

the Patent Office. The Commissioner of Patents actually determines the patentability of an invention or design and grants the patent.

The current regulations, 37 CFR 202.10(a) and (b), reflect the Copyright Office's policy of accepting the doctrine of "election of protection." For many years, the Copyright Office required claimants to elect between patent or copyright protection of useful pictorial, graphic, or sculptural expressions. The origin of this policy can be traced to a 1910 decision, *Louis de Jonge & Co. v. Breuker & Kessler Co.*, 182 F. 150 (C.C.S.E.D. Pa. 1910), *aff'd*, 191 F. 35 (3d Cir. 1911), *aff'd*, 235 U.S. 33 (1914), wherein the court held that a claimant could elect to secure protection under either patent or copyright but could not secure both. Similarly, in 1927, the D.C. Court of Appeals, in *In re Blood*, 23 F.2d 772 (D.C. Cir.1927) embraced the election doctrine.

The primary basis for the existing Copyright Office policy was the Second Circuit's decision in *Korzybski v. Underwood & Underwood, Inc.*, 36 F.2d 727 (2d Cir. 1929). The court ruled that "[a]n inventor who has applied for and obtained a patent cannot extend his monopoly by taking out a copyright." "The filing of the application for the patent * * * was a publication [and full disclosure of the invention] that entitled anyone to copy the drawings [representing the invention]." *Id.* at 729 (parenthetical added). However, in a landmark decision, *Mazer v. Stein*, 347 U.S. 201 (1954), the Supreme Court ruled that the same disclosure or publication might support a design patent and a copyright. "Neither the Copyright statute nor any other says that because a thing is patentable it may not be copyrighted." *Id.* at 217. The Court, however, expressly refused to entertain the issue of whether the grant of either monopoly precluded that of the other. A few years later, in *Vacheron & Constantin-LeCoultre Watches, Inc. v. Benrus Watch Co. Inc.*, 155 F. Supp. 932 (S.D.N.Y. 1957), *modified*, 260 F.2d 637 (2d Cir. 1958), the district court rejected arguments that seeking copyright protection precluded securing design patent protection. Indeed, the overlapping protection concerns two distinct statutory monopolies; and the doctrine of *Korzybski* "must rest upon the assumption that the owner of the statutory monopoly has some power to protect his 'work,' for otherwise any dedication would be without consideration." 260 F.2d at 642.

In 1968, the Copyright Office reviewed the election policy and reaffirmed its position on two grounds—public policy considerations and the

publication with notice requirement. The public policy ground was based on the theory that it is an undue extension of the patent monopoly to allow, after the patent has expired, a copyright for the same design. If copyright protection were allowed to subsist, the public would be deprived from exploiting the work for the duration of the copyright. The second ground was a more practical one. The patent procedure required publication in the Official Gazette without notice of copyright. Since the 1909 Copyright Act required a notice of copyright on all published copies to secure and maintain copyright protection, this requirement foreclosed copyright protection for the patent drawings and placed the work in the public domain.

Prior to 1974, The United States Patent and Trademark Office had an election policy similar to that of the Copyright Office. The Patent Office discontinued this requirement in view of the decision in *In re Yardley*, 493 F.2d 1389 (C.C.P.A. 1974), wherein the court stated that even though there is a definite overlap, "Congress has not provided that an author inventor must elect between securing a copyright or securing a design patent." *Id.* at 1394. "[T]he mere fact", said the court "that the copyright will persist beyond the term of any design patent which may be granted does not provide a sound basis for rejecting appellant's patent application." *Id.* at 1395. Reassessing its policy, the Copyright Office chose to follow *Korzybski* instead of *Yardley*, on the rationale that the latter case was limited to an interpretation of the design patent act while *Korzybski* interpreted the Copyright Act.

The Copyright Office regulations based on the election doctrine have been criticized. In his treatise on copyright, Nimmer observes:

Without offering the rationale of publication or any other basis, Copyright Office Regulations under the 1909 Act simply provided that once a patent has been issued, copyright registration would be denied to a work of art and to a scientific or technical drawing. There appears to be no statutory or other justification for this position. It would seem on principle that if a work otherwise meets the requirements of copyrightability, it should not be denied such simply because the claimant happens to be entitled to supplementary protection under other legislation.¹

We agree.

In consideration of the foregoing, the Copyright Office is issuing this Policy Decision and amending 37 CFR chapter II in the manner set forth below.

¹ David Nimmer and Melville B. Nimmer, *Nimmer on Copyright* § 2.19 (1994).

PART 202—[AMENDED]

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

Authority: Section 702, 90 Stat. 2541, 17 U.S.C. 702.

2. In § 202.10, paragraphs (a) and (b) are removed, the existing paragraph (c) is redesignated as paragraph (b), and a new paragraph (a) is added to read as follows:

§ 202.10 Pictorial, graphic, and sculptural works.

(a) In order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form. The registrability of such a work is not affected by the intention of the author as to the use of the work or the number of copies reproduced. The availability of protection or grant of protection under the law for a utility or design patent will not affect the registrability of a claim in an original work of pictorial, graphic, or sculptural authorship.

Marybeth Peters,

Register of Copyrights.

Dated: March 14, 1995.

Approved by:

James H. Billington,

The Librarian of Congress.

[FR Doc. 95-7363 Filed 3-23-95; 8:45 am]

BILLING CODE 1410-30-P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Meeting; Arts in Education Advisory Panel

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Public Law 92-463), as amended, notice is hereby given that a meeting of the Arts in Education Advisory Panel (Arts Plus Section) to the National Council on the Arts will be held on April 10-14, 1995. The panel will meet from 10:30 a.m. to 5:30 p.m. on April 10; from 9:00 a.m. to 6:00 p.m. on April 11; from 9:00 a.m. to 2:00 p.m. on April 12; and from 8:30 a.m. to 5:00 p.m. on April 13. This meeting will be held in Room 730, at the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

A portion of this meeting will be open to the public on April 13 from 3:15 p.m. to 5:00 p.m. for a policy discussion including a discussion of the FY 96 and 97 Arts Plus guidelines.

The remaining portions of this meeting from 10:30 a.m. to 5:30 p.m. on April 10; from 9:00 a.m. to 6:00 p.m. on April 11; from 9:00 a.m. to 2:00 p.m. on April 12; and from 8:30 a.m. to 3:15

p.m. on April 13 are for the purpose of panel review, discussion, evaluation, and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency by grant applicants. In accordance with the determination of the Chairman of February 8, 1994, these sessions will be closed to the public pursuant to subsection (c) (4), (6), and 9(B) of section 552b of Title 5, United States Code.

Any person may observe meetings, or portions thereof, of advisory panels which are open to the public, and may be permitted to participate in the panel's discussions at the discretion of the panel chairman and with the approval of the full-time Federal employee in attendance.

If you need special accommodations due to a disability, please contact the Office of Special Constituencies, National Endowment for the Arts, 1100 Pennsylvania Avenue, NW., Washington, DC 20506, 202/682-5532, TTY 202/682-5496, at least seven (7) days prior to the meeting.

Further information with reference to this meeting can be obtained from Ms. Yvonne Sabine, Committee Management Officer, National Endowment for the Arts, Washington, DC 20506, or call 202/682-5788.

Dated: March 20, 1995.

Yvonne M. Sabine,

Director, Office of Council and Panel Operations, National Endowment for the Arts.
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BILLING CODE 7537-01-M

on April 11 are for the purpose of Panel review, discussion, evaluation, and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency by grant applicants. In accordance with the determination of the Chairman of February 8, 1994, these sessions will be closed to the public pursuant to subsection (c) (4), (6) and 9(B) of section 552b of Title 5, United States Code.

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Further information with reference to this meeting can be obtained from Ms. Yvonne Sabine, Committee Management Officer, National Endowment for the Arts, Washington, DC 20506, or call 202/682-5788.

Dated: March 20, 1995.

Yvonne M. Sabine,

Director, Office of Council and Panel Operations, National Endowment for the Arts.
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review, discussion, evaluation, and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency by grant applicants. In accordance with the determination of the Chairman of February 8, 1994, these sessions will be closed to the public pursuant to subsection (c) (4), (6) and 9(B) of section 552b of Title 5, United States Code.

Any person may observe meetings, or portions thereof, of advisory panels which are open to the public, and may be permitted to participate in the panel's discussions at the discretion of the panel chairman and with the approval of the full-time Federal employee in attendance.

If you need special accommodations due to a disability, please contact the Office of Special Constituencies, National Endowment for the Arts, 1100 Pennsylvania Avenue, NW., Washington, DC 20506, 202/682-5532, TTY 202/682-5496, at least seven (7) days prior to the meeting.

Further information with reference to this meeting can be obtained from Ms. Yvonne Sabine, Committee Management Officer, National Endowment for the Arts, Washington, DC 20506, or call 202/682-5788.

Dated: March 20, 1995.

Yvonne M. Sabine,

Director, Office of Council and Panel Operations, National Endowment for the Arts.
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Meeting; Challenge/Advancement Advisory Panel

Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Public Law 92-463), as amended, notice is hereby given that a meeting of the Challenge and Advancement Advisory Panel (Advancement Phase I Review Section) to the National Council on the Arts will be held on April 10-11, 1995 from 9:00 a.m. to 5:30 p.m. This meeting will be held in Room M-14, at the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

Portions of this meeting will be open to the public from 9:00 a.m. to 10:00 a.m. on April 10, for opening remarks and introductions and from 4:30 p.m. to 5:30 p.m. on April 11 for a policy discussion.

The remaining portions of this meeting from 10:00 a.m. to 5:30 p.m. on April 10 and from 9:00 a.m. to 4:30 p.m.

Meeting; Media Arts Advisory Panel

Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Public Law 92-463), as amended, notice is hereby given that a meeting of the Media Arts Advisory Panel (Arts on Television Section) to the National Council on the Arts will be held on April 6-7, 1995, from 10:00 a.m. to 6:00 p.m. on April 6 and from 9:00 a.m. to 4:00 p.m. on April 7. This meeting will be held in Room 716, at the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

Portions of this meeting will be open to the public from 10:00 a.m. to 10:15 a.m. on April 6, for opening remarks and from 3:30 p.m. to 4:00 p.m. on April 7, for a policy discussion.

The remaining portions of this meeting, from 10:15 a.m. to 6:00 p.m. on April 6 and from 9:00 a.m. to 3:30 p.m. on April 7 are for the purpose of Panel

Meeting

Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Public Law 92-463), as amended, notice is hereby given that a meeting of the Music Advisory Panel (Jazz Fellowships/Jazz Ensembles Section) to the National Council on the Arts will be held on April 4-7, 1995 from 9:00 a.m. to 5:30 p.m. This meeting will be held in Room M-14, at the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

A portion of this meeting will be open to the public from 4:00 p.m. to 5:30 p.m. on April 7, 1995 for a policy discussion and guidelines review.

The remaining portions of this meeting, from 9:00 a.m. to 5:30 p.m. on April 4-6 and from 9:00 a.m. to 4:00 p.m. on April 7 are for the purpose of Panel review, discussion, evaluation, and recommendation on applications for financial assistance under the