IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BRUHN NEWTECH, INC., *et al.*, Plaintiffs, v. UNITED STATES, Defendant.	Case No. 16-783 C Senior Judge Marian Blank Horn

RESPONSE OF THE ACTING REGISTER OF COPYRIGHTS TO REQUEST PURSUANT TO 17 U.S.C. § 411(b)(2)

On February 8, 2019, pursuant to 17 U.S.C. § 411(b)(2), the Court requested advice from the Register of Copyrights ("Register")[1] on the following questions:

1. Would the Register of Copyrights have refused registration of the application for Copyright Registration No. TX 7-836-490 (titled "NBC Analysis JWARN 1F PHASE 2, CRID 1489, 1490, 1491") if, as alleged by the Defendant:
   a) the claimed "work" encompasses three different separately-published versions of a computer program;
   b) the claimed "work" incorporated source code owned by other entities, including the Government;
   c) the claimed "work" was completed in 2012, rather than 2008; and
   d) the claimed "work" was first published in the United States, rather than Denmark?
2. Would the Register of Copyrights have refused registration of the application for Copyright Registration No. TX 7-836-500 (titled "NBC Analysis – CRID 0040") if, as alleged by the Defendant:
   a) the claimed "work" was completed in 1999, rather than 1998; and
   b) the claimed "work" was first published in the United States, rather than Denmark?[2]

The Acting Register hereby submits her response.

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[1] The Librarian of Congress appointed Karyn A. Temple to the position of Acting Register of Copyrights on Oct. 21, 2016. *See* U.S. COPYRIGHT OFFICE, *About Us*, https://www.copyright.gov/about/leadership/karyn-temple.html (last visited Mar. 8, 2019).

[2] Order regarding Referral of Copyright Registration Questions to the Register of Copyrights, ECF No. 123.

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BACKGROUND

A review of the Copyright Office's records shows the following:

On April 24, 2014, the U.S. Copyright Office ("Copyright Office" or "Office") received an application to register a literary work, namely a computer program called CBRN-Analysis JWARN 1F PHASE 2, CRID 1489, 1490, 1491. The application identified Bruhn NewTech, A/S as the work made for hire author and copyright claimant of the work. The application stated that the work was completed in 2011 and was first published in Denmark. The application did not identify the work as a derivative work or disclose that the work incorporated preexisting material. It was not clear from the application or the deposit that the application sought to cover three versions of a computer software program. After corresponding with an examiner, Applicant's counsel requested that several changes be made to the application, including changing the beginning of the title of the work from "CBRN-Analysis" to "NBC Analysis," changing the completion date to 2008, and excluding previous versions of the software. The Office made the requested changes to the application, then registered the work under registration number TX 7-836-490.

On April 24, 2014, the Copyright Office received an application to register a textual work called NBC Analysis – CRID 0040. The application identified Bruhn NewTech, A/S as the work made for hire author and copyright claimant of the work. The application stated that the work was completed in 1995 and was first published in Denmark. The application did not identify the work as a derivative work or disclose that the work incorporated preexisting material. After corresponding with an examiner, Applicant's counsel requested that several changes be made to the application, including changing the completion date to 1998 and excluding previous versions of the software. The Office made the requested changes to the application, then registered the work under registration number TX 7-836-500.

Attached to the court's order seeking the Register's advice were a number of related court documents.[3] As the Copyright Office understands the dispute, plaintiffs Bruhn NewTech, Inc. and Bruhn NewTech, A/S ("Plaintiffs") allege that the United States Marine Corps breached its contract with Bruhn NewTech, Inc. and infringed Bruhn NewTech, A/S's copyrights in a computer software product known as NBC Analysis or CBRN-Analysis (the "Software").[4]

Plaintiffs allege that the Software was first published in 1999, but then was refined and improved "at least one per year" by Bruhn NewTech, A/S.[5] Plaintiffs allege that Bruhn NewTech, A/S registered the copyright "both for the software code as it existed when first

[3] Order granting Def.'s Mot. to Refer Copyright Registration Questions to the Register of Copyrights, ECF No. 114; Def.'s Redacted Mot. to Refer Copyright Registration Questions to the Register of Copyrights, ECF No. 108; Pls.' Opp. to Def.'s Mot. to Refer Copyright Registration Questions to the Register of Copyrights, ECF No. 96; Def.'s Reply in Supp. of its Mot. to Refer Copyright Registration Questions to the Register of Copyrights, ECF No. 105; and Parties' Revised Joint Statement of Questions to Refer to the Register of Copyrights, ECF No. 122. In addition to the documents provided by the court, the Acting Register has also reviewed the Second Amended Complaint, ECF No. 36, and Defendant's Response to the Second Amended Complaint, ECF No. 44.

[4] Second Am. Compl. ¶¶ 14, 63, 71.

[5] Second Am. Compl. ¶ 29.

delivered to the Government and first 'published' (U.S. Copyright Reg. No. TX0007836500), and also for all updates and improvements that were made to the software code thereafter, up until the time of the acts of breach and infringement alleged in this Second Amended Complaint (U.S. Copyright Reg. No. TX0007836490)."[6] Specifically, Plaintiffs allege that the version of the Software last updated and published by Bruhn NewTech, A/S in September 2012 contained all of the updates and improvements made to the Software between 1998 and May 2013, and this version of the Software is covered by U.S. Copyright Reg. No. TX 7-836-490.[7] Plaintiffs note that this registration expressly excluded previous versions, including what plaintiffs describe as the "original software code that had been completed in 1998."[8] Plaintiffs allege that the Software that was completed and delivered to the U.S. in 1998 is covered by U.S. Copyright Registration No. TX 7-836-500.[9] Thus, Plaintiffs allege that "the Software as it existed on the date of the Contract is the subject of a US copyright registration, as are all updates and improvements made to the Software after that time and through the date of the relevant acts of breach and infringement."[10]

ANALYSIS

I. Relevant Statutes, Regulations, and Agency Practice

An application for copyright registration must comply with the requirements of the Copyright Act set forth in 17 U.S.C. §§ 408(a), 409, and 410. Regulations governing applications for registration are codified in title 37 of the Code of Federal Regulations at 37 C.F.R. §§ 202.1 to 202.24. The principles that govern how the Office examines registration applications are found in the *Compendium of U.S. Copyright Office Practices*. Bruhn NewTech, A/S filed its applications in 2014. The governing principles the Office would have applied at that time are set forth in the *Compendium of U.S. Copyright Office Practices, Second Edition* (referred to as "*Compendium II*"). In this response, the Acting Register cites the current, third edition of the Compendium (referred to as "*Compendium (Third)*"), which was released and became effective December 22, 2014, and was last updated in 2017, where the relevant practices have not materially changed and cites *Compendium II* if the relevant practices have materially changed or where helpful to further illustrate Office practices.

A. Registration of Multiple Versions of a Computer Program

As an overarching principle, the Office generally requires that separate works be registered separately.[11] The Copyright Act states: "where the work has been prepared in different versions, each version constitutes a separate work."[12] The Office will register multiple

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[6] Second Am. Compl. ¶ 29.
[7] Second Am. Compl. ¶ 29, n.1.
[8] Second Am. Compl. ¶ 29, n.1.
[9] Second Am. Compl. ¶ 29, n.1.
[10] Second Am. Compl. ¶ 29, n. 1.
[11] *See* COMPENDIUM (THIRD) § 511. There are limited exceptions to this rule, including for registration of collective works, published works using the "unit of publication" option, and group registration for serials, newspapers, newsletters, contributions to periodicals, unpublished photographs, published photographs, databases, and secure test items. *See* 37 CFR §§ 202.3(b)(5), 202.4; COMPENDIUM (THIRD) §§ 511, 512.2 n.2.
[12] 17 U.S.C. § 101 (defining "created").

versions of a published work, provided that each version contains a sufficient amount of copyrightable authorship that does not appear in the other versions, if the applicant submits "a separate application, a separate filing fee, and a separate set of deposit copies for each version."[13]

The Copyright Office will register different versions of a computer program provided that each version contains "new material" that is "original" and "contain[s] a sufficient amount of copyrightable authorship."[14] This requirement is not satisfied by "[m]aking only a few minor changes or revisions to a preexisting work, or making changes or revisions of a rote nature that are predetermined by the functional considerations of the hardware."[15]

The *Compendium (Third)* illustrates these principles through two relevant examples. The first example involves source code for two versions of the same video game, developed for two different consoles, where the code is "substantially different, and not simply the result of interoperability or hardware compatibility."[16] In such a case, both versions of the software must be registered separately because each version contains different copyrightable authorship and the works are therefore separate works.[17] In the second example, where software is merely "adapted" to run on a different operating system, the different adaptations should not be registered separately. Office practice in such a case is for the registration specialist to communicate with the applicant to determine whether the author contributed a sufficient amount of copyrightable authorship, in which case a second application is warranted, or if the only differences between the versions were the result of interoperability or hardware compatibility, in which case a second application should not be filed.[18]

Similarly, the *Compendium II* describes a scenario where a "previously published program is adapted to run on a different model or brand of computer."[19] In such a case, the Office would have "question[ed] the nature and extent of the adaption" and refused registration for the second work if the changes were "functionally predetermined."[20]

Under the *Compendium II*, where an applicant sought to register different versions of a published work and the versions contained only "uncopyrightable differences," such as modifications made for the purpose of interoperability or hardware compatibility, Office practice was to register only one claim using the "best edition" as the deposit.[21]

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[13] COMPENDIUM (THIRD) § 512.2. Depending on which version is the "most complete" and when each version is published with respect to the other versions, the *Compendium (Third)* outlines specific application procedures. *See* COMPENDIUM (THIRD) § 512.2(A)–(C); *see also* COMPENDIUM II § 610.06.
[14] COMPENDIUM (THIRD) § 721.8.
[15] COMPENDIUM (THIRD) § 721.8; *see also* COMPENDIUM II § 323.01 (noting "registration is not possible" for works that include only these types of changes).
[16] COMPENDIUM (THIRD) § 721.8.
[17] COMPENDIUM (THIRD) § 721.8.
[18] COMPENDIUM (THIRD) § 721.8.
[19] COMPENDIUM II § 323.01.
[20] COMPENDIUM II § 323.01.
[21] COMPENDIUM II § 610.04.

B. Each Published Version of a Computer Software Program That Contains New Copyrightable Authorship Should Be Registered Separately

A registration for a specific version of a computer program covers only the new material that the author contributed to that version.[22] It does not cover material that was previously published.[23] The *Compendium (Third)* provides the example of an application to register a program titled *Clothing Maker version 3.0*, which contains an appreciable amount of code that appeared in versions 1.0 and 2.0 of the same program. Because the applicant distributed copies of versions 1.0 and 2.0 of the program to the public before it filed its application to register version 3.0, versions 1.0 and 2.0 are considered previously published. The application to register version 3.0 of the program therefore covers only new material that appears in version 3.0 and the material that had been previously published in versions 1.0 and 2.0 should be excluded from the claim.[24]

C. Identification and Exclusion of Works Owned by Person Other Than Claimant

In pertinent part, the statutory requirements for copyright registration dictate that an application for registration of a compilation or derivative work must include "an identification of any preexisting work or works that it is based upon or incorporates, and a brief, general statement of the additional material covered by the copyright claim being registered."[25] Identifying the new or revised material the author has contributed to a work and any material that is not claimed "is essential to defining the claim that is being registered" and "ensures that the public record will be accurate."[26]

In addition to asking applicants to disclaim material previously registered or published by the claimant, the *Compendium II* required applicants who sought to register derivative textual works, including derivative computer programs, to exclude all material that had been previously registered or published, including by a third-party, or that was in the public domain.[27] Additionally, the *Compendium II* explicitly provided that if a work combines copyrightable elements with uncopyrightable government material,[28] the claim does not extend to the

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[22] COMPENDIUM (THIRD) § 721.8.
[23] COMPENDIUM (THIRD) § 721.8. Publication is defined as "the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending." 17 U.S.C. § 101.
[24] COMPENDIUM (THIRD) § 721.8.
[25] 17 U.S.C. § 409(9).
[26] COMPENDIUM (THIRD) § 621.1.
[27] COMPENDIUM II §§ 306.01, 325.01.
[28] Works that are prepared by an officer or employee of the U.S. government as part of that person's official duties are not copyrightable. However, the U.S. government can own the copyright in a work if the copyright was transferred to the U.S. government. 17 U.S.C. § 105; COMPENDIUM II § 206.02. Based on the Court's question, which asks the Register to assume that the work incorporates source code "owned" by the Government, the Acting Register understands the question to refer to material that was not created by an employee of the U.S. government within the scope of that person's employment, but rather for which the copyright was validly assigned or otherwise transferred to the Government by a third party.

uncopyrightable material and the application should include "an appropriate disclaimer or limitation of claims."[29]

Significantly, the requirement to exclude preexisting material from the copyright claim only applied when the preexisting material was "substantial."[30] The *Compendium II* defined "substantial" to mean that the preexisting material represents a "significant portion of the work."[31] The *Compendium II* pointed to a derivative program containing a total of 5,000 lines of program text, fifty of which were previously published, as an example of a work in which the preexisting material was not a substantial portion of the work as a whole.[32]

Thus, the *Compendium II* required an applicant to disclaim all previously published or registered material that was owned by a third party, including the U.S. government if that material constituted a significant portion of the work as a whole.[33]

D. Year of Completion

Under the Copyright Act, an application must include "the year in which creation of the work was completed."[34] In defining when a work is "created," the statute states: "where a work is prepared over a period of time, the portion of [the work] that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work."[35] Under the governing regulation, "year of completion" means "the latest year in which the creation of any copyrightable element was completed."[36] Likewise, the *Compendium II* explains that an applicant should provide as the year of creation "the latest year when copyrightable material was added to the version being registered."[37]

According to the *Compendium II*, if multiple versions of a work are being registered together (because they do not contain copyrightable differences), the applicant should give the date of creation of the latest version of the work.[38] Further, if the date of creation provided in the application is inconsistent with other dates appearing on the application or the deposit, Office

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[29] COMPENDIUM II § 617.04.
[30] COMPENDIUM II § 306.01.
[31] COMPENDIUM II § 325.01(b).
[32] COMPENDIUM II § 325.01(a)(1). Similarly the *Compendium (Third)* instructs that there is no need to exclude 50 lines of source code that appeared in a previously published version of a computer program if the program contains 5,000 lines of entirely new source code. COMPENDIUM (THIRD) § 721.8.
[33] In contrast, the *Compendium (Third)* explicitly states that an applicant should identify material that "is owned by an individual or legal entity other than the claimant who is named in the application" if the work contains an appreciable amount of such material. COMPENDIUM (THIRD) § 621. Thus, applicants currently must exclude from their applications all works owned by the U.S. government or a third party.
[34] 17 U.S.C. § 409(7).
[35] 17 U.S.C. § 101; *see also* COMPENDIUM (THIRD) §§ 611.1(B), 721.9(D).
[36] 37 C.F.R. § 202.3(b)(4)(ii). Effective March 15, 2019, this regulation will be moved to 37 C.F.R. § 202.3(c)(4).
[37] COMPENDIUM II § 620.01.
[38] COMPENDIUM II § 620.02(a). The *Compendium II* section 620 titled "Date of creation" was revised and retitled as "Year of Completion" in section 611 of the *Compendium (Third)* to more accurately reflect the statutory and regulatory requirement that an applicant provide the latest year in which copyrightable element of the work was completed.

practice was for the registration specialist to communicate with the applicant regarding the inconsistency.[39]

E. Nation of First Publication

The statutory requirements for copyright registration dictate that applications shall include the date and nation of a work's first publication if the work has been published.[40] Publication is defined as the "distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending."[41] Publication occurs when copies or phonorecords of the work are actually distributed to the public or when they are offered for distribution to the public, provided that the offer is made by or with the authority of the copyright owner and copies or phonorecords of the work exist at the time the offer is made.[42] Distribution to a member of the public is made when "one or more copies or phonorecords are distributed to a member of the public who is not subject to any express or implied restrictions concerning the disclosure of the content of that work."[43] Distribution to "a definitely selected group with a limited purpose and without the right of diffusion, reproduction, distribution, or sale," is not considered a distribution to the public and is therefore not a publication.[44]

The *Compendium* requires applicants to identify the country in which a published work was first published.[45] If a work is published in the United States and another country on the same date, the applicant should identify "United States" as the nation of first publication.[46]

F. Other Copyright Office Regulations and Practices

Copyright Office regulations require applicants to make "[a] declaration that information provided within the application is correct to the best of [the applicant's] knowledge."[47] Generally the Office "accepts the facts stated in the registration materials, unless they are contradicted by information provided elsewhere in the registration materials or in the Office's records."[48]

In responding to the Court's questions, the Office applies the foregoing governing statutory and regulatory standards and examining principles. The Office notes that it is not unusual for an examiner to correspond with an applicant about factual assertions if the assertions

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[39] COMPENDIUM II § 620.03.
[40] 17 U.S.C. § 409(8).
[41] 17 U.S.C. § 101.
[42] 17 U.S.C. § 101; COMPENDIUM (THIRD) §§ 1906, 1906.3.
[43] COMPENDIUM (THIRD) § 1905.1.
[44] COMPENDIUM (THIRD) § 1905.1 (citing *White v. Kimmell*, 193 F.2d 744, 746–47 (9th Cir. 1952)).
[45] COMPENDIUM (THIRD) § 612.6(B).
[46] COMPENDIUM (THIRD) § 612.7(J). The *Compendium (Third)* also instructs applicants to provide "United States" as the nation of first publication if the work was first published in a foreign country that has entered into a copyright treaty with the United States and if the work was subsequently published in the United States within thirty days thereafter. COMPENDIUM (THIRD) § 612.7(J). However, that guidance was not included in the Second Edition of the Compendium and therefore is not applicable here.
[47] 30 C.F.R. § 202.3(c)(2)(iii).
[48] COMPENDIUM (THIRD) § 602.4(C).

appear to conflict with other information provided in the application materials.[49] Accordingly, if the Office becomes aware of an error at the time of application, such as the omission of the statement regarding preexisting material or a date of creation that is inconsistent with a deposit, or has questions about facts asserted in the application, it provides the applicant an opportunity to correct the error or verify the facts within a specified period of time.[50] If the applicant responds in a timely fashion to the satisfaction of the Office, the Office can proceed with the registration. The Acting Register's response herein is thus premised on the fact that any errors identified were not timely corrected through such a process.

II. Acting Register's Responses to Court's Questions

Based on the foregoing statutory and regulatory standards, and its examining practices, the Acting Register responds to the Court's questions as follows:

The Scope of Bruhn NewTech, A/S's Copyright Registrations

Plaintiffs' allegation that the TX 7-836-490 registration includes "all of the updates and improvements that had been made to the software code after completion of the Software in 1998 through May 2013," is likely inaccurate.[51] Plaintiffs allege that Bruhn NewTech, A/S updated the Software at least once per year.[52] If Bruhn NewTech, A/S "published" new versions of the Software as it made its annual updates, including by distributing copies to its customers, the TX 7-836-490 registration would cover only the material that Bruhn NewTech, A/S added to or modified from the most recently published version of the Software. Any material that had been included in a version of the Software that had been published previously could not be claimed as part of the TX 7-836-490 application.[53] Indeed, Bruhn NewTech, A/S explicitly disclaimed previous versions of the Software in the TX 7-836-490 application, so the material in those versions is not covered by that registration.

Similarly, the application to register NBC Analysis – CRID 0040 covers only new material that was added to or modified in the Software when that version of the Software was published in January 1999. In the application to register this work, Bruhn NewTech, A/S explicitly disclaimed previous versions of the Software. That registration covers only the material in the Software that was first added or modified in the version that was published in January 1999.[54] Any content that had been previously published as part of a different version of the Software is not included in the TX 7-836-500 registration.

Plaintiffs therefore incorrectly alleged in the Second Amended Complaint that Bruhn NewTech, A/S owns copyright registrations for the Software as it existed on the date Bruhn NewTech, Inc. entered into a contract with the United States, as well as all updates and

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[49] COMPENDIUM (THIRD) § 602.4(C).
[50] Generally, when a registration specialist corresponds with an applicant, the applicant will be given 45 days to respond to the specialist's questions concerning issues in the application materials. COMPENDIUM (THIRD) § 605.6 (B), (D).
[51] Second Am. Compl. ¶ 29, n.1.
[52] Second Am. Compl. ¶ 29.
[53] COMPENDIUM (THIRD) § 721.8.
[54] COMPENDIUM (THIRD) § 721.8.

improvements that were made to the Software between the date of the contract and the date of the acts of alleged infringement.[55] Based on the two copyright registrations identified in the Second Amended Complaint, Bruhn NewTech, A/S owns registrations for the new copyrightable content in the versions of the Software that were first published in January 1999 and in September 2012, but not in any material that was included in any version of the Software first published prior to 1999 or first published between February 1999 and September 2012.

As noted above, it is not unusual for an examiner to correspond with an applicant about factual assertions in an application. If the Office becomes aware of an error at the time of application, or has questions about facts asserted in the application, it provides the applicant an opportunity to correct the error or verify the facts. The Office would typically correspond with the applicant to resolve each of the questions for which the Court seeks advice, and it might be typical for this process to resolve such errors. The Acting Register's responses herein are based on the assumption that any errors identified in the applications would not have been timely corrected through such a process.

Question 1(a)

Had the Office been aware, prior to registration, that the claimed work encompassed three different separately-published versions of a computer program, the Office would have corresponded with the applicant to determine whether the three submitted versions of the program were substantially different or rather if the program had merely been adapted to run on a different model or brand of computer, as well as whether any differences between the versions were "functionally predetermined" or "simply the result of interoperability or hardware compatibility."

If the three versions of the program each contained a sufficient amount of copyrightable content that was not simply the result of interoperability or hardware compatibility, then the versions should each have been registered separately. In that case, the Office would have registered one of the versions under the application submitted by Bruhn NewTech, A/S and would have required a separate application and filing fee for each of the other two versions.

If the three versions of the program did not contain different copyrightable content or the differences between the versions were purely based on functional considerations such as interoperability or hardware compatibility, the Office would have registered the "most complete" version of the program under a single registration.

Question 1(b)

There are a number of additional facts that would need to be established before the Acting Register could provide a definitive answer to the question regarding whether the Office would have refused registration for the work if the claimed work incorporated source code owned by third-parties, including the U.S. Government. Specifically, the Acting Register would need to know:

[55] Second Am. Compl. ¶ 29, n.1.

- Whether the material owned by the Government or a third-party had been previously published or registered prior to its incorporation in the Software;
- When the material owned by the Government or a third-party was first incorporated in the Software; and
- Whether the material owned by the Government or a third-party constituted a "substantial" portion of the Software at the relevant time.

If the material owned by the Government or a third-party had not been previously published or registered, the *Compendium II* did not require Bruhn NewTech, A/S to exclude that material in its application. Similarly, if the material owned by the Government or a third party did not make up a "substantial" portion of the Software at the relevant time, Bruhn NewTech, A/S was not required to disclaim the material in its applications.

If, alternatively, the material owned by the Government or a third-party had been previously published or registered, and the material constituted a "substantial" portion of the version of the Software that is registered under Copyright Registration No. TX 7-836-490, Bruhn NewTech, A/S would have been required to exclude that material in its application for that version if the Government or third-party owned material was first incorporated into that version of the Software.

Question 1(c)

Assuming that the work that was the subject of the application for TX 7-836-490 was completed in 2012, had the Office been aware at the time the application was submitted that the claimed work was completed in 2012 rather than 2008, the Office would have refused registration for the work if the application indicated the work had been completed in 2008.

Question 1(d)

Assuming that the work that was the subject of the application for TX 7-836-490 was first published in Denmark, had the Office been aware at the time the application was submitted that the claimed work was first published in Denmark and not the United States, the Office would have refused registration for the work if the application indicated the work had first been published in the United States.

Question 2(a)

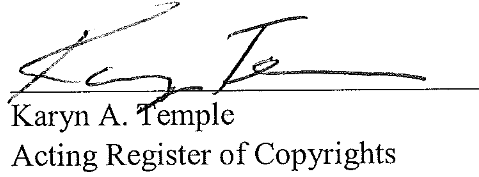
Assuming that the work that was the subject of the application for TX 7-836-500 was completed in 1999, had the Office been aware at the time the application was submitted that the claimed work was completed in 1999 rather than 1998, the Office would have refused registration if the application indicated that the work had been completed in 1998.

Question 2(b)

Assuming that the work that was the subject of the application for TX 7-836-500 was first published in Denmark, had the Office been aware at the time the application was submitted that the claimed work was first published in Denmark and not the United States, the Office would

have refused registration for the work if the application indicated the work had first been published in the United States.

Dated: March 12, 2019



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