

ADMINISTRATIVE APPEALS

Contents

1701	What This Chapter Covers	1
1702	Registration Refused After Examination	1
1703	First Request for Reconsideration	2
1703.1	Filing the Request	2
1703.2	Review of the First Request for Reconsideration	3
1704	Second Request for Reconsideration	3
1704.1	Filing the Second Request for Reconsideration	3
1704.2	Review of the Second Request for Reconsideration	4
1705	Effective Date of Registration	5
1706	Final Agency Action	5
1707	Retention of Records	5
1708	General Requirements for First and Second Requests for Reconsideration	6
1708.1	Filing Fee	6
1708.2	Address for Delivery	6
1708.3	Deadline for Submitting a Request for Reconsideration	6
1708.4	Withdrawing a Request for Reconsideration	7
1708.5	Amending the Application During an Administrative Appeal	7
1708.6	No Expedited Review	7
1708.7	No Adverse Proceedings	7

ADMINISTRATIVE APPEALS

1701 What This Chapter Covers

This Chapter discusses the process for appealing a refusal to register a copyright **claim** within the U.S. Copyright Office.

1702 Registration Refused After Examination

The U.S. Copyright Office does not register all claims to copyright. The Office may refuse to register claims that do not meet the statutory requirements for copyright registration, including on the following grounds:

- The **applicant** failed to submit a complete application, complete **filing fee**, and/or complete **deposit copy(ies)**.
- The work is not **fixed** in a tangible medium of expression.
- The work lacks human authorship.
- The applicant asserts a claim to copyright in a work that is not covered by U.S. copyright law. *See 17 U.S.C. §§ 102, 103.*
- The work was not independently created.
- The work lacks the minimum level of creative authorship to support a copyright claim.
- The work is in the **public domain**.
- The work is a **sound recording** that was fixed before February 15, 1972 (*i.e.*, the date on which sound recordings became eligible for federal copyright protection).
- The work is an **architectural work** created before December 1, 1990 (*i.e.*, the date on which architectural works became eligible for federal copyright protection), or the application to register the architectural work does not otherwise meet the requirements set forth in Copyright Office regulations. *See 37 C.F.R. § 202.11.*
- The work is ineligible for copyright protection in the United States based on the author's citizenship or domicile, based on the nation of first **publication**, or any other factor set forth in **Section 104** of the Copyright Act.
- The work does not meet the eligibility requirements for a particular registration option.
- The applicant is not authorized to register a claim in the work.

- The **claimant** named in the application is not a proper copyright claimant.
- The work unlawfully employs preexisting material that is under copyright protection. See **17 U.S.C. § 103(a)**; see also **Chapter 300, Section 313.6(B)**.
- The applicant failed to submit a *bona fide* copy of the work. See **Chapter 1500**, Section 1503.2.

If the Office determines that the work does not constitute copyrightable subject matter or that the other formal and legal requirements have not been met, the Office will refuse to register the claim. The **registration specialist** assigned to the application will notify the applicant in writing and will explain the reasons for the Office's decision. See **17 U.S.C. § 410(b)**. The Office will send the notification to the correspondent listed in the Correspondent section of the application.

1703 First Request for Reconsideration

1703.1 Filing the Request

If the **applicant** disagrees with a refusal to register the entire work or a refusal to register a specific element of the work, the applicant may **appeal** that decision within the U.S. Copyright Office. This is an administrative procedure known as a first **request for reconsideration**.

A request for reconsideration must be in writing. The request should specify the reasons that the applicant believes that registration was improperly refused, including any legal arguments or supplementary information that support the applicant's position. **37 C.F.R. § 202.5(b)(1)**.

The applicant must provide the following information in the subject line on the first page of the request:

- A statement that the document is a "FIRST RECONSIDERATION."
- The ten digit case number/service request number that the Office assigned to the **claim** and the seven digit correspondence ID number that appears in the subject line of the letter refusing to register the work.
- The name of the copyright **claimant(s)** specified in the application and the title(s) of the work exactly as it appears in the application.

The pages of the first request should be numbered, including any attachments or exhibits thereto.

The applicant should send one copy of the request to the address specified in Section **1708.2**, together with one copy of the reply sheet that was attached to the refusal to register, and the **filing fee** set forth in **37 C.F.R. § 201.3(d)(4)(i)**.

The request and the filing fee must be postmarked or dispatched by a commercial carrier, courier, or messenger within three months of the date set forth in the refusal. See Sections **1708.1** and **1708.3**.

See generally **37 C.F.R. § 202.5(b)(1)-(3)** (setting forth the procedure for submitting a first request for reconsideration).

1703.2 Review of the First Request for Reconsideration

The first request for reconsideration will be reviewed by a U.S. Copyright Office staff attorney in the Registration Program office who did not participate in the initial examination of the **claim**. The Office will base its decision on the **applicant's** submission and the administrative record. If the Office needs additional information in order to make its decision, the staff attorney will notify the applicant in writing. The Office will not hear oral argument in support of a first request for reconsideration.

The refusal to register is subject to *de novo* review, which means that the Office will take a fresh look at whether the work meets the statutory requirements for copyright registration.

If the Office decides to register the work, it will notify the applicant in writing. This notification will be sent to the individual who submitted the first request for reconsideration, rather than the correspondent listed in the application. A **certificate of registration** will be sent separately to the mailing address specified in the application. See **Chapter 600**, Section 622.4.

If the Office upholds the refusal to register, it will notify the applicant in writing and will explain the reasons for its decision. This notification will be sent to the individual who submitted the first request for reconsideration.

The Office will respond to the first request within four months after the date that the first request was received. If the deadline falls on a weekend or a federal holiday, the deadline will be extended to the next federal work day. In no case shall a failure to respond within four months after the date that the first request was received result in the registration of the applicant's work.

See generally **37 C.F.R. § 202.5(b)(4)** (discussing the procedure for reviewing a first request for reconsideration).

1704 Second Request for Reconsideration

1704.1 Filing the Second Request for Reconsideration

If the U.S. Copyright Office refuses to register a work after reviewing a first request for reconsideration, the **applicant** may submit a second request for reconsideration.

A second request for reconsideration must be in writing. The request should specify the reasons that the applicant believes that registration was improperly refused, including any legal arguments or supplementary information that support the applicant's position. The applicant must specifically address the Office's reasons for upholding the refusal to register following the applicant's first request for reconsideration. See **37 C.F.R. § 202.5(c)(1)**.

The applicant must provide the following information in the subject line on the first page of the request:

- A statement that the document is a “SECOND RECONSIDERATION.”
- The ten digit case number/service request number that the Office assigned to the **claim** and the seven digit correspondence ID number that appears in the subject line of the Office’s response to the applicant’s first request for reconsideration.
- The name of the copyright **claimant(s)** specified in the application and the title(s) of the work exactly as it appears in the application.

The pages of the second request should be numbered as well as any attachments or exhibits thereto.

The applicant should send one copy of the request to the address specified in Section **1708.2**, together with a copy of the reply sheet that was attached to the Office’s response to the applicant’s first request for reconsideration, and the **filing fee** set forth in **37 C.F.R. § 201.3(d)(4)(ii)**.

The second request and the filing fee must be postmarked or dispatched by a commercial carrier, courier, or messenger within three months of the date set forth in the Office’s response to the first request for reconsideration. *See* Sections **1708.1** and **1708.3**.

See generally **37 C.F.R. § 202.5(c)(1)-(3)** (setting forth the procedure for submitting a second request for reconsideration).

1704.2 Review of the Second Request for Reconsideration

The second **appeal** will be reviewed by the **Review Board**. The Review Board consists of the **Register of Copyrights** and the General Counsel of the U.S. Copyright Office (or their respective designees) and a third individual designated by the Register. **37 C.F.R. § 202.5(f)**.

The Review Board will base its decision on the **applicant’s** written submission and the administrative record. Specifically, the Board will consider the arguments and evidence set forth in the applicant’s second request for reconsideration, as well as the application and the **deposit copy(ies)**. In addition, the Board may consider any prior correspondence between the applicant and the Office, or may take administrative notice of matters of general knowledge or matters known to the Office or the Review Board. If the Board needs additional information to review the second request, it will notify the applicant in writing. The Review Board will not hear oral argument on a second request for reconsideration.

Both the decision made by the **registration specialist** and the decision to uphold the refusal to register following the applicant’s first request for reconsideration are subject to *de novo* review, which means that the Board will take a fresh look at whether the work meets the statutory requirements for copyright registration.

A majority of the Review Board’s members must agree to uphold or reverse a refusal to register. A decision issued by the Review Board has no precedential value, nor is any decision binding upon the Board in any other appeal.

If the Review Board decides to register the applicant’s work, it will notify the applicant in writing. This notification will be sent to the individual who submitted the second request for reconsideration.

tion, and the **certificate of registration** will be sent separately to the mailing address specified in the application. See **Chapter 600**, Section 622.4.

If the Review Board decides to uphold the refusal to register, it will notify the applicant in writing and will explain the reasons for its decision. This notification will be sent to the individual who submitted the second request for reconsideration. If the Review Board has been notified that the work is involved in litigation, the Review Board will send a copy of its decision to counsel of record for the parties in that dispute.

See generally **37 C.F.R. § 202.5(c)(4)** (discussing the procedure for reviewing a second request for reconsideration).

1705 Effective Date of Registration

If the U.S. Copyright Office registers a work following a first or second request for reconsideration, the Office will assign an **effective date of registration** (“EDR”) to the registration. The effective date of registration is the day on which the Office receives an acceptable application, **deposit copy(ies)**, and **filing fee**, which are later determined by the **Register of Copyrights** or by a court of competent jurisdiction to be acceptable for registration. **17 U.S.C. § 410(d)**.

As a general rule, if the **applicant** made a reasonable, good faith effort to complete the relevant fields/spaces in the application, the effective date of registration is the date that the Office received the application, provided that the applicant submitted the appropriate deposit copy(ies) and paid the applicable filing fee as of that date. See **Chapter 600**, Section 625.

1706 Final Agency Action

A decision issued by the **Review Board** in response to a second request for reconsideration constitutes the final agency action with respect to the issues addressed therein. **37 C.F.R. § 202.5(g)**.

If the U.S. Copyright Office upholds the refusal to register following a request for reconsideration, an applicant may appeal that decision under the Administrative Procedure Act (“APA”) by instituting a judicial action against the **Register of Copyrights** in federal district court. See **5 U.S.C. § 500 et seq.**

An applicant does not need to appeal a refusal to register under the APA in order to institute an **infringement** action in federal district court. See **17 U.S.C. § 411(a)**. However, the applicant must serve a copy of the infringement complaint on the Register, and “[t]he Register may, at his or her option, become a party to the action with respect to the issue of registrability of the copyright claim by entering an appearance within sixty days after such service” *Id.*

1707 Retention of Records

The U.S. Copyright Office maintains records of all documents and correspondence relating to a first or second request for reconsideration.

1708 General Requirements for First and Second Requests for Reconsideration

1708.1 Filing Fee

The **applicant** must submit the appropriate **filing fee** together with both the first or the second request for reconsideration. See 37 C.F.R. § 202.5(b)(2), (c)(2). The current filing fees are set forth in the U.S. Copyright Office’s **fee schedule** in the field marked “Requests for reconsideration.”

The applicant must pay a separate filing fee for each **claim** that has been refused registration, even if the Office refused to register two or more claims in the same letter. See **Copyright Office Fees**, 78 Fed. Reg. 18,742, 18,745 (Mar. 28, 2012).

1708.2 Address for Delivery

Each request for reconsideration (including requests that are delivered by mail, by courier, or by hand) should be addressed on the outside of the envelope as follows:

FIRST or SECOND REQUEST FOR RECONSIDERATION
U.S. Copyright Office
RAC Division
P.O. Box 71380
Washington, DC 20024–1380.

See 37 C.F.R. § 201.1(c)(4), 202.5(d).

1708.3 Deadline for Submitting a Request for Reconsideration

A first request for reconsideration must be postmarked or dispatched by a commercial carrier, courier, or messenger no later than three months from the date that appears in the written notice from the Office of its decision to refuse registration. 37 C.F.R. § 202.5(b)(3).

A second request for reconsideration must be postmarked or dispatched by a commercial carrier, courier, or messenger no later than three months from the date that appears in the written notice from the Office of its decision to uphold the refusal to register following the **applicant’s** first request for reconsideration. 37 C.F.R. § 202.5(c)(3).

The Office will not consider a second request for reconsideration if the applicant failed to submit the first request in a timely manner.

If the deadline for submitting a first or second request falls on a weekend or a federal holiday, the deadline will be extended until the next federal work day. See 37 C.F.R. § 202.5(b)(3), (c)(3).

The deadline for submitting a first or second request may be suspended or waived, in whole or in part, by the **Register of Copyrights** upon a showing of good cause. The request for a suspension or waiver should be made in writing, it should indicate whether the request involves a “FIRST” or “SECOND” request for reconsideration, and it should be sent to the address specified in Section 1708.2. A suspension or waiver may be granted only with respect to a specific request for

reconsideration, and shall not be considered in connection with any other request from that applicant or any other applicant. See 37 C.F.R. § 202.5(e).

1708.4 Withdrawing a Request for Reconsideration

An **applicant** may submit a request to withdraw a first or second request for reconsideration at any time before the U.S. Copyright Office has issued its decision. The request should be made in writing, it should indicate whether the requested withdrawal involves a “FIRST” or “SECOND” request, and it should be sent to the address specified in Section 1708.2. The decision whether to approve or deny the request will be made at the discretion of the Office. The **filing fee** will not be refunded and the Office will not reinstate a request for reconsideration once it has been withdrawn.

1708.5 Amending the Application During an Administrative Appeal

When evaluating a first or second request for reconsideration, the U.S. Copyright Office will focus on the type of authorship claimed in the application, such as “2-D artwork” or “text.” As a general rule, the Office will not consider any type of authorship that was not expressly claimed in the application when the claim was refused. That said, the Office may allow an applicant to amend the application during a first or second appeal if the failure to include this information was the result of an honest omission or mistake.

Example:

- An application is submitted for a children’s book titled *The Empty Piñata*. The work contains artwork and a *de minimis* amount of text, but the applicant only asserted a claim in “text.” The registration specialist refuses registration. On appeal, the applicant admits that the words are uncopyrightable, and states that the applicant inadvertently failed to include a claim in “2-d artwork.” The Office will uphold the refusal to register the claim in “text,” and will consider whether the artwork contains a sufficient amount of creative expression to support a registration.

1708.6 No Expedited Review

Special handling is a procedure for expediting the examination of an application to register a **claim** to copyright or the **recording** of a transfer or other document pertaining to copyright. The U.S. Copyright Office offers this service in certain circumstances where a copyright owner or other interested parties have a compelling reason for the expedited issuance of a certificate. As discussed in **Chapter 600**, Section 623.2, the Office will not grant a request for special handling in connection with a first or second request for reconsideration.

1708.7 No Adverse Proceedings

The U.S. Copyright Office does not invite, and generally does not consider, arguments or evidence submitted by or on behalf of any party other than the **applicant** or the applicant’s duly **authorized agent**.

