

enjoy the fireworks display in a safe manner. In addition, commercial vessels transiting the area can transit around the area. The Coast Guard will give notice to the public via a Broadcast to Mariners that the regulation is in effect.

#### Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104-121), we offered to assist small entities in understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking process. Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1-888-REG-FAIR (1-888-734-3247).

#### Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520).

#### Federalism

We have analyzed this rule under Executive Order 13132, Federalism, and have determined that this rule does not have implications for federalism under that Order.

#### Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

#### Taking of Private Property

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

#### Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive

Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

#### Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

#### Environment

We have considered the environmental impact of this rule and concluded that under figure 2-1, paragraph (34)(g), of Commandant Instruction M16475.IC, this rule is categorically excluded from further environmental documentation. A "Categorical Exclusion Determination" is available in the docket for inspection or copying where indicated under ADDRESSES.

#### Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. It has not been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

#### Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

#### List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons set out in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

### PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

1. The authority citation for part 165 continues to read as follows:

**Authority:** 33 U.S.C. 1231; 50 U.S.C. 191, 33 CFR 1.05-1(g), 6.04-1, 6.04-6, 160.5; 49 CFR 1.46.

2. A new temporary § 165.T09-957 is added to read as follows:

#### § 165.T09-957 Safety Zone; Lake Michigan, Grand Haven, MI.

(a) *Location.* The following area is a safety zone: all waters of Lake Michigan within the arc of a circle with a 140-foot radius from the fireworks launch site with its center in approximate position 43° 00' 00" N, 086° 13' 7" W (off #50 Wilderness Drive) (NAD 1983).

(b) *Effective time and date.* This regulation is effective from 9 p.m. until 10:30 p.m. (local), on August 1, 2001.

(c) *Regulations.* This safety zone is being established to protect the boating public during a planned fireworks display. In accordance with the general regulations in § 165.23 of this part, entry into this zone is prohibited unless authorized by the Coast Guard Captain of the Port Chicago, or the designated Patrol Commander.

Dated: June 25, 2001.

**R.E. Seebald,**

*Captain, U.S. Coast Guard, Captain of the Port Chicago.*

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### LIBRARY OF CONGRESS

#### Copyright Office

#### 37 CFR Part 202

[Docket No. RM 95-7C]

#### Registration of Claims to Copyright, Group Registration of Photographs

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

**ACTION:** Final regulations.

**SUMMARY:** The Copyright Office of the Library of Congress is announcing final regulations to establish a new procedure for group registration of published photographs. The new regulations permit submission of groups of published images in a variety of formats as deposit copies, together with an application and filing fee. This option applies to groups of works created by an individual photographer that are published within one calendar year. The Office is also modifying deposit requirements for groups of unpublished

photographs registered as unpublished collections.

**EFFECTIVE DATE:** August 16, 2001.

**FOR FURTHER INFORMATION CONTACT:**

David O. Carson, General Counsel, or Patricia Sinn, Senior Attorney, P.O. Box 70977, Southwest Station, Washington, DC 20024. Telephone: (202) 707-8380. Fax: (202) 707-8366.

**SUPPLEMENTARY INFORMATION:** In this document, we announce a final rule governing group registration of published photographs. The rule also liberalizes the deposit requirements for photographs included in unpublished collections of photographs registered pursuant to 37 CFR 202.3(b)(3). The new rule permits a group of photographs taken by the same photographer and published within the same calendar year to be submitted as a group for a single registration. If the claimant does not wish to or cannot identify the specific date of publication of each photograph, a range of publication dates may be stated provided that all of the photographs in the group were first published within three months before the date the application, fee and deposit are received by the Copyright Office. The deposit for the group registration of photographs, or for photographs submitted as unpublished collections pursuant to 37 CFR 202.3(b)(3), may consist of images on CD-ROMs or DVD-ROMs, unmounted prints measuring at least 3 inches by 3 inches, contact sheets, slides with single or multiple images, the photograph in a form in which it has been published (e.g., clippings from newspapers or magazines); photocopies; or a videotape clearly depicting each photograph.

### I. Background

Under the 1976 Copyright Act, as amended, an applicant may seek registration of a claim in an original work of authorship with the Copyright Office by submitting a completed application, the applicable fee, and a deposit of the work to be registered. Title 17, United States Code, sets forth some of the requirements for the deposit and authorizes the Register of Copyrights to specify by regulation the nature of the copies or phonorecords to be deposited. See 17 U.S.C. 408(b), 408(c). The legislative history of the 1976 Act also reflects Congress's intent to give the Register the ability to adjust deposit requirements. See H.R. Rep. No. 94-1476, at 153, 154 (1976) ("House Report"). Generally, one complete copy or phonorecord of an unpublished work is required as a deposit, and two complete copies or phonorecords of the best edition of a published work are

required if the work is first published in the United States. However, the Register of Copyrights may permit the deposit of identifying material instead of copies or phonorecords "where copies or phonorecords are bulky, unwieldy, easily broken, or otherwise impractical to file and retain as records identifying the work registered \* \* \*". Id. at 154. Congress has also authorized the Register to allow a single registration for a group of related works in order to alleviate expense for authors and administrative burdens on the Copyright Office. 17 U.S.C. 408(c). See also 65 FR 26162, 26163 (May 5, 2000). A group of photographs by one photographer was cited as one example where group registration might be appropriate. House Report at 154.

During congressional hearings on the proposed Copyright Reform Act of 1993, photographers complained that they were unable to take advantage of the benefits of registration because the Copyright Office practices were too burdensome. Photographers stated that it required a tremendous amount of time and effort to submit a copy of each image that they wished to register and that registration was financially burdensome.<sup>1</sup>

In reaction to these concerns and following the 1993 recommendations of the Librarian of Congress's Advisory Committee on Copyright Registration and Deposit (ACCORD), see Library of Congress, Advisory Committee on Copyright Registration and Deposit, Report of the Co-Chairs, at 20 (1993), the Office initiated a proposed rulemaking in December 1995. 60 FR 61657 (Dec. 4, 1995). The Office initially proposed regulations which would have permitted group registration of mixed unpublished and published photographs, with a deposit of identifying material consisting of general descriptions of the photographs rather than a deposit of images of the photographs. Because the proposed rules elicited much controversy, the Office held a public hearing and allowed an additional comment period. See 61 FR 28829 (June 6, 1996). Sharply differing views were presented by interested parties.

Having reviewed all the comments and testimony, and having considered various approaches to facilitate copyright registration for photographers,

a year ago the Office announced new proposed rules that would permit group registration of related published photographs and liberalize the deposit requirements for unpublished collections of photographs. 65 FR 26162 (May 5, 2000). Under this proposal, a group registration of up to 500 photographs created by one photographer published within the same calendar year would be permitted. Id. However, this proposal incorporated a less liberal deposit requirement than the original proposal; rather than accept general descriptions of the subject matter of the photographs in lieu of the photographs themselves, the Office proposed to require the deposit of a copy of each photograph in the group. The Office explained that it was reluctant to implement a procedure that would permit acceptance of deposits that do not meaningfully reveal the works for which copyright protection is claimed. On the other hand, the proposed rule would permit submission of images in a number of formats, in order to make it as easy and inexpensive as possible for photographers to register their works while still providing the actual images for which copyright was claimed. The proposed formats included digital images on CD-ROM or DVD-ROM, single images, contact sheets, slides with single images, slides each containing up to 36 images, multiple images on video tape, or the formats in which the images were originally published (e.g., clippings from newspapers or magazines). 65 FR 26164.

In this announcement, comment was requested on several issues, including: how many images should an applicant be permitted to include in one registration; how the date of publication should be provided for each photograph in a group; whether the Office's general continuation sheet (CON) should be used for identification purposes, or whether an optional specialized continuation sheet which would provide specific information about each photograph included in a group should be used; whether claimants should be required to number the photographs in a group consecutively, and the manner in which the numbering would be accomplished; whether the Office should accept deposits in formats other than those set forth in the proposed rule, and if so, in what formats; what file formats should be accepted for photographs submitted in electronic form; and whether the Office should consider offering the alternative of providing a range of dates for images covering a three-month period, rather than providing the specific date of

<sup>1</sup> See Copyright Reform Act of 1993: Hearings on H.R. 897 Before the Subcomm. On Intellectual Property and Judicial Administration of the House Comm. On the Judiciary, 103d Cong., 1st Sess. 370-72 (1993). See also, Copyright Reform Act of 1993: Hearing on S. 373 Before the Subcomm. On Patents, Copyrights and Trademarks of the Senate Comm. On the Judiciary, 103d Cong., 1st Sess. 169 (1993).

publication of each photograph in the group. 65 FR 26165–26166.

## II. Comments Received in Response to the May 5, 2000 Notice of Proposed Rulemaking

The Office received eleven sets of comments in response to its proposed regulations published May 5, 2000. The comments covered not only the questions the Office presented May 5, 2000, but also other issues such as whether the Office should revisit its earlier proposal to permit the use of general descriptions of photographs in lieu of requiring deposit of the actual images; whether applicants for group registration of photographs should be required to comply with proposed “Photo Industry Copyright Guidelines” developed by associations representing manufacturers, photographers, photo processing firms and camera stores; and whether the proposed limit of 500 photographic images in a group should be rejected.

### A. Comments in Response to Questions Posed in Notice of Proposed Rulemaking

1. How Should the Date of Publication of Each Photograph Be Indicated on (a) the Deposit Itself, and (b) a Continuation Sheet? Should a New Continuation Sheet Be Created for This Purpose, or Should the Office’s Current Continuation Sheet, Form CON, Be Used?

The American Society of Media Photographers (ASMP) suggested that for digital media, the file name for a particular image could be cross referenced to the image’s date of publication by entering the file name and publication date on a reference sheet. For slides containing up to 36 images, each image should be numbered and that the number and the date of publication of the image could similarly be recorded on a list. For contact sheets, that date of publication could be written on an accompanying sheet with the frame number of the image cross-referenced to the date of publication. For videotapes, a cross-referenced list could be made on which the date of publication of each image is listed in the same sequence in which the images appear on the videotape. ASMP comments at 1. ASMP noted that the date of publication of each photograph can be indicated “by attaching \* \* \* reference sheets \* \* \* to the continuation sheet.” ASMP comments at 1. By doing so, “the date of publication is indicated.” Id. ASMP also endorsed the idea of fashioning a special continuation sheet tailored to

the requirements for group registration of photographs.

A number of commenters asserted that requiring photographers to identify dates of publication specifically for each photograph submitted would be unduly burdensome, placing a hardship on photographers outweighing any benefit to the public record. Professional Photographers of America (PPA) suggested that if such a requirement is retained, photographers should have the flexibility to identify publication dates on the deposited image itself, the application form, or on a continuation sheet, and that photographers be given latitude to choose the most efficient methods of dating the photographs based upon the nature of their own businesses. PPA comments at 10. PPA also suggested that a photographer should be free to use any labeling system as long as it meets the goal of enabling one to identify the specific date of publication of any photograph in the group. Id. at 12. The Advertising Photographers of America, National (APA) suggested that the regulations should require only that a claimant indicate in a permanent manner the publication date of each photograph on the deposit or on the registration application or continuation sheet, and suggested that claimants choosing to note the publication date on the registration application or continuation sheet should number each photograph on the deposit and indicate the publication date for each image by photograph number. APA comments at 1–2. APA commented that claimants who choose to state the publication date on the continuation sheet should number each photograph on the deposit and, on the continuation sheet, indicate the publication date for each image by photograph number. APA comments at 2. APA also suggested that photographers be permitted to choose the form (Form CON or a new, specialized continuation sheet) most appropriate in a given case. The Graphic Artists Guild (Guild) commented that the simplest standard means of identifying and numbering images would be by referencing the numbers on a continuation sheet. Guild comments at 2.

Professor Peter Jaszi (Jaszi) suggested that applicants be required to provide not only information about the date on which each photograph in a group was taken, but also a brief amount of information about what each photograph or sequence of photographs depicts. Jaszi comments at 1–2. The Magazine Publishers of America and Newspaper Association of America (MPA/NAA) also suggested that

descriptive information be required. MPA/NAA comments at 3. Both comments emphasized that such a requirement would foster a more meaningful and comprehensive public record.

Professor Jaszi and MPA/NAA also suggested that use of a continuation sheet should be mandatory in order to provide information about each photograph. Jaszi comments at 1; MPA/NAA comments at 5. ASMP agreed that a special continuation sheet should be made available for group registration of photographs. ASMP comments at 2. APA asserted that photo claimants should be allowed to choose the form that is most appropriate, on a case-by-case basis, to ease burdens on photographers while still creating meaningful identification of works being registered. APA comments at 2–3. The Guild agreed that a continuation sheet should be available, but expressed no views on whether the Office’s existing continuation sheet should be used or whether a special continuation sheet for group registration of photographs should be created. Guild comments at 2.

2. Should Claimants Be Required To Number the Photographs in a Group Consecutively (e.g., from 1 to 500), and To Indicate the Number of Each Photograph on or Affixed to the Individual Image of the Photograph That Is Deposited?

As noted above, ASMP suggested using the file name for each photographic image or, in the case of contact sheets, assign a number to each image on the contact sheet, and coordinate the file name or number with the date of publication on a reference sheet. ASMP comments at 1–2. PPA asserted that requiring a uniform numbering system would be unduly burdensome for most photographers. PPA comments at 12. Other commenters agreed. E.g., APA comments at 3–4, Patti McConville Photography comments at 1. No comments supported imposition of a numbering requirement.

3. Should the Office Accept Deposits in Formats Other Than CD–ROM or DVD–ROM; Single Images; Contact Sheets; Slides With Single Images; Slides Each Containing Up to 36 Images; or Multiple Images on Video Tape? If So, What Other Formats Should Be Accepted?

One commenter asserted that photocopies of images should also be accepted. ASMP comments at 1.C.3. Another commenter found the proposed regulations to be acceptable, but suggested that the Office should be prepared to accept deposits in

additional formats as they become available. Guild comments at 2. Another commenter proposed that the advanced photo system (APS) be used, with enhancements that permit copyright-related information about each photograph to be electronically encoded on the film itself. It is not clear whether this proposal envisioned that applicants be required to use this technology, but the commenter admitted that the hardware and systems needed to implement the proposal do not currently exist. Coalition for Consumers' Picture Rights comments at 7-10.

One commenter urged the Office to return to an earlier proposal that would have permitted the use of descriptive identifying material in lieu of a deposit of actual images. PPA comments at 3-6.

Some commenters believed the Office's proposed formats were too liberal. For example, one commenter questioned what function would be served by including an analog option such as "a videotape clearly depicting each photograph" rather than proven and cost-effective new technologies for digital image storage and retrieval. The same commenter questioned the wisdom of including "slides containing up to 36 images" as a deposit option. Jaszi comments at 2. Another commenter criticized the inclusion of contact sheets and slides, observing that such deposits are difficult to search. That commenter also expressed concerns about the potential shelf-life of other formats, such as videotape. MPA/NAA comments at 5-6.

4. For Photographs Submitted on CD-ROMs or in Other Electronic Formats, What File Formats (e.g., JPEG, GIF, etc.) Should Be Accepted, and Why?

One commenter asserted that claimants should be permitted to submit digital deposits in any commercially available file format provided the format is identified. APA comments at 4. Another commenter wrote that the Office should not limit the types of electronic formats acceptable for meeting the deposit requirements to a static list. It noted that JPEG and GIF are currently the most common formats by which images are stored digitally. PPA comments at 12-13. Another commenter recommended accepting JPEG, TIFF and PCD formats, which it claimed are the most popular file formats for storage used by photographers. ASMP comments at 3.

5. As an Alternative To Requiring a Claimant To Provide the Date of Publication of Each Photograph in the Group, Should the Office Consider Offering the Alternative of Providing a Range of Dates Over a Three-Month Period (e.g., January 1-March 31, 2001)? What Would Be the Advantages and Disadvantages—to Claimants and to the Public Record—of Such an Approach?

PPA and ASMP observed that requiring claimants to provide the precise date of publication of each photograph in a group would impose an unjustifiable and burdensome hardship on photographers. They endorsed the Office's alternate proposal that would not require an application to specify the date of publication of each photograph in the group, but would permit the application to provide a range of dates of publication over a period of no more than three months. See PPA comments at 8-10; ASMP comments at 3. APA suggested that the range of dates should be as minimally restrictive as possible, although a three month range would be acceptable. APA comments at 4-5. The Graphic Artists Guild (Guild) did not favor allowing a range of publication dates, asserting that this practice could compromise the requirements of 17 U.S.C. 412 that permit claims for attorneys' fees and statutory damages when a work has been registered within three months after publication. Guild comments at 3.

#### *B. Additional Comments Submitted in Response to the May 5, 2000 Notice of Proposed Rulemaking*

Commenters also addressed a number of additional issues, such as the number of photographs that may be included in a group registration, whether works made for hire should be eligible for group registration, and whether claimants using the group registration procedure should be required to abide by Photo Industry Copyright Guidelines.

1. *The number of photographs that may be included in a group registration.* The May 2000 notice proposed that a maximum of 500 photographs could be included in a group registration. Many commenters objected to limiting a group registration to 500 photographs. PPA observed that many professional photographers take 500 images or more in the course of one or two days' work. PPA comments at 3, 6-8. Another commenter agreed, noting that it generates thousands of images per quarter. Patti McConville Photography comments at 1.

2. *Works made for hire.* PPA objected that the proposed regulation could be read as being available only to single

individual photographers, ignoring the realities of the photography business where many photographs are works made for hire. PPA comments at 3, 11. In contrast, the Graphic Artists Guild objected that the proposed regulation was available to works made for hire. The Guild asserted that the proposed amendments are intended to ease the burdens of registration for individual authors and noted that in other contexts, the Office has restricted certain benefits such as the Short Form VA to individual authors. Guild comments at 2.

3. *Adoption of Photo Industry Copyright Guidelines.* Some commenters urged the Office to incorporate proposed Photo Industry Copyright Guidelines into the group registration regulations. These Guidelines were negotiated by ASMP, PPA, the Photo Marketing Association International (PMA), the Association of Professional Color Laboratories, the Professional School Photographers Association, and the Coalition for Consumers' Picture Rights (CCPR). PMA comments (Appendix). Among the guidelines are requirements that photographers advise customers of the photographer's ownership of copyright and give information on how to obtain additional copies of photographs; that when reasonably possible, photographers identify and mark their photographs to permit others to know whom to contact to obtain permission to copy them; that they respond promptly to requests for permission to copy their photographs; and that they give written notice to photo processors when they believe their copyrights have been infringed, in an effort to prevent further infringement, determine the cause of the alleged infringement, and permit possible resolution of the matter. Id.

Representatives of photo processors, camera stores, manufacturers of photographic equipment and others, concerned about the possibility of being sued for copyright infringement by professional photographers for duplicating photographs in cases where they were not aware of a photographer's copyright, urged that the Office require photographers who take advantage of group registration of photographs to agree to follow the guidelines and consent to application of the guidelines in any infringement action. PMA comments at 6. Under their proposal, photographers who take advantage of group registration of photographs would be required to waive any claims for statutory damages or attorney's fees in cases in which the infringer acted "innocently" in accordance with the Photo Industry Guidelines. Eastman

Kodak Company comments at 2; PMA comments at 6 and Appendix.

PMA argues that because the Office is not required to institute a group registration of photographs proposal, it has the power to require photographers to waive their rights to statutory damages and attorney's fees in the circumstances where the guidelines would deny those remedies. PPA comments at 6–7. PPA cites two instances in which the Office has established special requirements as a condition of registration: (1) Regulations for registration of holograms that require deposit not only of the hologram itself, but also of detailed instructions for displaying and viewing the hologram and a photograph or other description of the hologram (37 CFR § 202.20(c)(2)(iii)); and (2) the Office's **Federal Register** notice accompanying the announcement of the final regulations for group registration of daily newsletters, 64 FR 29522 (1999), in which the Office stated that the group registration privilege is contingent upon the claimant meeting the conditions specified in the regulation. PMA comments at 7–8.

PPA also asserted that the Office could adopt the guidelines, but this assertion was made in the context of PPA's plea that the Office accept the earlier proposal that would have permitted group registration without requiring deposit of the actual images of the works being registered. PPA comments at 1–2 & n.2. PPA noted that in other contexts, the Office, Congress, and the courts have cited industry-endorsed guidelines with the intent that they be used by the courts in infringement litigation, referring to the Agreement of Guidelines for Classroom Copying in Not-For-Profit Educational Institutions, adopted in H.Rep. No. 94–1467, 96th Cong., 2d Sess. At 68–70 (1976). PPA comments at 2–3 n.2.

4. *Other opposition to the proposal.* Groups representing photo processors, camera stores, manufacturers of photographic equipment, consumers and others expressed their opposition to the group registration proposal. Although willing to accept the proposal if compliance with the Photo Industry Copyright Guidelines were required by claimants, PMA expressed concern that without such a provision, the group registration proposal would make it easy for photographers to collect statutory damages and attorney's fees for infringement, leading to a flood of litigation over minor matters. PMA comments at 5. The Coalition for Consumers' Picture Rights (CCPR), an ad hoc organization of camera store owners, minilab retailers, photo

processors and photofinishers, film and paper manufacturers, camera and lens manufacturers, frame and album manufacturers, photographers, and consumers, asserted that the proposal "could jeopardize the successful photofinishing industry." CCPR comments at 2. The Coalition noted the difficulty photofinishers have in determining whether a copyright in a photograph is owned by someone other than the customer who brings the photo into the shop or, in the internet environment, transmits a photo in digital form to a photofinisher. CCPR comments at 2–3. CCPR asserted that making it easier to register photographs without building in safeguards for users will lead to more copyright infringement litigation by photographers, to the detriment of photofinishers. CCPR (and MPA/NAA) urged that the Office refrain from announcing final rules on group registration of photographs until after the Office has conducted its study that will examine copyright deposit in general. CCPR comments at 6–7; MPA/NAA comments at 6.

### III. The Office's Decisions

The Office has carefully considered the comments described in part II of this notice and has resolved the issues addressed in those comments as follows.

1. *Date of publication and continuation sheet.* As is discussed below, the Office has decided to implement its alternative proposal that would permit applicants to designate a range of dates of publication within the three-month period immediately prior to registration, rather than require identification of the specific date of publication of each photograph in a group. Nevertheless, it is anticipated that many photographers will elect to register an entire year's worth of published photographs and to identify the specific date of publication of each photograph. For those who elect the latter alternative, the Office is persuaded by the commenters who asserted that a photographer should be free to use any labeling system as long as it meets the goal of enabling one to identify the specific date of publication of any photograph in the group. Accordingly, the final regulation provides that the date of publication of each photographic work within a group must be identified either on the deposited image or on a continuation sheet, in such a manner that for each photographic work in the group, the date of publication can be identified. So long as the applicant selects a method that clearly accomplishes this purpose,

the application will be acceptable. For example, an applicant might choose to number the images, or to give each image a unique name, and cross-reference the number or name of each photograph on a continuation sheet along with the date of publication. The procedure suggested by ASMP appears to meet these requirements.<sup>2</sup>

The Office will make available a special optional continuation sheet for group registration of photographs that applicants may use to provide information such as the date of publication of each photograph.

The proposal to require descriptive information about each photograph in a group has merit, in that such descriptions would assist in providing a more meaningful and comprehensive public record. However, the Office does not require such descriptions in other contexts. Indeed, one can currently register an individual photograph without providing any descriptive information about that photograph (apart from a title that may provide no information about the nature of the photograph), resulting in a public record that sheds no light about the nature of the photograph. One can also currently register an unpublished collection of photographs, pursuant to § 202.3(b)(3)(B), without providing any description of the subject matter of the photographs in the collection apart from a title that does not necessarily describe the works included in the collection. Indeed, apart from information on titles (which may or may not describe the subject matter of a work) and the generalized descriptions that appear in the "nature of this work" and "nature of authorship" spaces, a typical registration of any work will offer little information about the content of the work being registered. The Office concludes that the burdens that would result from requiring a description of each photograph in a group registration would outweigh the benefits of the proposed requirement.

However, applicants are encouraged to provide descriptive information for each photograph, or each group of

<sup>2</sup> Although applicants will now have a number of options for designating the date of publication, including the option of providing a range of dates within three months of registration and the option of indicating the date of publication on the deposited image, applicants should consider the advantages of indicating the specific date of publication of each photograph on the continuation sheet. Because the certificate of registration is prepared from the application (including the continuation sheet), a specific date of publication that is indicated on the application becomes part of the certificate of registration. The recital of the date of publication on the certificate becomes prima facie evidence that the identified photograph was published on that date. See 17 U.S.C. 410(c).

related photographs. To that end, space will be set aside on the optional continuation sheet to permit the entry of such information.

2. *Numbering of photographs.* In light of the decision not to require any particular labeling system to identify the date of publication for each photograph in a group, the Office agrees with the weight of comments that no numbering requirement should be imposed.

3. *Acceptable formats.* The Office concludes that applicants should be permitted to submit photographs in any of the formats included in the list of acceptable formats in the May 2000 notice of proposed rulemaking. Although some commenters questioned the utility of options such as slides containing up to 36 images and videotapes depicting each photograph, the Office believes that providing applicants with a variety of options will serve the purpose of facilitating the registration of photographs.

The Office also concludes that the proposal to permit submission of photocopies of images has merit. This conclusion is reinforced by the Office's recognition that the current regulation governing registration of contributions to collective works, which can and often do include photographs, permit submission of a deposit in the form of "a photocopy of the contribution itself as it was published in the collective work" See 37 CFR 202.20(b)(2)(iii); 202.20(c)(2)(xv). However, this proposal is accepted with some hesitation, because the quality of photocopies of photographs can vary considerably. The final rule provides that photocopies must "clearly depict[] the photograph," and photocopies that do not present clear images of the underlying photograph will be rejected as deposits. The final rule also requires that when a photograph was first published in color, a photocopy deposit of the photograph must also be in color. This requirement will assist in insuring that photocopies received as deposits are clear representations of the photographs being registered.

The permitted formats are listed in § 202.20(c)(2)(xx) in the Library of Congress's order of preference, and applicants are encouraged to select a format as close to the top of that list as possible. It should be noted, however, that compliance with the requirements of § 202.20(c)(2)(xx) is not necessarily compliance with the mandatory deposit requirement of 17 U.S.C. 407. If the Library determines that it desires the "best edition" of a particular photograph as published in the United States for its collections, it may demand the deposit of that photograph in its best

edition as set forth in 37 CFR 202.19. This is a separate legal requirement, independent of the deposit requirements for registration of copyright.

Finally, the Office rejects the plea of at least one commenter to permit the use of descriptive identifying material in lieu of the actual images. Although the Office had previously expressed a willingness to consider such a proposal, the most recent notice of proposed rulemaking noted that "the Office is reluctant to implement a procedure that would permit the acceptance of deposits that do not meaningfully reveal the work for which copyright protection is claimed." 65 FR at 26164. Deposit of the work being registered is one of the fundamental requirements of copyright registration, and it serves an important purpose. As the legislative history of the Copyright Act of 1976 recognizes, copies of registration deposits may be needed for identification of the copyrighted work in connection with litigation or for other purposes. See H.R. Rep. No. 94-1476, at 171 (1976). See also *Seiler v. Lucasfilm, Inc.*, 808 F.2d 1316, 1322 (9th Cir. 1986) (noting that "possibilities for fraud would be limitless" if reconstructions of claimant's original work could be submitted as registration deposits); *Tradescape.com v. Shiraram*, 77 F.Supp.2d 408, 413-14 (S.D.N.Y. 1999) (noting that when deposit of redacted version of computer program is permitted, the result in infringement litigation is uncertainty as to whether allegedly infringed code actually is the subject of an existing registration). The ability of litigants to obtain a certified copy of a registered work that was deposited with the Office prior to the existence of the controversy that led to a lawsuit serves an important evidentiary purpose in establishing the identity and content of the plaintiff's work.<sup>3</sup>

It is true that, as PPA observed in its comments, current registration procedures permit the deposit of identifying material in some contexts. However, as noted in the May 2000 notice of proposed rulemaking, the Office intends to issue a notice of inquiry to reexamine the purpose of section 408 copyright deposit for all classes of works, and this examination may cause the Office to reconsider whether many or all of the circumstances in which it accepts identifying material are justified when

<sup>3</sup> That ability is, however, limited by the Office's policy on retention of deposits of published works. See Notice of Policy Decision; Policy Statement on Deposit Retention Schedule, 48 FR 12862 (March 28, 1983).

the identifying material does not reveal the copyrightable expression for which protection is claimed. Prior to the conclusion of such a study, the Office will not initiate as far-reaching an expansion of the practice of accepting identifying material as that which is proposed by PPA.<sup>4</sup>

4. *File formats for deposits on CD-ROM.* While the Office sympathizes with the comment that a deposit in digital form should be accepted in any commercially available file format, it is necessary to limit the acceptable formats to those which the computers in the Office's Examining Division are equipped to handle. The file formats specifically identified in comments were JPEG, GIF, TIFF, and PCD. The Office accepts the assertions by the proponents of these file formats that they are the formats most commonly used by photographers. Currently, a claimant who submits deposits of photographs in digital form will be required to use one of these formats, and the Office will ensure that the Examining Division is equipped to view deposits submitted in those formats. If the Office becomes aware that other file formats have come into common use, it will include them in the list of acceptable file formats and acquire the necessary equipment and/or software to view them.

5. *The option of providing a range of dates.* In the May 2000 notice of proposed rulemaking, the Office sought comments on whether applications for group registration of photographs should be permitted to state a range of dates of up to three months (e.g., January 1-March 31, 2001) in which all the photographs in the group were published, rather than stating specific dates of publication for each photograph. The Office noted that it would consider such an alternative only if it were persuaded that requiring specific dates of publication for each photograph would impose an unjustifiable and burdensome hardship on photographers, and that the advantages (to claimants and to the public record) of such an alternative would outweigh its disadvantages.

<sup>4</sup> The Office rejects PPA's assertion that its insistence that the actual copyrighted images be deposited is arbitrary, capricious, and contrary to law. The statute requires that for an unpublished work, "one complete copy or phonorecord" be deposited, and that for a published work, "two complete copies or phonorecords of the best edition" be deposited. 17 U.S.C. 408(b)(1)&(2) (emphasis added). It gives the Register discretion to permit the deposit of identifying material instead of copies or phonorecords. 17 U.S.C. 408(c)(1). The Register's reasoned refusal to exercise her discretion to depart from a statutory deposit requirement is hardly arbitrary, capricious or contrary to law.

As noted above, a large number of commenters endorsed this alternative, noting the considerable difficulty and burden of identifying specific dates of publication for each photograph in a group of photos published over a period of as much as a year. The Office recognizes the burden and believes that some relaxation of the requirement that the date of publication be specified is justified. On the other hand, a key benefit of copyright registration is the availability of statutory damages and attorney's fees for a plaintiff in a copyright infringement suits who has registered a work within three months after first publication of the work. 17 U.S.C. 412(2). Moreover, 17 U.S.C. 409(7) requires that an application for copyright registration include the date and nation of first publication.<sup>5</sup>

The Office believes that the requirements of section 409 and 412, and the needs of photographer claimants, can best be reconciled by offering the option to designate a range of dates of publication for all the photographs in a group, rather than requiring the specific date of publication for each photograph, so long as all of the photographs were first published within three months of the effective date of registration, i.e., the date on which an acceptable application, an acceptable deposit, and the applicable fee are received in the Copyright Office. Thus, a correctly completed application for group registration received (with the applicable fee and acceptable deposit) on March 31, 2002 could include photographs first published as early as January 1, 2002 and as late as March 31, 2002, and the date of publication could be entered in space 3 of the Form VA application as "January 1–March 31, 2002."<sup>6</sup> Because all of the photographs would have been first published within three months of the effective date of registration, the applicant would legitimately obtain the benefit of section 412(2) without having to identify, in the application, the precise date of publication of each photograph.<sup>7</sup>

<sup>5</sup> In recognition of the fact that an author may not always know the precise date of publication of a work, it is permissible to qualify the date stated on the application; e.g., "approximately," "on or about," "circa," "no later than," or "no earlier than." Compendium of Copyright Office Practices, Compendium II, Sec. 910.02 (1984).

<sup>6</sup> As a practical matter, a registration using this option might have to consist of photographs first published over a period of slightly less than three months, unless the applicant is able to deliver the application, fee and deposit to the Office on the same day as the day of publication of the last of the photographs in the group.

<sup>7</sup> The certificate of registration would be prima facie evidence that each of the photographs included in the group was first published between

6. *The number of photographs that may be included in a group registration.* In light of the comments from photographers observing that the proposed 500-photo limit is too low, the Office has reexamined its reasons for proposing such a limit. The Office has concluded that the administrative burdens of processing a group registration of a large number of photos in excess of 500 would be acceptable. Therefore, the final rule contains no limitation on the number of photographs that may be included in a group.

7. *Works made for hire.* The final rule clarifies that works made for hire may be included in a group registration of published photographs, but does not permit an employer for hire to include works by a number of different photographers in the same group registration. Rather, the rule provides that "[t]he photographer who photographed each of the photographic works submitted for registration as part of the group must be the same person." Thus, a photographic studio that employs a number of photographers under work-for-hire agreements may register those photographers' works in group registrations, but must submit separate registrations for the photos taken by each photographer. The Office recognizes that many photographers work as employees of photographic studios, and that their employers—many of them small businesses—experience the same difficulties that individual photographers experience in registering their photographs. However, the Office is also mindful that its power to fashion group registrations is limited to cases involving "groups of related works." 17 U.S.C. 408(c)(1). Some of the commenters objecting to this group registration proposal contended that it lacks the type of nexus required by the Copyright Act. See, e.g., MPA/NAA comments at 3. The Office disagrees with that objection, but it recognizes that there must nevertheless be a relationship between all the photographs in a group. The Office believes that limiting the group to photographs (1) taken by the same individual and (2) first published within the same year, satisfies that requirement. This conclusion finds support in the statutory and regulatory requirements for group registration of contributions to periodicals, a form of group registration similar in many respects to the new group registration of

January 1 and March 31, inclusive. 17 U.S.C. 410(c). Of course, that conclusion could be rebutted by evidence that a specific photograph was not first published within that time period.

photographs. The Copyright Act limits the availability of group registration of contributions to periodicals to a group of works by the same individual author, and the Office's regulations implement this statutory requirement by providing that all the works in the group must be by the same author and that the author of each work must be an individual, and not an employer or other person for whom the work was made for hire. See 17 U.S.C. 408(c)(2); 37 CFR § 202.3(b)(7); see also 17 U.S.C. 408(c)(3). The legislative history of the 1976 Copyright Act also supports such a limitation, noting that group registration may be desirable for "a group of photographs by one photographer." House Report at 154 (emphasis added).

When a group registration consists of works made for hire, the claimant will be required to designate as the author, in space 2 of the Form VA, the name of the employer for hire as well as the name of the photographer who took the photograph (e.g., "XYZ Corporation, employer for hire of John Doe").

8. *Photo industry guidelines.* The Office does not believe that it has the authority to impose those guidelines on photographers who register their copyrights using the group registration regulation, nor does it believe the incorporation of the guidelines is advisable. Although representatives of photographers, photofinishers and users agreed upon the Photo Industry Guidelines several years ago, that agreement was in the context of a proposal that would have permitted photographers to register groups of photographs without depositing the images of the works. The Office has declined to permit such a liberal registration scheme. We do not infer from PPA's endorsement of the guidelines in the former context that photographers would accept incorporation of the guidelines into the more modest group registration proposal adopted today.

Whatever the merits might have been when the guidelines were being considered in the context of a more liberal group registration scheme, the Office does not believe that requiring photographers to surrender valuable rights enjoyed by other copyright owners is justified in the context of the more modest group registration proposal adopted in the final regulation. Photographers have long been able to register collections of their unpublished photographs under conditions similar to those adopted today for published photographs, and have not been required to waive their rights to statutory damages and attorneys fees in

order to do so. Photographers have also been able to register groups of published photographs so long as those photographs were published as contributions to periodicals, also without being required to waive those rights. The proposal adopted today is not a radical departure from those already-existing group registrations, and the Office does not believe that the case has been made for incorporating the guidelines into this particular group registration regulation.

On the merits, the arguments made in support of the Office's power to require photographers to comply with the guidelines in order to participate in the group registration program are unconvincing. The existing registration requirements cited by PMA in support of the guideline proposal related to the nature of the deposit or the application, and not to other legal obligations having nothing to do with registration. The requirement of additional identifying material to accompany applications to register holograms exists simply to assist the Office's examiners in their examination of the deposits. The Office's statement when it adopted regulations on group registration of daily newsletters that "[t]he group registration privilege is contingent upon the claimant meeting the conditions specified in the regulation," 64 FR 2922 (1999), is a truism. None of the conditions in that regulation required claimants to comply with any industry guidelines or waive any rights; rather, all of the conditions related to registration and deposit. The guidelines on classroom copying cited by PPA have not been incorporated into any registration regulations; rather, Congress simply endorsed those guidelines, in legislative history, as offering guidance on fair use in the classroom.

The Office is unconvinced that it has the power to require copyright owners to waive statutory rights they have against infringers in order to take advantage of a registration option designed to facilitate the registration of their works. Even if the Office had such power, it does not appear that this would be a wise precedent to set. The purpose of the group registration regulation is to make it possible for photographers to obtain the benefits conferred by registration, not to require them to waive those benefits.

9. *The threat of litigation.* The Office understands the fears of photofinishers and others that by making it easier for photographers to register their works, the Office is also increasing the risk that those who process film and make copies of photographs will be sued for copyright infringement. With that risk

comes the prospect of statutory damages and attorney's fee awards. But the concerns expressed by these opponents of the regulation really relate not to the group registration option being adopted today, but to longstanding provisions of copyright law that permit awards of statutory damages and attorney's fees to prevailing plaintiffs who have made timely registration of their works. A photofinisher who is truly an "innocent" infringer and who had no reason to believe that he was infringing probably has little to fear from this regulation. Courts are not likely to award attorney's fees to such innocent infringers, and the minimum award of statutory damages, even against a defendant who is not an innocent infringer, is very modest. Litigation can be burdensome and expensive, but those burdens and expenses are borne by plaintiffs as well as defendants. The Office has no reason to believe that photographers will wish to bear the burdens and expenses of litigation to pursue claims against photo finishers who have acted reasonably and in good faith, when the costs of such litigation are likely to outweigh any recovery. But photographers, like all other copyright owners, should be entitled to enforce their copyrights. The Office rejects any suggestion that a regulation that enables photographers to register their copyrights is unjustified because it makes it easier for them to assert their rights.

#### IV. Conclusion

The final regulation announced today liberalizes requirements for registration of photographs by permitting photographers to register their published photographs in groups, with a variety of deposit options (all of which require deposit of the actual images of the works being registered). In practice, it represents an incremental expansion of current options available to photographers (such as group registration of contributions to collective works and registration of unpublished collections). It also expands the list of options for deposit for photographs registered under the existing regulation for registration of unpublished collections. The Copyright Office believes that this regulation will make it easier for photographers to register their works, thereby populating the public record with many more works in a field where registration has been difficult. The Office has attempted to strike the appropriate balance between those who urge adoption of a group registration scheme that would leave the public record bereft of any reliable indication of what works are

actually included in a registration, and those who urge that liberalizing registration procedures for photographers will open the floodgates of litigation against those who unwittingly infringe copyrights in photographs.

#### Regulatory Flexibility Act

Although the Copyright Office, located in the Library of Congress and part of the legislative branch, is not an "agency" subject to the Regulatory Flexibility Act, 5 U.S.C. 601-612, the Register of Copyrights has considered the effect of a proposed amendment on small businesses. The purpose of this regulation is to facilitate the ability of photographers, who usually constitute small businesses, to register the copyrights in their works, by simplifying the requirements for registration.

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

Claims, Copyright.

#### Final Regulation

For the reasons set forth in the preamble, the Copyright Office amends 37 CFR part 202 as follows:

#### PART 202—REGISTRATION OF CLAIMS TO COPYRIGHT

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

**Authority:** 17 U.S.C. 408, 702.

2. In § 202.3, paragraph (b)(9) is redesignated as paragraph (b)(10), and a new paragraph (b)(9) is added to read as follows:

#### § 202.3 Registration of copyright.

\* \* \* \* \*

(b) \* \* \*

(9) *Group registration of published photographs.* Pursuant to the authority granted by 17 U.S.C. 408(c)(1), the Register of Copyrights will accept a single application (on Form VA), deposit and filing fee for registration of a group of photographs if the following conditions are met:

(i) The copyright claimant in all of the photographs must be the same.

(ii) The photographer who photographed each of the photographs submitted for registration as part of the group must be the same person.

(iii) The photographs in the group must have been published within the same calendar year.

(iv) If the photographs in a group were all published on the same date, the date of publication must be identified in space 3b of the application. If the photographs in a group were not all published on the same date, the range

of dates of publication (e.g., January 1–December 31, 2001) must be provided in space 3b of the application, and the date of publication of each photograph within the group must be identified either on the deposited image or on a continuation sheet, in such a manner that for each photograph in the group, the date of publication can be identified. A special continuation sheet for registration of a group of photographs shall be made available by the Copyright Office.

(v) If each photograph within the group was first published within three months before the date on which an acceptable application, an acceptable deposit, and the applicable fee are received in the Copyright Office, the applicant may, in lieu of the procedure set forth in paragraph (b)(9)(iv) of this section, simply state the range of dates of publication (e.g., February 15–May 15, 2001) in space 3b of the application, without specifically identifying the date of publication of each photograph in the group either on the deposited image or on a continuation sheet.

(vi) The deposit(s) and application must be accompanied by the fee set forth in § 201.3(c) of this chapter for a basic registration.

(vii) The applicant must state “Group Registration/Photos” and state the approximate number of photographs included in the group in space 1 of the application Form VA under the heading “Previous or Alternative Titles” (e.g., “Group Registration/Photos; app. 450 photographs”).

(viii) If the photographs in the group are works made for hire, the applicant must note, as part of the applicant’s entry in space 2 of the application Form VA for “Name of Author,” both the name of the employer for hire and the name of the photographer who photographed the works in the group (e.g., “XYZ Corporation, employer for hire of John Doe”).

(ix) As an alternative to the best edition of the work, one copy of each photograph shall be submitted in one of the formats set forth in § 202.20(c)(2)(xx).

\* \* \* \* \*

3. Section 202.20 is amended by adding a new paragraph (c)(2)(xx) to read as follows:

**§ 202.20 Deposit of copies and phonorecords for copyright registration.**

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \*

(xx) *Photographs: group registration.* For groups of photographs registered with one application under §§ 202.3(b)(3)(i)(B) (unpublished

collections) or 202.3(b)(9) (group registration of published photographs), photographs must be deposited in one of the following formats (listed in the Library’s order of preference):

(A) Digital form on one or more CD-ROMs (including CD-RW’s) or DVD-ROMs, in one of the following formats: JPEG, GIF, TIFF, or PCD;

(B) Unmounted prints measuring at least 3 inches by 3 inches (not to exceed 20 inches by 24 inches);

(C) Contact sheets;

(D) Slides, each with a single image;

(E) A format in which the photograph has been published (e.g., clippings from newspapers or magazines);

(F) A photocopy of each of the photographs included in the group, clearly depicting the photograph, provided that if registration is made pursuant to § 202.3(b)(9) for group registration of photographs, the photocopy must be either a photocopy of an unmounted print measuring at least 3 inches by 3 inches (not to exceed 20 inches by 24 inches) or a photocopy of the photograph in a format in which it has been published, and if the photograph was published as a color photograph, the photocopy must be a color photocopy;

(G) Slides, each containing up to 36 images; or

(H) A videotape clearly depicting each photograph.

\* \* \* \* \*

Dated: July 9, 2001.

**Marybeth Peters,**

*Register of Copyrights.*

**James H. Billington,**

*The Librarian of Congress.*

[FR Doc. 01–17864 Filed 7–16–01; 8:45 am]

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**DEPARTMENT OF VETERANS AFFAIRS**

**38 CFR Part 20**

**RIN 2900–AJ75**

**Board of Veterans’ Appeals: Rules of Practice—Notification of Representatives in Connection With Motions for Revision of Decisions on Grounds of Clear and Unmistakable Error**

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Final rule.

**SUMMARY:** This document adopts as a final rule the provisions of an interim final rule that amended the Rules of Practice of the Board of Veterans’ Appeals (Board) relating to challenges to Board decisions on the grounds of

“clear and unmistakable error” (CUE). The amendment provides for notification of the party’s representative and an opportunity for a response when the Board receives a request for CUE review.

**DATES:** Effective Date: July 17, 2001.

**FOR FURTHER INFORMATION CONTACT:** Steven L. Keller (01C), Acting Vice Chairman, Board of Veterans’ Appeals, Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, (202) 565–5978.

**SUPPLEMENTARY INFORMATION:** The Board is an administrative body that decides appeals from denials of claims for veterans’ benefits. There are currently 57 Board members, who decide 35,000 to 40,000 such appeals per year.

This amendment was previously published in the **Federal Register** as an interim final rule on February 12, 1999 at 64 FR 7090, with a request for comments by March 15, 1999. We received no comments. Based on the rationale set forth in the interim final rule, we are adopting its provisions as a final rule with minor technical changes.

**Paperwork Reduction Act**

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3520).

**Unfunded Mandates**

The Unfunded Mandates Reform Act requires (in section 202) that agencies prepare an assessment of anticipated costs and benefits before developing any rule that may result in an expenditure by State, local, or tribal governments, in the aggregate, or by the private sector of \$100 million or more in any given year. This rule would have no consequential effect on State, local, or tribal governments.

**Regulatory Flexibility Act**

The Secretary hereby certifies that this final rule does not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This rule would affect only the processing of claims by VA and would not affect small businesses. Therefore, pursuant to 5 U.S.C. 605(b), this final rule is exempt from the initial and final regulatory flexibility analyses requirements of sections 603 and 604.

**List of Subjects in 38 CFR Part 20**

Administrative practice and procedure, Claims, Veterans.