



**BEFORE THE  
U.S. COPYRIGHT OFFICE**

**Copyright Office Fees**

**Docket No. 2018-4**

**COMMENTS OF THE COPYRIGHT ALLIANCE**

The Copyright Alliance appreciates the opportunity to submit the following comments in response to the [Notice of Proposed Rulemaking](#) (NPRM) published by the U.S. Copyright Office in the Federal Register on May 24, 2018, regarding the possible adoption of a new fee schedule.

In view of the ongoing and rapid changes in the information, entertainment, and technology sectors, the U.S. Copyright Office has never been more important than it is today in ensuring that copyright owners have access to critical services that support their artistic and economic endeavors, including the creation and dissemination of works to the public, and the development of innovative new business models by which to distribute such works. Few other government offices are more important to the growth of creative and commercial activity in our nation than the Copyright Office, and we applaud the Office for its continuing efforts to ensure that the needs of creators are addressed. We appreciate the devotion and knowledge of the Copyright Office staff and are grateful to have such a strong team of individuals working to ensure that the U.S. copyright system is the best in the world.

The Copyright Alliance is a non-profit, non-partisan public interest and educational organization representing the copyright interests of over 1.8 million individual creators and over 13,000 organizations in the United States, across the spectrum of copyright disciplines. The Copyright Alliance is dedicated to advocating policies that promote and preserve the value of

copyright, and to protecting the rights of creators and innovators. The individual creators and organizations that we represent rely on copyright law to protect their creativity, efforts, and investments in the creation and distribution of new copyrighted works for the public to enjoy.

While all of our members share a common interest in strong copyright protection, the work of the Copyright Office and the need for a modern, efficient, and affordable copyright registration system, they are not a monolithic group. Our membership is comprised of a diverse group of individual creators and small and large businesses, each occupying a different space within the copyright ecosystem, and among them, representing differing sets of interests, financial and other resources, types of creative works and business models.

The individual creators and small businesses (hereinafter referred to as “professional creators”) that we represent often lack the time, expertise, and financial resources to register all the copyrighted works they create, or even all the commercially viable copyrighted works they create. Similarly, our members who own large portfolios of copyrighted works often struggle with difficulties and costs associated with registering each work in their portfolios, regardless of their resources. Thus, our members, especially the professional creators, must be selective in deciding what to register, how to register, and when to register their works. In many cases, these constraints result in our members registering fewer works than they otherwise would, or in the case of many professional creators, not registering their works at all. While copyright registration fee increases will adversely affect the bottom-lines of all creators who make use of the system, professional creators stand to suffer the greatest harm from steep increases like the ones proposed in the NPRM.

We understand and appreciate that, from time to time, the Copyright Office will need to adjust its fees, therefore, we do not oppose Copyright Office fee increases in general. However, we cannot support the increases proposed in the NPRM—41% on average—in the absence of a more comprehensive consideration of (i) appropriate copyright registration policy reform and (ii)

the efficiencies and cost savings hoped to be brought about by operational and IT modernization, both of which we discuss in more detail in these comments.<sup>1</sup>

Because copyright registration is voluntary (as copyright protection is automatic), raising fees at a rate beyond what would be justified by inflation should be the option of last resort. It's essential that the Office exercise caution and exhaust all alternative means for balancing its budget—for example, through appropriations and by cutting costs, improving efficiencies, and offering additional services for a fee—before increasing registration fees, as any additional costs or barriers serve as a disincentive to participation in the system.

In reviewing the NPRM and the Booz Allen [fee study report](#), a number of questions and concerns arose about how the study was conducted and its conclusions. First, unlike previous studies, which explicitly identified the specific costs that were included and excluded from the analysis, the Booz Allen report does not provide these details. For example, previous fee studies explicitly excluded costs associated with the mandatory deposit program, as well as programs dedicated to providing general education and information to the public.<sup>2</sup> The Booz Allen report, on the other hand, states only that “[f]or the purposes of this fee study, Booz Allen focused on the Office’s basic budget and licensing budget.”<sup>3</sup> While the Booz Allen report does not indicate what is included in the Office’s basic budget, in reviewing the Library of Congress’ fiscal 2018 budget justification, the “basic budget” appears to include both the “administering the legal deposits of certain published works into the collections of Library of Congress,” as well as “providing copyright education and assistance to the public, including through a public

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<sup>1</sup> While the vast majority of our members object to the fee increases, some of our organizational members have no or fewer objections. See Motion Picture Association of America, *Comments on Copyright Office Fees* (Sept. 21, 2018).

<sup>2</sup> See Marybeth Peters, Register of Copyrights, *Proposed Schedule and Analysis of Copyright Fees to Go into Effect on or about April 1, 2014* (2013), <https://www.copyright.gov/docs/newfees/USCOFeeStudy-Nov13.pdf> (“But as in earlier studies, this most recent study continued to exclude costs associated with the policy and international programs, the mandatory deposit program, and programs dedicated to providing general education and information to the public.”); Marybeth Peters, Register of Copyrights, *Analysis and Proposed Copyright Fee Adjustments to Go into Effect on or about August 1, 2009* (2009), <https://www.copyright.gov/reports/fees2009.pdf> (The study omitted public information costs and certain costs associated with legislative, regulatory, judicial, and international responsibilities that do not relate directly to any fee service. The study also omitted activities, including those involved in processing incoming deposits not associated with registration and securing copies of copyrighted works published in the United States that were not registered or voluntarily deposited for the use of the Library of Congress. Overhead expenses associated with omitted activities were likewise excluded.).

<sup>3</sup> Booz Allen Hamilton, *2017 Fee Study Report* 3 (2017), [https://www.copyright.gov/rulemaking/feestudy2018/fee\\_study\\_report.pdf](https://www.copyright.gov/rulemaking/feestudy2018/fee_study_report.pdf).

information office and a variety of publications.”<sup>4</sup> Therefore, based on this language, it would appear that, unlike in prior fee studies, both costs associated with the mandatory deposit program and general education are included in this year’s fee study. We request that the Office clarify which costs are included and excluded from the most recent fee study analysis, and to the extent that costs associated with either the mandatory deposit program,<sup>5</sup> or programs dedicated to providing general education and information to the public<sup>6</sup> were included in the study—which would run counter to the Office’s authority under Section 708<sup>7</sup> and artificially inflate costs—the Office should re-calculate the costs using only those costs that fall within its authority under Section 708, and lower the fees accordingly.<sup>8</sup>

Second, there appears to be a lack of consistency among the cost estimates from one fee study to the next, raising the question of how these costs are calculated and whether the factors used to calculate these costs are consistent from study to study. For example, the 2018 NPRM lists the cost of “certification of copyright office records” as \$314/hour,<sup>9</sup> whereas the same service was said to cost the Office \$436/hour in 2013<sup>10</sup> and \$141/hour in 2008<sup>11</sup>. The 2018

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<sup>4</sup> LIBRARY OF CONG., FISCAL 2018 BUDGET JUSTIFICATIONS 121 (2018), <https://www.loc.gov/portals/static/about/reports-and-budgets/documents/budgets/fy2018.pdf>.

<sup>5</sup> Costs associated with the mandatory deposit program, which is a program run by the Library of Congress, not the Copyright Office, should be borne by the Library. Copyright Office fees should not be used to fund this program, or other programs run by the Library.

<sup>6</sup> The cost of programs dedicated to providing general education and information to the public should not be included fee calculations, except to the extent that general education and information pertains specifically to educating creators and copyright owners about the copyright registration system.

<sup>7</sup> See 17 U.S.C. § 708(b)(1) (emphasis added) (“The Register shall conduct a study of the costs incurred by the Copyright Office for the registration of claims, the recordation of documents, and the provision of services...”).

<sup>8</sup> As a general matter, creators should not be asked to bear the costs of “new initiatives” that are unrelated to the direct costs of registration, such as the “virtual reading room” and the storage for old deposits, both of which are part of the new initiatives proposed for the FY2019 budget. Of the \$21.6 million in needs the Copyright Office reported to Congress for “new initiatives” in a recent budget request, 5 million is for a “Searchable Historic Records” project which will include digitization of the public records and the development of a “virtual reading room.” 1.3 million is for long-term storage for old deposits. See U.S. Copyright Office, *Statement of Karyn Temple before the Subcommittee on Legislative Branch Appropriations: Fiscal 2019 Budget Request*, <https://www.copyright.gov/about/budget/2019/house-budget-testimony-fy19.pdf>.

<sup>9</sup> Copyright Office Fees: *Notice of Proposed Rulemaking*, 83 Fed. Reg. 24,054, 24,062 (May 24, 2018).

<sup>10</sup> Marybeth Peters, Register of Copyrights, *Proposed Schedule and Analysis of Copyright Fees to go into Effect on or about April 1, 2014*, App. B (2013), <https://www.copyright.gov/docs/newfees/USCOFeeStudy-Nov13.pdf>.

<sup>11</sup> Melissa Dadant, *Copyright Cost Study and Fee Recommendations: A Report Prepared for the Register of Copyrights* 28 (2008), <https://www.copyright.gov/reports/fees2008.pdf>.

NPRM lists the cost of processing an application for group registration of serials as \$76,<sup>12</sup> whereas the same service was said to cost \$22 in 2013,<sup>13</sup> and \$26 in 2008.<sup>14</sup> In addition, the 2018 NPRM incorporates costs that seem to have grown exponentially. For example, the NPRM lists the cost of group registration of updates and revisions to non-photographic databases as \$694,<sup>15</sup> whereas the same service was said to cost \$53 in 2008—an apparent increase of more than 1,200% over ten years.<sup>16</sup> These inconsistencies and exponential increases appear throughout several of the cost estimates, with no apparent explanation for the change in cost. We request that the Office compare the cost estimates from prior studies to the cost estimates in 2018 and explain the inconsistencies and, as appropriate, re-adjust any costs that were incorrectly calculated before moving forward with any increases.

<b>Copyright Office Service</b>	<b>2008 Estimated Cost</b>	<b>2013 Estimated Cost</b>	<b>2018 Estimated Cost</b>
Certification of Copyright Office Records	\$141/hour	\$436/hour	<b>\$314/hour</b>
Processing an Application for Group Registration of Serials	\$26	\$22	<b>\$76</b>
Processing Group Registration of Updates and Revisions to Non-Photographic Databases	\$53	not provided	<b>\$694</b>

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<sup>12</sup> Copyright Office Fees, *supra* note 9, at 24,057.

<sup>13</sup> Marybeth Peters, *supra* note 10.

<sup>14</sup> Melissa Dadant, *supra* note 11.

<sup>15</sup> Copyright Office Fees, *supra* note 9, at 24,058.

<sup>16</sup> See Melissa Dadant, *supra* note 11.

## I. SIGNIFICANT FEE INCREASES THAT PRECEDE ADDED VALUE WILL HAVE CONSIDERABLE ADVERSE EFFECTS ON THE FILING OF REGISTRATION APPLICATIONS BY CREATORS

The Copyright Office is proposing a large fee increase at a time when the value of copyright registration to professional creators has decreased significantly, as evidenced by a growing number of creators who decline to register their works. In a survey conducted by the Copyright Alliance<sup>17</sup> of creators of all types, which received 1,194 responses, 37% reported that they have not filed a copyright registration application with the U.S. Copyright Office within the last 5 years. The number one reason these creators provided for their decision not to register was “it’s too expensive.”<sup>18</sup> Between 2004 and 2017—during which time the Office increased fees four times<sup>19</sup>—there was a steady decline in the number of copyright registration applications filed, with occasional peaks in some years.<sup>20</sup> To increase fees now would likely exacerbate this decline.<sup>21</sup> The Booz Allen fee study report supports this conclusion by forecasting a projected 11% decrease in registration applications as a result of the proposed increase.<sup>22</sup> As we explain in more detail below, we think that more should be done to prevent this decline, rather than simply accepting it as a necessary consequence of adequately funding the Office.

### a. Many Creators Already Question Whether Copyright Registration Provides Sufficient Value

For many professional creators who have either never registered their works with the Copyright Office, or have had to stop or decrease the number of registration applications they

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<sup>17</sup> Copyright Alliance, *Copyright Registration Fee Survey* (2018).

<sup>18</sup> Of those creators who reported having not filed a copyright registration application with the U.S. Copyright Office within the last 5 years, 37% said that they have not done so because “it’s too expensive.” For this question, respondents were permitted to select as many responses as applied. *See id.*

<sup>19</sup> Fee adjustments were made in 2006, 2007, 2009, and 2014. *See* Copyright Office Fees: *Final Rule*, 74 Fed. Reg. 32805-06 (Jul. 9, 2009); Copyright Office Fees: *Final Rule*, 79 Fed. Reg. 15910 (Mar. 24, 2014).

<sup>20</sup> In 2004 the Office received approximately 614,235 copyright registration applications, compared to 2017 where it received approximately 539,662 registration applications. *See* U.S. COPYRIGHT OFFICE, ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS (2004), <https://www.copyright.gov/reports/annual/2004/annual2004.pdf>; U.S. COPYRIGHT OFFICE, FISCAL 2017 ANNUAL REPORT (2017), <https://www.copyright.gov/reports/annual/2017/ar2017.pdf>.

<sup>21</sup> While the Office could take corrective actions in the future in an effort to bring these former applicants back, at that point it may be too late because once these creators opt not to file, it becomes more difficult to get them back in the future.

<sup>22</sup> *See* Booz Allen Hamilton, *2017 Fee Study Report* 19 (2017), [https://www.copyright.gov/rulemaking/feestudy2018/fee\\_study\\_report.pdf](https://www.copyright.gov/rulemaking/feestudy2018/fee_study_report.pdf).

file, the perception is that copyright registration does not provide enough value for the time and expense it requires.<sup>23</sup> For example, one benefit of registering a work is the ability to enforce the copyright to the work in federal court against infringers, but it is well documented that a significant number of professional creators cannot afford to enforce their rights in court due to the high costs associated with litigating in federal court.<sup>24</sup> Likewise, many of the other benefits associated with registration, like the availability of statutory damages and the presumption of validity, lack value to professional creators who are unable to enforce their rights in court. The inability to even access a courthouse, under a system where virtually all of the incentives for copyright registration are tied to litigation, largely nullifies the value of copyright registration to those creators.<sup>25</sup>

The final rule limiting group registrations of photographs to 750 photographs per application, which went into effect in February of this year, is another example of the way in which the value of copyright registration has diminished for creators. While we recognize that the group registration option in itself provides a benefit to photographers, the decision to place a limit of 750 photographs—which fails to accommodate the average professional photographer’s workflow—when compared to the previously unlimited option for registering groups of photographs, served as a *de facto* fee increase and introduced an additional barrier to the registration system.<sup>26</sup> We hear from photographers nearly every day about how the limit of 750

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<sup>23</sup> “As valuable as registering is, it’s the leverage I need to take on those who infringe my images, [there] comes a point where the costs can appear to outweigh the benefits.” See Copyright Alliance, *Copyright Registration Fee Survey* (2018).

<sup>24</sup> See U.S. Copyright Office, *Copyright Small Claims: A Report of the Register of Copyrights* (2013), <https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf>.

<sup>25</sup> In the Copyright Alliance survey, of the 63% of creators who reported having filed a copyright registration application with the U.S. Copyright Office within the last 5 years, 77% said they register their work “So that I can sue if infringement occurs.” That answer choice tied with “To prove that the work belongs to me” as the most popular answer choice. For this question, respondents were permitted to select as many responses as applied.

Of those creators who reported not having filed a copyright registration application with the U.S. Copyright Office within the last 5 years, 24% said that they have not done so because “It’s not worth it since I can’t afford to sue for infringement anyway.” This was the second most popular answer choice, behind “It’s too expensive.” For this question, respondents were permitted to select as many responses as applied. See Copyright Alliance, *Copyright Registration Fee Survey* (2018).

<sup>26</sup> When the limit of 750 was introduced earlier this year, the Office set the fee at \$55, stating that that specific limit was selected based on the determination that “that 750 is a reasonable limit for GRPPH and GRUPH given ... the **current filing fee** for these group registration options, and the technical capabilities of the **current system**” (emphasis added). However, the limit of 750 remains *despite* the Office’s proposal, only 3 months later, to increase

impacts their ability to register even a complete set of photographs from a single shoot.<sup>27</sup> The result of this rule change is that, rather than submitting multiple applications at a cost of \$55 each, many have opted to stop filing altogether, while others who continue to file must spend time—time that they should be spending creating new photographs—sifting through thousands of photographs to determine which 750 they are going to register since they cannot afford the added expense of filing additional registrations.<sup>28</sup> Congress implemented the group registration option for photographs because it recognized that “[i]n some cases, requiring separate applications and a separate filing fee may cause copyright owners to forego registration altogether.”<sup>29</sup> The recent 750 limit undermines Congress’ intent, and the proposed fee increase will only further distance the group registration option for photographs from Congress’ expressed intent.

The rate at which fees have increased has compounded copyright owners’ frustrations with the registration system.<sup>30</sup> For many services, fees have increased at a far greater rate than the rate of inflation. This rapid increase has not come with a corresponding decrease in pendency nor improvements to registration services or processes.

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the \$55 filing fee by 82% to \$100. *See* Group Registration of Photographs: *Final Rule*, 83 Fed. Reg. 2542 (Jan. 18, 2018).

<sup>27</sup> “I have been registering all my images with the Copyright Office religiously for the last few years. But with the new fees and new limit of 750 images per registration, it makes it impossible for creators like me who often shoot over 20,000 images a month, to register . . . [T]rying to edit and whittle down 20,000 [photographs] to 750 per month, to reduce fees and applications, would take hundreds of hours of editing to try to predict the best images to protect from each month’s shoot. It has forced me to stop registering.” *See* Copyright Alliance, *Copyright Registration Fee Survey* (2018).

<sup>28</sup> We have heard from some of our photographer members that the process of selecting 750 photographs is itself very difficult since the photographer has little idea which photographs may be ones have value until years, sometimes decades, later.

<sup>29</sup> H.R. No. 94-1476, at 154 (1976).

<sup>30</sup> For example, using the Bureau of Labor Statistic’s CPI Inflation Calculator, available at [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm), the present day cost for a standard electronic registration under the fees effective July 2007 would be \$42.34, compared to the NPRM’s proposed fee of \$75. The present day cost for group registration of non-photographic databases under the fees effective August 2009 would be \$40.86, compared to the NPRM’s proposed fee of \$500; for group registration of published photographs (electronic), those same numbers are \$40.86 and \$100, respectively.

b. Photographers Have Been Hit Especially Hard by Back-To-Back Fee Increases in a Short Span of Time

In light of the *de facto* fee increase imposed by the limit of 750 photographs in a group registration just seven months ago, to raise the fee *again* from \$55 to \$100—an 82% increase—fails to demonstrate due consideration to the objectives of the copyright system, as proscribed by Section 708 of the Copyright Act. Neither the NPRM nor the fee study report provide any explanation for the need to increase the fees so drastically in such a short amount of time. In fact, neither even make mention, or demonstrate any degree of consideration, of how these back-to-back increases would affect photographers.

To the extent the effect on photographers was considered, it was limited to a statement that “[t]he proposed new fee raises [the current cost of \$0.07 per photograph] only slightly to \$0.12 per photograph if the maximum number of works are registered.”<sup>31</sup> It is misleading to discuss the fee for group registrations of photographs on a cost-per-photograph basis because the likelihood that more than a few of those 750 photographs will ever truly benefit from the registration is exceptionally low. However, because it’s impossible to predict which photographs might acquire value over time or be infringed, a prudent photographer will register as many photos as they can afford in the hopes of securing those additional benefits for the one or two photographs in the batch that might one day avail themselves of those benefits. Practically speaking, for the average photographer, the entire \$100 of the proposed fee would go toward securing additional benefits for no more than a few of those 750 photographs. It is therefore inaccurate to attempt justify the fee increase by spreading the cost across all 750 photographs.

c. Given the Perceived Lack of Value to Creators, Increasing Copyright Registration Fees Will Lead to a Reduction in the Amount and Frequency of Registration Applications

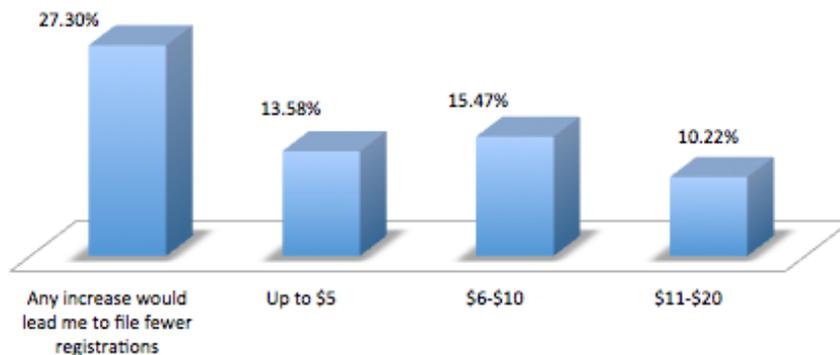
For most professional creators, the proposed fee increase is simply too steep for them to afford to continue registering the same volume of works and at the same frequency going forward. Of those creators who reported having filed a copyright registration application within the last 5 years, 27% said that *any* increase in fees at this time would lead them to file fewer

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<sup>31</sup> As an initial matter, if the cost of \$100 is spread across 750 photographs, that amounts to a cost of just over \$0.13 per photograph, not \$0.12 as incorrectly stated in the NPRM.

registration applications; 14% said that a fee increase of more than \$5 would lead them to file fewer applications; 15% said that a fee increase of more than \$6 - \$10 would lead them to file fewer registrations; 10% said that a fee increase of more than \$11 - \$20 would lead them to file fewer registrations. Accordingly, because the Office proposes raising the fee for a standard application by \$20, once the new fee schedule goes into effect over half—at least 56%—of these respondents would begin filing fewer registrations. As for those creators who have not filed within the last 5 years, 37% said that they have not done so because the *current fees* are already more than they can afford.<sup>32</sup>

**What's the most that the U.S. Copyright Office could increase fees before you begin filing fewer registration applications?**



In the NPRM, the Office states that it is proposing an increase in “many of the group registration fees to achieve a higher rate of cost recovery” based on its assertion that demand for many of the group registrations is “relatively inelastic,”—meaning that the price has little effect on the demand for that service—and that “achieving a higher rate of recovery should not result in a significant decrease in registrations.” However, that assertion contradicts even Booz Allen’s findings, which report that all but one category of group registrations are *elastic*, and forecast a significant decline in the number of group registrations as a result of the proposed fee increase.<sup>33</sup> Additionally, any attempt to quantify the elasticity of demand for group registrations of

<sup>32</sup> Copyright Alliance, *Copyright Registration Fee Survey* (2018).

<sup>33</sup> Among the types of group registrations, the Booz Allen report lists only “Group registration of updates and revisions to non-photographic databases (paper)” as inelastic. See Booz Allen Hamilton, *2017 Fee Study Report 24-25* (2017), [https://www.copyright.gov/rulemaking/feestudy2018/fee\\_study\\_report.pdf](https://www.copyright.gov/rulemaking/feestudy2018/fee_study_report.pdf).

photographs, while relying on historical data to do so, would be unreliable as the historical data does not reflect the limit of 750 photographs per application that was introduced just this year.

d. The Proposed Fee Increase Does Not Give Due Consideration to the Objectives of the Copyright System

Section 708 of the Copyright Act calls for adjustments in fees to be “fair and equitable and give due consideration to the objectives of the copyright system.” Those objectives include making registration more attractive, making timely registrations easier to achieve, increasing the number of registrations, processing applications in a timely manner, making registration records available to the public in a timely manner, and creating a more robust public record.<sup>34</sup>

We do not believe that the significant fee increases reflected in the Office proposal are fair and equitable, nor do we believe that *due* consideration was given to the objectives of the copyright system.<sup>35</sup> For example, one of the objectives of the copyright system is to encourage creators to register their works, and to do so promptly—which, in practice, often means *before* the creator has even begun to appreciate the value of the work. Copyright registration fees that are too high, like the ones currently being proposed, work against this goal by encouraging creators to *wait* until they can determine that a given work’s value will justify the cost of registration. At best, the NPRM and fee study report make conclusory statements about the fairness and equity of the proposed fees, and the level of consideration given to the objectives of the copyright system, while providing little support for those conclusions. *Prior to proposing* a new fee schedule, it would have been prudent for the Office to first consult with stakeholders about ways to decrease costs, while still meeting the needs of creators, rather than take the immediate step of increasing fees so drastically. Since that is no longer possible, *before implementing* any of the proposed fee increases we urge the Office to engage in more complete dialogue with stakeholders (than merely asking for written comments).

Because the deposit system is tied directly to copyright registration, fees that are too expensive will also mean that the public record and Library’s collections will be incomplete as they would predominantly and disproportionately reflect the contributions of corporate entities

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<sup>34</sup> See Marybeth Peters, Register of Copyrights, *Analysis and Proposed Copyright Fee Adjustments to Go into Effect on or about July 1, 2007* 7-8, (2007), <https://www.copyright.gov/reports/fees2007.pdf>.

<sup>35</sup> To the best of our knowledge, the Copyright Office has never raised fees this significantly in a single fee increase.

and other high-earning creators.<sup>36</sup> An incomplete public record will also exacerbate the orphan works problem. As fees continue to increase without any measurable increase in the benefit of registration, registrations will continue to decrease making it increasingly difficult for potential licensees, archives, libraries, historians and others to identify and locate the copyright owners.<sup>37</sup>

While professional creators stand to suffer the greatest harm by the proposed fee increase, many other individuals and organizations also stand to be harmed. For example, the proposal to increase database registration fees from \$85 to \$500—a nearly 500% increase—goes well beyond inflation. Furthermore, since database owners, large and small, continuously update their databases and register them commensurate with these updates, this fee increase is exponentially worse. It is hard to conceive how the Office could characterize such an increase as fair and equitable.

## II. THE COPYRIGHT OFFICE MUST PRIORITIZE MODERNIZATION OF ITS IT SYSTEMS, WHICH IN TURN WOULD INCREASE EFFICIENCY, DECREASE COSTS, AND ENCOURAGE MORE REGISTRATIONS

The Copyright Alliance has filed comments and testified at length about the importance of prioritizing modernization of the Copyright Office’s operations, infrastructure and technologies (hereinafter referred to as “IT Modernization”).<sup>38</sup> We understand that IT modernization may need to be funded in part by fees. To the extent any fee increase is warranted to fund modernization, that increase should: (1) be a shared responsibility that is borne by all

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<sup>36</sup> As the Office has said in evaluating fees in the past:

*Registration provides a valuable public record and includes deposit for use by the Library of Congress. While registration benefits the applicant, the registration record and deposit benefit both the Library and the general public. Moreover, not every copyright owner considers the benefits of registration to justify its cost, and those copyright owners may choose not to register. When registrations decline, the Library and the public are the losers because the Library's collections and the public record are adversely affected*

Maybeth Peters, Register of Copyrights, *Analysis and Proposed Copyright Fee Schedule to Go into Effect July 1, 1999* 14 (1999), [https://www.copyright.gov/reports/fee\\_report.pdf](https://www.copyright.gov/reports/fee_report.pdf).

<sup>37</sup> Works that are less affected by large fee increases are likely to have ownership/authorship information readily available from a variety of sources other than the Copyright Office database. On the other hand, works most likely not be registered due to the large fee increase are also those works where the Copyright Office data may be the only available source of data.

<sup>38</sup> See Copyright Alliance, *Statement of Keith Kupferschmid before the House Committee on Appropriations* (May 3, 2017), <https://copyrightalliance.org/wp-content/uploads/2017/05/House-Leg-Branch-Approp-hrg-testimony-May-20171.pdf>.

users of the Copyright Office, not just creators, as well as appropriators; (2) improve existing services and add new services; and (3) be invested directly into the copyright registration system infrastructure. At the same time, we do not support IT modernization purely for modernization's sake. Rather, the goal of modernizing the Office must be to (1) increase efficiency, (2) decrease costs associated with copyright registration, and (3) reduce pendency.

Since IT modernization will increase efficiency and decrease long-term costs, any cost study associated with the fee increase should take into account the improved efficiencies and cost savings expected with a future IT modernization. This fee study is lacking in that respect, and we question the Office's proposal to raise fees based in part on a cost estimate of \$12 to \$15 million per year for IT modernization over the next five years, without an analysis and discussion of the effect that such modernization may have on costs or fees in the short or long term.<sup>39</sup> For example, since these modernization costs are included in the Office's fee increase calculations and these costs will disappear after five years, we expect that registration fees would decrease after five years because the Office is no longer incurring the cost of modernization and because improved efficiencies from modernization will reduce costs. We also question the decision to include modernization costs in the fee study at this juncture when the Office is exploring zero-cost contracts and cost-sharing initiatives whereby "the vendor will volunteer and craft a solution for the government at no, or exceptionally low, cost."<sup>40</sup>

We praise the Office for, among other things, providing its IT plan and a projected timeline for modernization and consulting with certain stakeholders on different modernization efforts. However, what appears to be missing is that to date there have been neither tangible

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<sup>39</sup> Copyright Office Fees: *Notice of Proposed Rulemaking*, 83 Fed. Reg. 24,054, 24,055 (May 24, 2018).

<sup>40</sup> George Thuronyi, *Copyright Office Invites Creative Solutions*, LIBRARY OF CONG. (May 10, 2018), <https://blogs.loc.gov/copyright/2018/05/copyright-office-invites-creative-solutions>.

The proposed fee schedule was calculated using an estimate of \$12 to \$15 million for IT modernization costs annually. However, if the vendor hired by the Office to implement the entire modernization project employs a zero cost contract (as suggested as a possible funding option in the RFI (<https://www.fbo.gov/utills/view?id=7fe2f355eb886325160add19c81fbf80>)), the upfront IT modernization costs will be zero, thus leaving the Office with a huge surplus and fees that did not need to be increased as much as presently proposed. After the vendor completes the project, presumably they would be compensated through a scheme that is based on them receiving a percentage of the registration fees for a period of time. This may lead to the Copyright Office having to raise fees again in order to compensate the vendor while balancing its budget. Ultimately, this would mean that users end up paying for modernization twice. This further bolsters our point that it is premature to raise fees until more is known about the IT modernization plans.

improvements to the registration system nor any detailed discussion of whether or how IT modernization will (1) increase efficiency, (2) decrease costs associated with copyright registration, or (3) reduce pendency. As noted above, these discussions are essential if the Office is going to incorporate IT modernization costs into the total cost calculations that lead to the fee increase.

a. IT Modernization Must Result in More Efficient Processing and Reduced Pendency

In 1956, the average length of time between the date a creator filed a registration application and the date a registration certificate was issued or denied (i.e., application pendency) was one to two weeks.<sup>41</sup> In 1981, pendency was five to six weeks.<sup>42</sup> Today, the average pendency is seven to nine *months*.<sup>43</sup> It's worth pointing out that the Office processed *more* registrations in 1981, about 471,000,<sup>44</sup> than it did in 2017—only 452,122 registrations were processed in 2017.<sup>45</sup> So the extended pendency period is not due to an increase in registrations. Nor is it due to decrease in staff<sup>46</sup> or a significant increase in correspondence (25% in 1981<sup>47</sup> compared to 30% in 2017<sup>48</sup>). Given these numbers, fees should not be raised until there is a better understanding of why pendency has increased so much and a thorough examination of ways to decrease registration pendency is completed.

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<sup>41</sup> U.S. GEN. ACCOUNTING OFFICE, GAO/AFMD-83-13, IMPROVING PRODUCTIVITY IN COPYRIGHT REGISTRATION I (1982).

<sup>42</sup> *Id.*

<sup>43</sup> The Register acts on applications submitted online in cases where no additional correspondence is required between the Copyright Office and the applicants (approximately 66% of applications) within three to eleven months, seven months on average; paper applications without correspondence (approximately 3% of applications) take two to sixteen months, nine on average; web applications with correspondence (approximately 30% of applications) take three to sixteen months, nine on average; and paper applications with correspondence (approximately 2% of applications) take four to twenty-eight months, sixteen months on average. U.S. Copyright Office, *Registration Processing Times*, <https://www.copyright.gov/registration/docs/processing-times-faqs.pdf>.

<sup>44</sup> U.S. GEN. ACCOUNTING OFFICE, *supra* note 41.

<sup>45</sup> U.S. COPYRIGHT OFFICE, FISCAL 2017 ANNUAL REPORT (2017), <https://www.copyright.gov/reports/annual/2017/ar2017.pdf>

<sup>46</sup> In 1981, the Office employed 287 staff in the acquisitions and processing, and examining divisions. At the start of 2017, the Office employed a total of 400 staff, and stated that the majority of those employees were examiners. See U.S. Copyright Office, *Overview of the Copyright Office*, <https://www.copyright.gov/about/> (last visited Sept. 11, 2018); U.S. GEN. ACCOUNTING OFFICE, *supra* note 41.

<sup>47</sup> U.S. GEN. ACCOUNTING OFFICE, *supra* note 41.

<sup>48</sup> U.S. Copyright Office, *Registration Processing Times*, <https://www.copyright.gov/registration/docs/processing-times-faqs.pdf>

If the Supreme Court holds in favor of the Certificate Rule in the *Fourth Estate Public Benefit Corp. v Wall-Street.com*—an interpretation that the Office has endorsed—the lengthy application pendency will cause significant harms to the creative community. For example, the lengthy pendency period could prevent the copyright owner from being able to seek or obtain a temporary restraining order or preliminary injunction or from filing a complaint within fourteen days after the filing of a DMCA counter-notice.<sup>49</sup> It may also cause the copyright owner to lose her chance to sue if the statute of limitations expires while the application is still pending. While the copyright owner waits out the long pendency period, she could lose access to evidence (witnesses could die; documents could be deleted or destroyed; and memories could fade while a plaintiff awaited action by the Register). In addition, the lengthy pendency times also put U.S. creators at a distinct disadvantage to foreign nationals, who need not register their copyrighted works prior to filing suit in U.S. courts. We understand that the law disadvantages U.S. nationals, but the lengthy pendency periods exponentially increase this harm.

These harms are too great to continue. It is therefore essential that any fee increase and IT modernization effort result in reduced pendency. However, the NPRM fails to explain how the fee increase will affect pendency.

b. IT Modernization Must Result in a More Efficient Registration Process for Creators and Examiners

It is also critical that IT modernization make the registration process more efficient for both creators and examiners. Of those creators surveyed who reported having not filed a copyright registration application with the U.S. Copyright Office within the last five years, 24% said that they have not done so because “it’s too complicated or confusing.”<sup>50</sup> Improving the website and electronic registration process and making them more user-friendly and intuitive—which the Office has already begun working on with the help of Deloitte—will make for a more simplified and efficient experience. We appreciate Deloitte and the Office consulting with various stakeholders as it continues this work. Additionally, use of technologies like artificial intelligence and data analytics will allow for reverse image searching and other methods that

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<sup>49</sup> Although expedited application processing could be available, the cost of such processing is prohibitively expensive for professional creators and those with large portfolios of copyrighted works that are infringed.

<sup>50</sup> Copyright Alliance, *Copyright Registration Fee Survey* (2018).

may improve the registration process. Use of these technologies may not only enable the Copyright Office to overcome some of its present technological burdens, but may also allow it to leapfrog many years forward. By making the process more efficient for both creators and examiners, the Office will be able to decrease its costs while at the same time encouraging more copyright owners to register their works.

With an improved IT system, the Office should also be able to incorporate technology that will support, for example, the use of third-party application programming interfaces—or APIs—that could integrate registration into a creator’s workflow and streamline and simplify the registration process.<sup>51</sup> The Office could also charge a fee to allow third-parties to interoperate with the Office’s API or access bulk registration data, which would help the Office recover some of its costs.

c. IT Modernization Must Result in Improved Registration and Recordation Database

The Copyright Office’s registration and recordation databases represent a missed opportunity for adding value to the system. The Copyright Office should be working with stakeholders to determine who uses these databases, how they use them, and what features and improvements they would like to see. For example, joining the registration and recordation databases would create a more complete public record and allow copyright owners and other users to track ownership data in a way that is both practical and more efficient.<sup>52</sup> A searchable database that allows users to search for visual works using a reverse image search, and incorporates algorithms to present the most accurate results first, would also be a tremendous improvement, so long as it was voluntary and took into account privacy and infringement concerns.

We do not address possible improvements to the registration and recordation databases in detail here, as we know that this is not the proper fora to raise them. However, we do raise our

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<sup>51</sup> APIs could also allow third-party platforms to link to the Office’s registration and ownership information to provide more robust information to end users.

<sup>52</sup> Databases administered by the Copyright Office should be strictly voluntary and address only the data that the Copyright Office is already required to collect as opposed to the collection of additional data that it does not presently collect.

database concerns more generally in the context of the fee study solely because it could lead to new services that the Office could charge for and therefore should be accounted for when determining a new fee schedule.

### III. THE COPYRIGHT OFFICE MUST CONSIDER MODERNIZING REGISTRATION POLICY AT THE SAME TIME THAT FEE INCREASES AND IT MODERNIZATION ARE CONSIDERED

There are two aspects of Copyright Office modernization. The first, which we discussed in the prior section, is IT modernization, which focuses on improving the Office's operations, infrastructure and technologies. The second is modernizing the regulations and laws effecting the registration process (hereinafter referred to as "registration policy"). If the Office is going to consider raising fees it should consider both of these aspects of Copyright Office modernization at the same time because both will have a significant effect on fees, the number of registration applications filed and other objectives of the copyright registration system.

Since 2004, the Office has increased copyright registration fees four times<sup>53</sup> and the number of registrations has consistently decreased over that same time period. Simply increasing fees yet again without making improvements in copyright registration policy to attempt to offset this decrease will continue this downward trend. We understand and appreciate that most changes to copyright registration policy must be made by Congress, not the Copyright Office. However, just because the Copyright Office doesn't have the authority to make these changes doesn't mean that the Office should move ahead with raising fees without first considering how improvements in copyright registration policy might counter the downward trend in filings that accompanies the proposed fee hikes. The Office should use its authority under 701(b)(4)<sup>54</sup> to conduct a study to examine the various copyright registration provisions in the Copyright Act and determine how changes might help improve the copyright registration system and counter the downward spiral of registration application filings.

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<sup>53</sup> See *supra* note 19.

<sup>54</sup> "In addition to the functions and duties set out elsewhere in this chapter, the Register of Copyrights shall perform the following functions: . . . (4) Conduct studies and programs regarding copyright, other matters arising under this title, and related matters, the administration of the Copyright Office, or any function vested in the Copyright Office by law, including educational programs conducted cooperatively with foreign intellectual property offices and international intergovernmental organizations." 17 U.S.C. § 701(b)(4).

To achieve the objectives of the copyright system, U.S. copyright registration policies should: (1) take into account the diversity of works being registered and financial resources of creators who seek to register their works to ensure that no one group of creators is disenfranchised and all groups are encouraged to use the copyright registration system; (2) create an efficient, streamlined and inexpensive copyright registration system; and (3) encourage creators to file applications to register their copyrighted works with the Office by eliminating complexities and other barriers that deter these filings. The Copyright Office could explore different changes to the registration system that could effectuate these goals, such as<sup>55</sup>:

- Fees for New Services. As improvements are made to the database that allow copyright owners and other users to track ownership data more efficiently, the Office could offer tiered access to its database—keeping the standard search free, but allowing more robust access for companies who want to build services on top of that data for an additional fee.<sup>56</sup>
- Reevaluate Existing Registration Incentives. The existing registration incentives are virtually all tied to litigation, yet (for various reasons) very few copyright disputes are actually litigated. We suggest that the Office examine potential non-litigation related incentives, such as eligibility for tax breaks for registrants based on the value of the deposit copies. The Office could also explore additional litigation-related incentives like mandatory reimbursement of attorneys’ fees to a prevailing party in infringement lawsuits who has timely registered, which would make other litigation-based incentives more accessible for professional creators.<sup>57</sup> Further, making the registration process more user-friendly could act as its own incentive. For example, the Office could consider

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<sup>55</sup> These examples are provided for illustrative purposes only, and the Copyright Alliance does not necessarily endorse any or all of these proposed changes.

<sup>56</sup> For example, Twitter offers a “Standard” tier, which is free, along with both “Premium” and “Enterprise” subscription levels. The Premium level “offer[s] scalable access to Twitter data for those looking to grow, experiment, and innovate,” while the Enterprise level provides greater access and more advanced features such as the ability to filter the data. See Twitter Developer Platform, *API Access that Scales with You and Your Solution*, <https://developer.twitter.com/en/pricing.html> (last visited Sept. 11, 2018).

<sup>57</sup> A number of these and other incentives to register were previously identified in the Office’s 1993 ACCORD Report. See Library of Cong., *Accord: Report of the Co-Chairs 21-25* (1993), <https://www.copyright.gov/1201/accord/>.

allowing third-parties to interoperate with the Office’s API in a way that would integrate registration into a creator’s workflow to streamline and simplify the registration process.

- Alternative Fee Structures. The Copyright Office could implement a tiered fee structure that permits small businesses and individual creators to pay a reduced fee to register works, similar to the U.S Patent and Trademark Office’s small and micro entity options. This could be implemented in conjunction with other suggestions for reducing costs so that the Office could create the small entity option without the need to increase fees charged to larger entities. As another alternative to the current fee structure, the Copyright Office could explore a subscription model that would allow copyright owners to pay an annual fee for a certain number of registrations per year.
- Provisional Copyright Registration. The Copyright Office could consider creating a “provisional registration” option that would allow copyright owners to pay a discounted fee for registration without an examination. A provisional copyright registration would not provide the benefit of a presumption of validity in court, but other benefits of registration would still apply if the provisional application was timely filed. A provisional registrant could later pay an additional fee to upgrade the provisional registration to a full registration and become eligible for the presumption of validity. Since provisional applications would not be examined, these applications would be much less costly for the Office and the Office could set the fee for provisional registrations lower than the fee for a standard registration application but at or above the costs to process the provisional registrations. The lower fee should encourage applicants to register, while making it easier for the Office to balance its budget. The increase in registrations would improve the public record<sup>58</sup> and increase the number of deposits for the Office. Currently, the Office loses money on each registration application it receives. So increased filings leads to more losses. If provisional registrations were permitted, the Office would could set a fee to break even, thereby allowing the Office to benefit from increased filings without losing money. Creators would also benefit with lower fees, as would licensees, researchers, archivists and other users as well as the Library who stand

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<sup>58</sup> The Office could easily include a distinction between provisional registrations and full registrations in the database, so as to make clear which works have been examined. While the examination process is important, the Copyright Office cannot examine for all threshold copyrightability requirements. So in reality, the distinction between examined and unexamined works is less significant than it first appears.

to benefit from a more comprehensive public record and more deposits for the Library's collections.

- Automated Exam. The Office could significantly reduce its costs by exploring the use of artificial intelligence and data analytics to automate the examination process to some extent.
- Reduce Unnecessary Complexities that Act as a Barrier to Registration. The distinction between published and unpublished works is so complex that it serves a barrier toward registration. The requirements for indicating whether a work is published—and if so, the date of first publication—on a registration application and registering unpublished and published works separately should be eliminated or at the least, be made optional, as it prevents copyright owners from taking advantage of less expensive registration options for collections and causes unnecessary confusion for novice copyright owners seeking to register their works. We believe this would also reduce processing time and time spent responding to confusion about publication status.

These are just a few examples of changes in copyright registration policy that could be considered as a way to counteract a potential decrease in registration applications that would otherwise result from an increase in fees, and to improve the registration system.

To reiterate, while we understand that the Copyright Office cannot implement most copyright registration policy reforms without the support of Congress, we do not think any fee increase should become effective until such time as the Copyright Office has at least explored these and other options—with input from stakeholders—and Congress has had an opportunity to consider any proposed changes, because they would ultimately have an effect on the fee schedule.

The Office should also articulate any barriers it believes it faces in implementing innovative fee structures. It's one thing if the Office is restricted from implementing certain changes because the statute does not provide it the authority to do so, but it's another if the Office is restricted because of practical or technological limitations—the latter being much easier to address. The Office should also explore other ways to reduce examination costs in addition to modernizing. Has the Office reviewed the examination process to determine where inefficiencies

lie? Finally, has the Office considered raising other fees, like fees for designating DMCA agents<sup>59</sup> and the filing of notices of intent under section 115 as a way to subsidize costs associated with registration? Unlike with copyright registration, demand for services like those should be much less sensitive to fee increases.

## **Conclusion**

We thank you for the opportunity to submit these comments and we look forward to engaging in a more comprehensive dialogue with the Copyright Office and other stakeholders on these matters. Please let us know if we can provide any additional input or answer further questions.

Respectfully submitted,

Keith Kupferschmid  
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<sup>59</sup> The proposed fee for registering a DMCA agent is \$6, while the calculated cost of that service is \$52. Why is the American public being asked to subsidize fees for ISPs?

## Appendix

### Purpose:

The purpose of the Copyright Alliance’s 2018 Copyright Registration Fee Survey was to gather information to better understand the copyright community’s response to the U.S. Copyright Office’s [proposed fee increase](#) published in the Federal Register on May 24, 2018.

### Methods:

Using Survey Monkey, we created a survey aimed at gathering information about individual creators as well as organizations and companies that register works they produce, distribute or publish. The questions focused on respondents’ copyright registration practices under the current fee schedule, and how those practices might change, if at all, should the proposed fee schedule go into effect.

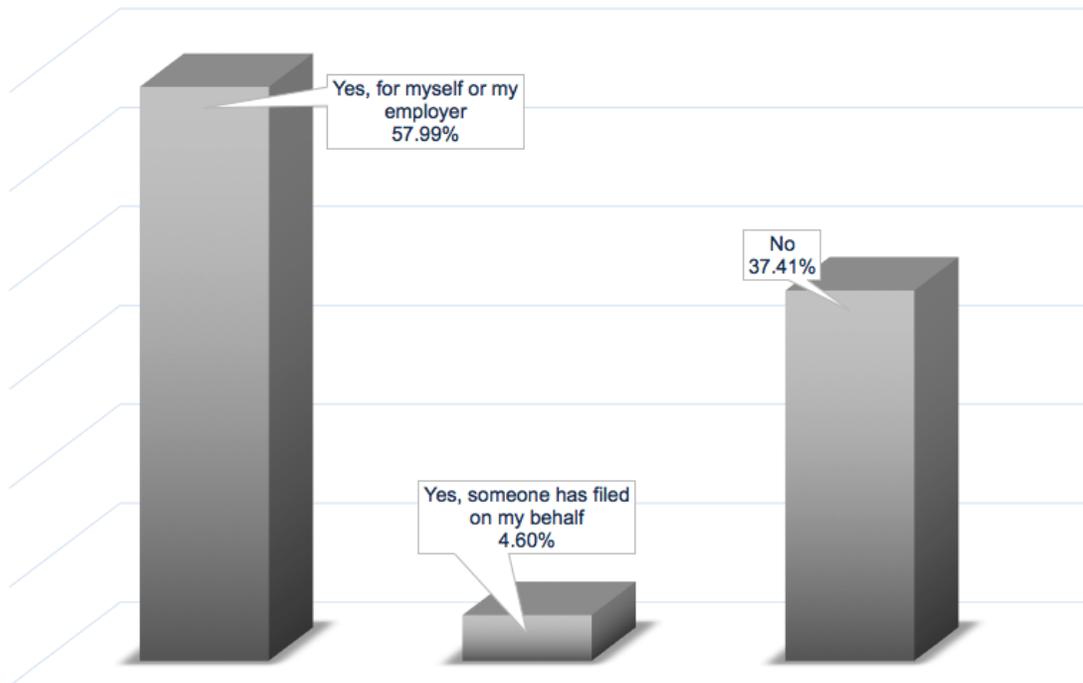
The survey utilized “branching logic,” meaning that the particular set of questions varied from one respondent to the next based on that respondent’s answers to previous questions in the survey.<sup>60</sup> The questions were multiple choice, some of which allowed the respondent to select more than one answer. Respondents were also permitted to upload a document to share any additional comments they had regarding the proposed fee increase.

The survey was active beginning July 17, 2018 through September 2, 2018. Over the course of those six weeks, the Copyright Alliance reached out to individual creators, companies, and organizations within the creative industries through email, Twitter, Facebook and Instagram to complete this survey. The survey was also widely distributed by Copyright Alliance member and non-member organizations and individuals. A total of 1,194 creators, including individuals and businesses who are not members of the Copyright Alliance, took the survey. Below are graphs depicting responses to questions that we referenced throughout these comments.

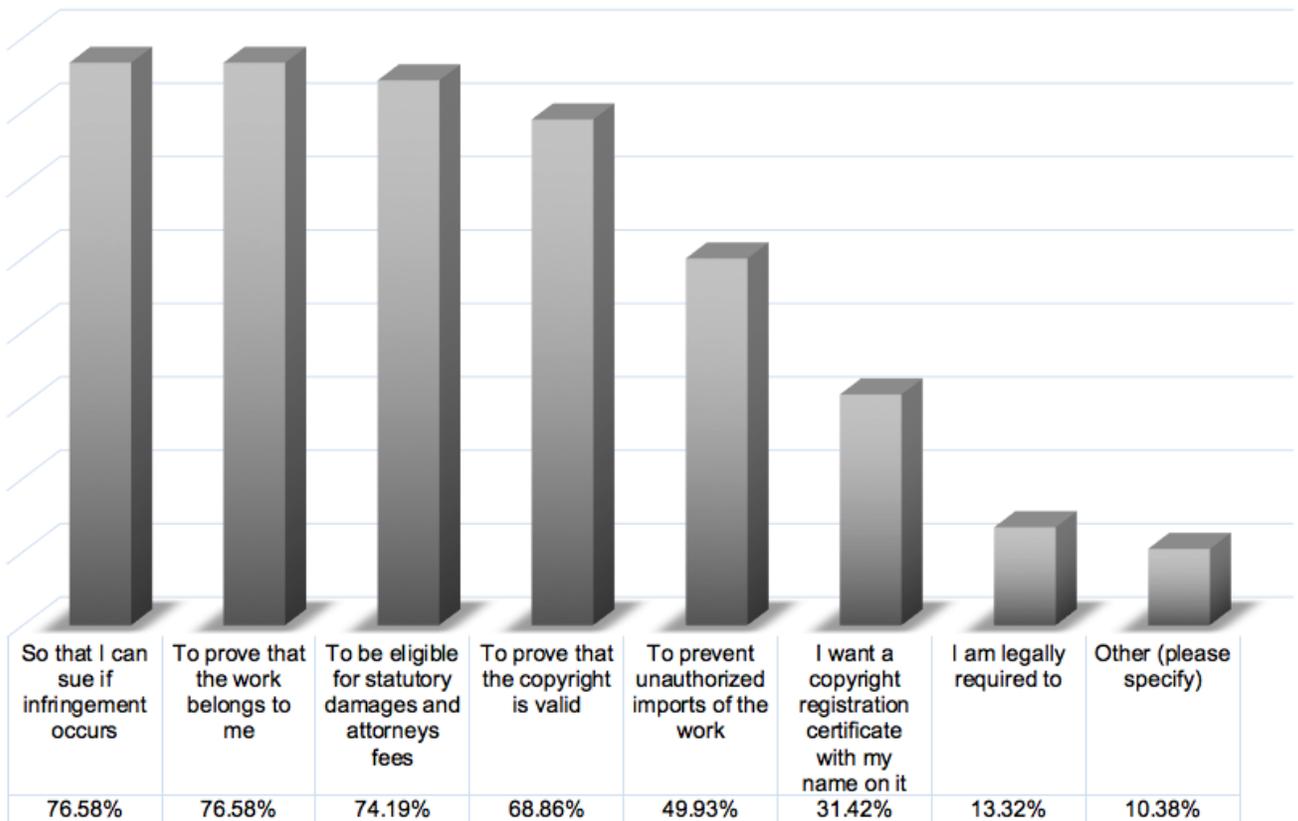
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<sup>60</sup> For example, those respondents who answered “No” in response to “*Have you filed a copyright registration application with the U.S. Copyright Office within the last 5 years?*” were not asked “*Why do you register works with the U.S. Copyright Office?*” or “*What’s the most that the U.S. Copyright Office could increase fees before you begin filing fewer registration applications?*”

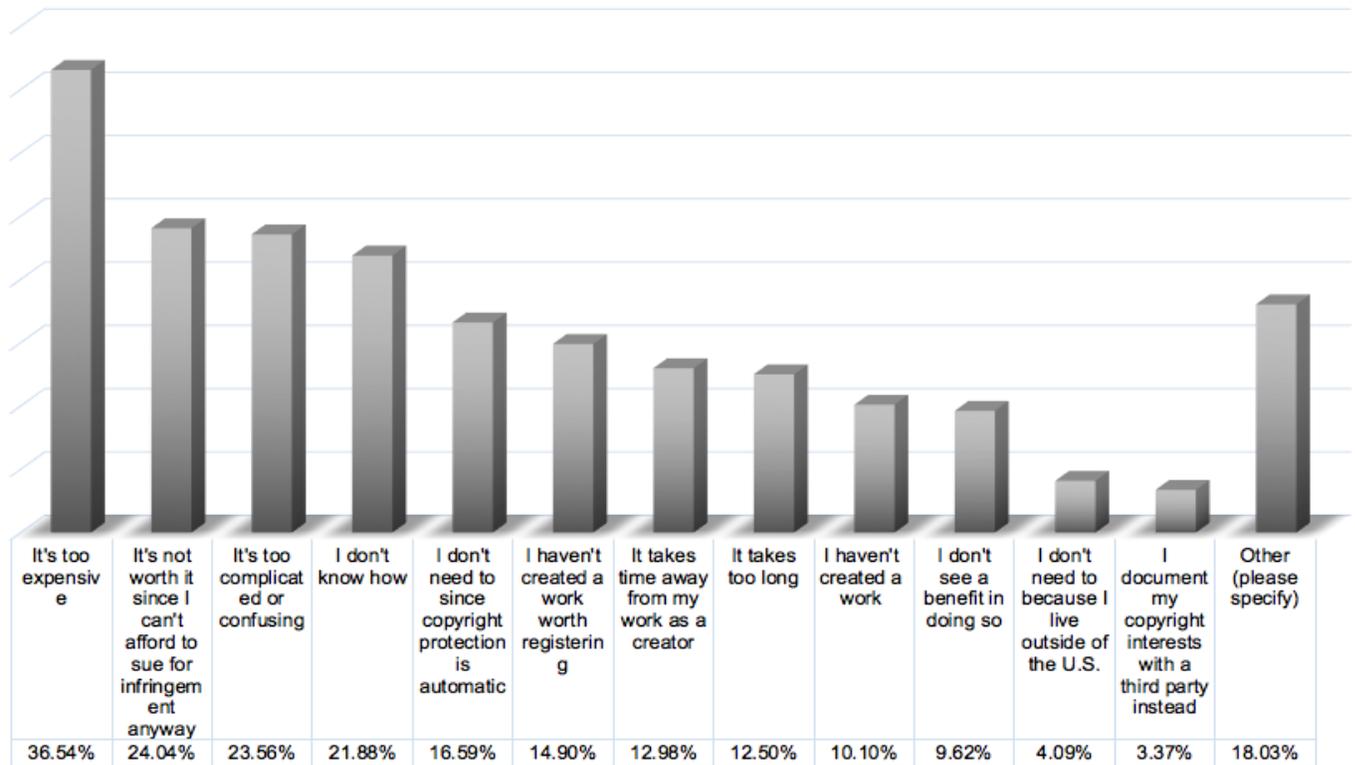
## Have you filed a copyright registration application with the U.S. Copyright Office within the last 5 years?



## Why do you register works with the U.S. Copyright Office?



## Why haven't you filed a copyright registration application with the U.S. Copyright Office in the last 5 years?



## What's the most that the U.S. Copyright Office could increase fees before you begin filing fewer registration applications?

