



Copyright Review Board
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000

December 22, 2022

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**Re: Second Request for Reconsideration for Refusal to Register Cane River
(SR # 1-7704548061; Correspondence ID: 1-44N393U)**

Dear Ms. Callif:

The Review Board of the United States Copyright Office (“Board”) has considered Sacha and Dominique Jenkins’ (“Claimants”) second request for reconsideration of the Registration Program’s refusal to register a motion picture claim in the work titled “Cane River” (“Work”). After reviewing the application, deposit copy, and relevant correspondence, along with the arguments in the second request for reconsideration, the Board reverses the Registration Program’s denial of registration and refers the matter to the Registration Policy and Practice division for registration of the Work, provided that all other application requirements are satisfied.

Because the history of the Work raises complex copyright issues that are not present in most registration applications, we provide a detailed factual background below, which then informs our legal analysis of registrability. Here, the creativity of the Work is not at issue. Instead, our conclusion that the Work was published in 1983 requires us to consider whether the Work had to satisfy certain formality requirements to be eligible for registration.

I. BACKGROUND OF THE WORK

The Work is a 1982 motion picture created by filmmaker Horace Byrd Jenkins III. Based on materials before the Board, the Board understands that the motion picture follows the love story of Peter, a college football star from an elite Creole family, and Maria, a woman born of less privilege in Louisiana’s Natchitoches Parish. The movie’s plot is summarized here: As Maria preps for college to escape their small town, Peter rejects a professional career to become a poet with aims to anchor himself to the parish. The Work “revolves around [their] fraught courtship,” “shadowed by the complexities of history, race and politics.”¹ No issues have been raised regarding Mr. Jenkins’ authorship of the Work or the originality and creativity of the Work.

¹ A.O. Scott, ‘Cane River’ Review: A Lost Treasure of Independent Cinema, N.Y. TIMES (Feb. 6, 2020), <https://www.nytimes.com/2020/02/06/movies/cane-river-review.html>.

Mr. Jenkins passed away six months after completing the Work. At the time of his death, only one copy of the Work existed and it had not been commercially distributed. However, the physical location of the Work—and whether it still existed—became a mystery.

Claimants are Mr. Jenkins' heirs. They did not learn of the Work's continued existence and its physical location until 2016. Letter from Lisa A. Callif to U.S. Copyright Office at 2 (Sept. 4, 2020) ("Second Request"). After acquiring physical possession of the motion picture, Claimants submitted an application to register the Work, identifying Mr. Jenkins as its sole author and Claimants as copyright claimants by inheritance. The application stated that the Work was completed in 1982 and first published in Germany on October 14, 1982. As a deposit copy, Claimants submitted a DVD with a copyright notice that displays a copyright symbol and Mr. Jenkins' name but does not contain the year of publication.

II. THE OFFICE'S CONSIDERATION OF CLAIMANTS' APPLICATION

The Office initially refused registration of the Work because the deposit's copyright notice (without the year of publication) did not appear to comply with formalities required by the relevant law. When enacted, the 1976 Copyright Act required all works published on or after January 1, 1978 to bear "a notice of copyright" on "all publicly distributed copies from which the work can be visually perceived." 17 U.S.C. § 401(a) (1978). A copyright notice consists of three elements: (1) "the symbol © (the letter C in a circle), or the word 'Copyright', or the abbreviation 'Copr.'"; (2) "the year of first publication of the work"; and (3) "the name of the owner of copyright in the work." *Id.* § 401(b). Works published without such notice generally fell into the public domain.

Section 405 of the current Copyright Act still imposes this requirement, but limits its application to works published on or after January 1, 1978 and "publicly distributed by authority of the copyright owner" before March 1, 1989.² Because Claimants described the Work as published on October 14, 1982, the Office reviewed the deposit to determine if the copyright notice satisfied the requirements in section 401. Because the deposit copy's notice did not include a year of publication, the Office concluded that the Work did not meet the necessary statutory requirements to secure copyright at the time of first publication. For this reason, the Office refused registration on August 28, 2019. Initial Letter Refusing Registration from U.S. Copyright Office to Lisa Callif at 1 (Aug. 28, 2019).

Claimants sought reconsideration of the Office's refusal, arguing that (1) the Work was never published or, (2) in the alternative, the Work falls into one of section 405(a)'s statutory exceptions because a copyright notice was omitted only on a relatively small number of copies. Letter from Lisa A. Callif to U.S. Copyright Office (Oct. 4, 2019) ("First Request"). In their

² Ten years after the 1976 Act became effective, the United States acceded to the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention"), an international treaty that requires member countries to adopt certain minimum protections for literary and artistic works and provides that such protection may not be conditioned on the observance of any "formality" on "the enjoyment and the exercise" of rights in the treaty. In order to join the Berne Convention, Congress passed the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853. This law made copyright notice optional for works published on or after March 1, 1989, *see* 17 U.S.C. § 401(a), but retained the notice requirement for works publicly distributed before the law's effective date. *See id.* § 405(a) (requiring copyright notice only for works "publicly distributed by authority of the copyright owner *before the effective date of the Berne Convention Implementation Act*" (emphasis added)).

request for reconsideration, Claimants also provided additional factual information about the first dissemination of the Work that was not provided to the examiner, including that the Work was screened but not distributed before March 1, 1989. *Id.* at 2. On July 2, 2020, the Office denied the First Request, finding that it “lack[ed] a clear factual statement that the screenings of *Cane River*” did not constitute publication. *See* Refusal of First Request for Reconsideration from U.S. Copyright Office to Lisa Callif at 1 (July 2, 2020) (“Because *Cane River* was published between January 1, 1978 and March 1, 1989 with a defective copyright notice, we are legally obligated to refuse registration.”).

On September 4, 2020, the Claimants repeated the arguments made in their First Request in a letter to the Review Board, adding, “[p]ublic policy justifies registration of the film.” Second Request at 1–2.

III. THE REVIEW BOARD’S FINDINGS

The issue before the Board is a narrow one: Does the omission of the year of publication in the deposit’s copyright notice invalidate the Claimants’ copyright in the Work? After carefully examining the Work and the representations made by Claimants, and applying the legal standards discussed above, the Board finds that the Work has not lost copyright protection and therefore is eligible for registration, assuming all other registration requirements can be met. Specifically, the Board finds that (1) the Work was “published” as defined in the Copyright Act, but (2) the Work was not distributed to the public. Accordingly, section 405(a) does not apply because copies of the Work were never publicly distributed and, therefore, the incomplete copyright notice on the deposit copy is irrelevant. Each finding is discussed below.³

Based on Claimants’ description of the Work’s dissemination in the First Request, the Work appears to have been published in 1983.⁴ Under the Copyright Act, publication occurs (1) when copies or phonorecords are distributed to the public by sale or other means or (2) when an offer “to distribute copies or phonorecords to a group of persons” is made “for purposes of further distribution, public performance, or public display.” 17 U.S.C. § 101 (defining “publication”). Under the “offer” prong, distribution of copies is not required.⁵ Claimants state that the Work was “displayed for limited audiences on only four occasions.” First Request at 2; Second Request at 2. The first three screenings were held “privately” to benefit organizations or to honor Mr. Jenkins. First Request at 2. The fourth, and last, screening, however, was held “at IFP’s Independent Feature Film market in 1983 for selected registered *buyers*.” *Id.* (emphasis added). These facts strongly suggest that the fourth screening was held for the purpose of securing an acquisition or distribution deal. Such a screening, if authorized by the copyright

³ Because the Board concludes that the Work was not publicly distributed—and section 405(a) does not apply—it does not analyze Claimants’ argument made in both its First and Second Requests that the Work is entitled to the benefit of the exception in section 405(a)(1).

⁴ The precise date and nation of publication remain unclear. Claimants’ application stated that the Work was first published in Germany on October 14, 1982. But Claimants’ First Request suggests the Work was first published in the United States in 1983. *See* First Request at 2 (stating the Work “was screened at IFP’s Independent Feature Film market in 1983 for selected registered buyers only”). Because the Board refers this application to the Registration Program for further consideration, Claimants will have the opportunity to clarify these details.

⁵ For example, the Office has advised that publication can occur “when a motion picture is offered to a group of movie theaters or television networks for the purpose of exhibiting or broadcasting that work.” U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 1906.1 (3d ed. 2021).

owner, would constitute an offer to distribute copies to a group of persons for purposes of further distribution and would therefore constitute publication.⁶

In light of the Work's 1983 publication, the Board now considers whether section 405(a) of the Act bars registration of the Work because the copyright notice is defective. The Board concludes that section 405(a) does not bar registration of the Work because it only applies to works published prior to March 1, 1989 that were "publicly distributed by authority of the copyright owner." 17 U.S.C. § 405(a). Claimants explained that the Work was screened "no more than four times using one singular print copy of the Film," Second Request at 2, and have represented that "no copies of Cane River were distributed to the general public." Email from Josh Neubarth to U.S. Copyright Office (Sept. 30, 2022). Considering these representations, there was no public distribution of the Work; therefore, no copies were distributed without the required copyright notice. As a result, the Work's copyright was not forfeited by a defective copyright notice.

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For the reasons stated herein, the Review Board of the United States Copyright Office reverses the refusal to register the copyright claim in the Work. The Board now refers this matter to the Registration Policy and Practice division for registration of the Work, provided that all other application requirements are satisfied.



U.S. Copyright Office Review Board

Suzanne V. Wilson, General Counsel and

Associate Register of Copyrights

Maria Strong, Associate Register of Copyrights and

Director of Policy and International Affairs

Jordana Rubel, Assistant General Counsel

⁶ Because Mr. Jenkins passed away in 1982 and the IFP screening occurred in 1983, it is unclear whether the 1983 screening of the Work was with authorization from the copyright owner(s). *See* H.R. REP. NO. 94-1476, at 62 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5675–76 (explaining that Section 106(3) of the Copyright Act gives copyright owners "the right to control the first public distribution of an authorized copy or phonorecord of [the] work, whether by sale, gift, loan, or some rental or lease arrangement"). Claimants have not suggested the screening was unauthorized.