programs that have been fixed and transmitted to the public in accordance with regulations established by the Register of Copyrights. Up until now, those regulations have provided for the fixation only of unpublished television transmission programs. However, the Library now wishes to record other audio and audiovisual transmission programs as authorized by section 407(e)(1), and the proposed amendment would provide for such recording.

Specifically, the amendment would permit the Library of Congress to record fixed and unpublished audio and audiovisual transmission programs. As with the present rule for television, this

regulation would enable the Library to record or demand unpublished radio transmission programs. Based on empirical and survey information, the Copyright Office's presumption is that commercial and noncommercial radio transmission programs are unpublished. In consideration of the significance of these widely disseminated forms of public communication, the regulation would also extend the Library's acquisition authority to cable, satellite and Internet transmission programs.

Copyright owners may use the recordings made or demanded by the Library of Congress under this regulation to satisfy the deposit requirements for registration of copyright claims. 17 U.S.C. 408.

In response to the notice of proposed rulemaking, the Copyright Office received two comments. The California Association of Library Trustees and Commissioners supported the Library's proposed rule, stating that increasing the Library's holdings in this way benefits the archive and research community. The National Association of Broadcasters (NAB) did not oppose the regulation, but asserted that the notice of proposed rulemaking provided no basis for presuming that all radio transmission programs have been fixed. NAB pointed out that the Library's existing practice with respect to television programs is to provide notice to commercial television stations of its intention to record specific programs, or that it has recorded such programs, at which point the station may confirm or dispute the Library's belief with respect to the fixed or unpublished status of the program. Moreover, NAB asserted that in order meaningfully to exercise the time limited option of using the Library's recording as a deposit when registering claims to copyright, its members need to receive notice of the particular programs that the Library has recorded.

In response to both of NAB's concerns, the final rule announced herein includes a new provision requiring the Library to maintain on its Web site, at <http://www.loc.gov/rr/record>, for audio recordings, or <http://www.loc.gov/rr/mopic>, for audiovisual recordings, a list of the transmission programs that it has recorded under this authority. A radio, cable, satellite, or Internet transmission program that has been recorded by the Library shall be included on the list within fourteen days of the recording by the Library.¹

¹ Because of the administrative burden, the Library cannot undertake to send separate notifications to each transmitting organization whenever the Library has recorded a radio transmission program.

Making this information publicly available on the Web site gives the copyright owner the opportunity to challenge the Library's presumption that a particular transmission program had been fixed and unpublished, and it also gives the copyright owner notice that a recording has been made by the Library that the owner may use as a deposit in connection with registration of a copyright claim in the transmission program.

List of Subjects

Copyright, Sound recordings.

Final Regulation

■ In consideration of the foregoing, the Copyright Office amends part 202 of 37 CFR to read as follows:

PART 202—REGISTRATION OF CLAIMS TO COPYRIGHT

■ 1. The authority citation for part 202 continues to read as follows:

Authority: 17 U.S.C. 702, 407 and 408.

■ 2. Section 202.22 is amended as follows:

- a. by revising the section heading;
- b. by revising paragraph (a);
- c. by revising paragraph (b)(1);
- d. in paragraph (b)(2), by removing "by Pub. L. 94-553";
- e. by revising the heading of paragraph (c);
- f. by revising paragraph (c)(1);
- g. in paragraph (c)(2), by removing "copied off-the-air" and adding "recorded" in its place;
- h. in paragraph (c)(3), by removing "copy off-the-air" and adding "record" in its place, by removing "television", and by removing "copying" and adding "recording" in its place;
- i. by revising paragraph (c)(4);
- j. in paragraph (c)(5) introductory text, by removing "off-the-air copying" and adding "recording" in its place;
- k. in paragraph (c)(5)(iii), by removing "with notice of copyright";
- l. in paragraph (c)(6) introductory text, by removing "off-the-air" and by adding "or phonorecord" after "copy";
- m. in paragraph (c)(7), by adding "or phonorecord" after "copy";
- n. by revising (c)(8) introductory text;
- o. in the heading for paragraph (d), by removing "television";
- p. in paragraph (d)(1), by adding "or phonorecord" after "copy";
- q. in paragraph (d)(3)(ii), by adding "or phonorecord" after "copy" each place it appears;
- r. in paragraph (d)(3)(iv), by removing "copies" and adding "of the copies or phonorecords" after "use";
- s. in paragraph (d)(3)(v), by removing "(a) and (c)";

■ t. in paragraph (d)(3)(vi), by adding “, or in the case of an audio transmission program, a compliance phonorecord,” after “copy”;

■ u. in paragraph (d)(4), by adding “or phonorecord” after “copy” each place it appears;

■ v. in paragraph (d)(5), by adding “and phonorecords” after “Copies”;

■ w. in paragraph (d)(6)(iii), by removing “shall be granted” and adding “should be granted” in its place;

■ x. in the heading of paragraph (e) and paragraph (e)(1), by adding “and phonorecords” after “copies” each place it appears, and by adding “or phonorecord” after “copy”;

■ y. by revising paragraph (e)(2);

■ z. in paragraph (f)(1), by adding “and phonorecords” after “Copies”;

■ aa. in paragraph (f)(1)(ii), by adding “or phonorecord” after “copy”;

■ bb. in paragraph (f)(2), by adding “and phonorecords” after “Copies”, and by adding “or phonorecord” after “copy” each place it appears; and

■ cc. in paragraph (g)(1), by adding “or phonorecords” after “copies”, and by removing “television” and by adding “audio or audiovisual” in its place.

The additions and revisions to § 202.22 read as follows:

§ 202.22 Acquisition and deposit of unpublished audio and audiovisual transmission programs.

(a) *General.* This section prescribes rules pertaining to the acquisition of phonorecords and copies of unpublished audio and audiovisual transmission programs by the Library of Congress under section 407(e) of title 17 of the United States Code, as amended. It also prescribes rules pertaining to the use of such phonorecords and copies in the registration of claims to copyright, under section 408(b).

(b) * * *

(1) The terms copies, fixed, phonorecords, publication, and transmission program and their variant forms, have the meanings given to them in section 101 of title 17. The term network station has the meaning given it in section 111(f) of title 17. For the purpose of this section, the term transmission includes transmission via the Internet, cable, broadcasting, and satellite systems, and via any other existing or future devices or processes for the communication of a performance or display whereby images or sounds are received beyond the place from which they are sent.

* * * * *

(c) *Recording of transmission programs.* (1) Library of Congress employees, including Library of Congress contractors, acting under the

general authority of the Librarian of Congress, may make a fixation of an unpublished audio or audiovisual transmission program directly from a transmission to the public in the United States, in accordance with subsections 407(e)(1) and (4) of title 17 of the United States Code. The choice of programs selected for fixation shall be based on the Library of Congress's acquisition policies in effect at the time of fixation. Specific notice of an intent to record a transmission program will ordinarily not be given. In general, the Library of Congress will seek to record a substantial portion of the television programming transmitted by noncommercial educational broadcast stations as defined in section 397 of title 47 of the United States Code, and will record selected programming transmitted by commercial television broadcast stations, both network and independent. The Library will also record a selected portion of the radio programming transmitted by commercial and noncommercial broadcast stations. Additionally, the Library will record a selected portion of unpublished Internet, cable and satellite programming transmitted to the public in the United States.

* * * * *

(4) The Library of Congress is entitled under this paragraph (c) to presume that a radio program transmitted to the public in the United States has been fixed but not published at the time of transmission, and that a television program transmitted to the public in the United States by a noncommercial educational broadcast station as defined in section 397 of title 47 of the United States Code has been fixed but not published.

* * * * *

(8) The Library of Congress shall maintain a list of the radio, cable, Internet and satellite transmission programs that the Library has recorded on the Motion Picture, Broadcasting and Recorded Sound Division Web site at <http://www.loc.gov/rr/record/> for audio transmission programs, or <http://www.loc.gov/rr/mopic/> for audiovisual transmission programs, and, in making fixations of such unpublished transmission programs, shall identify a program that the Library has recorded by including that transmission program on the list no later than fourteen days after such fixation has occurred. The Library of Congress in making fixations of unpublished television transmission programs transmitted by commercial broadcast stations shall not do so without notifying the transmitting organization or its agent that such

activity is taking place. In the case of television network stations, the notification will be sent to the particular network. In the case of any other commercial television broadcasting station, the notification will be sent to the particular broadcast station that has transmitted, or will transmit, the program. Such notice shall, if possible, be given by the Library of Congress prior to the time of broadcast. In every case, the Library of Congress shall transmit such notice no later than fourteen days after such fixation has occurred. Such notice shall contain:

(e) * * *

* * * * *

(2) All copies and phonorecords acquired or made under this section, except copies and phonorecords of transmission programs consisting of a regularly scheduled newscast or on-the-spot coverage of news events, shall be subject to the following restrictions concerning copying and access: in the case of television or other audiovisual transmission programs, copying and access are governed by Library of Congress Regulation 818–17, Policies Governing the Use and Availability of Motion Pictures and Other Audiovisual Works in the Collections of the Library of Congress, or its successors; in the case of audio transmission programs, copying and access are governed by Library of Congress Regulation 818–18.1, Recorded Sound Listening and Duplication Services, or its successors. Transmission programs consisting of regularly scheduled newscasts or on-the-spot coverage of news events are subject to the provisions of the “American Television and Radio Archives Act,” 2 U.S.C. 170, and such regulations as the Librarian of Congress shall prescribe.

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Dated: October 13, 2004.

Marybeth Peters,

Register of Copyrights.

Approved by:

James H. Billington,

Librarian of Congress.

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