



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

**Registration Modernization**

**Docket No. 2018-9**

**COMMENTS OF THE COPYRIGHT ALLIANCE**

The Copyright Alliance appreciates the opportunity to submit the following comments<sup>1</sup> in response to the [Notice of Inquiry](#) (NOI) published by the U.S. Copyright Office in the Federal Register on October 17, 2018, regarding legal and policy changes the Office is considering relating to the registration system.

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.

In our [comments](#) filed on September 21, 2018, in response to the [Notice of Proposed Rulemaking](#) regarding the possible adoption of a new fee schedule by the Copyright Office (fee study comments), we suggested a number of changes to the registration system that the Office could explore to better effectuate the objectives of the copyright registration system. Having reviewed the registration modernization NOI, we are pleased that the Office is considering a broad range of legal and policy changes regarding registration, and seeking input from

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<sup>1</sup> These comments were filed with the U.S. Copyright Office on January 15, 2019.

stakeholders early in that process. We wish to reiterate that any changes the Office ultimately decides to implement 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.

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## **The Application Process: How Users Engage with the Registration System**

For many creators, the registration system is their sole interaction with the Copyright Office and exposure to the copyright system. As a result, the experience of engaging with the registration system can make the difference between a lifelong registrant, and a creator who opts never to register their works. The modernized registration system should be an exemplary one, void of unnecessary complexities that unduly complicate the process and create barriers that deter creators from registering their works with the Office. As the Office begins the process of developing a modern registration system, it should ensure that the system reinforces the objectives of the copyright system—i.e, 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>2</sup> Below, we address the specific questions referenced in this section.

### **1. New Solutions for Delivering Application Assistance**

#### ***How should the Office integrate in-application support and assistance to users of the electronic registration system?***

As an organization that represents a diverse group of copyright owners—including individual creators, and small and large businesses—the Copyright Alliance supports a multi-tier approach to in-application support and assistance that would more effectively meet the specific needs of both novice and experienced applicants. In a survey conducted by the Copyright Alliance<sup>3</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. Of those creators, 24% said that they have not done so because “it’s too complicated or confusing.”<sup>4</sup> We believe that most of those respondents are more novice users of the registration system, who would benefit from the “in-depth substantive assistance” described in the NOI.

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<sup>2</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>3</sup> Copyright Alliance, *Copyright Registration Fee Survey* (2018).

<sup>4</sup> Copyright Alliance, *Copyright Registration Fee Survey* (2018).

We also support a live chat support feature which we believe would be an especially helpful tool to assist copyright owners with specific or unique questions while also allowing the Copyright Office to track and monitor the contents of chat sessions to better understand and respond to any widespread issues or areas of confusion that may arise. In the realm of customer service, no technology can replace one-on-one assistance, so that option should always be available to applicants. In conjunction with the live chat feature, an expansion of live phone support would benefit applicants and likely increase registration.

***The Office requests comments on the most common questions users have when filling out applications for registration***

Easily the question users ask the Copyright Alliance more often than any other is about the distinction between published and unpublished and how these terms are defined under the Copyright Act. The distinction between published and unpublished works is so complex and divergent from an intuitive and colloquial understanding of the terms that it serves as a barrier to registration, especially with respect to works that are disseminated online. 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,<sup>5</sup> 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.

In no particular order, other questions we regularly hear from our individual creator members relate to:

- Whether titles and band names can be protected by copyright
- At what stage should a person register a work with the Office that is continuously being updated or revised, like a screenplay or a photograph?
- Should a work be registered before it is published? Then, does it need to be registered again when it is published?

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<sup>5</sup> We understand that a change in law may be necessary to accomplish this.

- How should a person register follow-up installments or updates to a registered work? And what sort of deposit should the person submit where there are not readily available physical copies for those specific installments/updates?
- If protection is automatic, why should I register?
- What is the effect if I unknowingly answer a question on the registration application incorrectly?
- Why does the registration process take so long?
- What do I do if my registration application got lost (and who do I contact)?
- Is my work “copyrighted” once I complete the application (or do I have to wait until I receive confirmation)? and
- How many works can I register at one time?

## **2. Electronic Applications and Payments**

### ***Should the Office mandate the use of electronic applications and eliminate the paper application?***

While we applaud the clear effort by the Office to increase efficiency and cut costs by proposing to eliminate paper applications in favor of electronic applications, and support the proposal as a general matter, we have a few concerns that the Office should first consider. Our members expressed concern about instances where the electronic system is down, either for technical reasons or due to a government shutdown, and they are unable to submit those electronic applications when time is of the essence—for example, when litigation is pending. If paper applications are eliminated, the Office must have a backup plan in place for accepting applications when the electronic system is unavailable. The Copyright Office’s modernization efforts should ultimately embrace a cloud-based approach that would prevent a system-wide shutdown of the registration application system, or at least make it more unlikely by utilizing a system in which redundancies are built so that even if one component fails, the system can remain operational.<sup>6</sup>

Accordingly, to satisfy the needs of all of its constituents and continue to encourage registration, the Copyright Office should have a limited exception to permit the filing of paper applications if certain criteria are met, such as (i) inability to access a computer due to indigence,

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<sup>6</sup> Of course, even a cloud-based solution would not address problems caused by a government shutdown.

mental or physical limitations, incarceration or other similar prohibition from using a computer or the internet that would preclude the applicant from completing an electronic application but not a paper application; and (ii) where the filing is time sensitive<sup>7</sup> and the electronic system is down or the government is shutdown making the electronic application inaccessible. To facilitate this, we suggest that the Copyright Office work with public libraries across the country to make paper applications available, but include a section at the top of those paper applications where applicants would be required to designate whether they are submitting a paper application due to the reasons outlined above.<sup>8</sup>

Mandating the use of electronic applications will likely mean people without access to a private computer will need to use computers in public places like libraries, school computer labs, etc. To accommodate this type of access, the Office must implement additional security measures to protect privacy and ensure the integrity of each application—for example, a prompt should ask if the applicant is using a computer that is a “shared computer” and prevent the system from “remembering” the login information of applicants who’ve accessed the application via a shared computer.<sup>9</sup>

In addition, the electronic application should (1) allow for e-signatures, and (2) process data in a way that can be easily viewed and forwarded outside of the system,<sup>10</sup> similar to the trademark registration system administered by the U.S. Patent and Trademark Office.

***Should the Office mandate the use of electronic payment and eliminate payment options via check or money order?***

We support the Office’s proposal to eliminate the use of physical forms of payments and require electronic payments, with the following conditions:

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<sup>7</sup> What is and is not considered to be time sensitive should be construed both subjectively and broadly. Some factors to consider when determining whether an application filing might be time sensitive include the statute of limitations, pending or imminent litigation, contractual or other business-related obligations, etc.

<sup>8</sup> The Office may want to impose a penalty against those who file a paper application but do not meet the requirements.

<sup>9</sup> It may also be a good idea to have a system prompt that warns users using a shared computer if they are about to save the application to a shared computer before doing so and requiring the user to affirmatively acknowledge that they understand. The system could also give those users the option, instead, to designate an email address where the application can be sent upon completion.

<sup>10</sup> For example, the system should permit a lawyer filing an application on behalf of a client to forward the application to the client for an e-signature.

As the Office transitions away from physical forms of payment, it is important that the Office accept not only credit card payments but also, debit cards, prepaid cards and other widely-accepted online payment options, like PayPal. It is important to ensure that the effort to modernize the Office does not have the adverse and unintended consequence of creating roadblocks for those who may not have access to a credit card, such as low-income populations, minors and young adults. This can be accomplished by accepting a wide variety of options, as set forth here.

It is essential that the Office continue to allow for the use of deposit accounts. The deposit account system facilitates good recordkeeping by providing detailed monthly statements listing each transaction for each account. These monthly statements allow applicants to track and attribute specific payments to specific projects and business units. Replacing the current system with Pay.gov would significantly disrupt these tracking and accounting systems because it only sends the user individual email receipts summarizing each transaction and does not provide monthly statements. As a result, Pay.gov works well for one-time transactions, but does not work well for multiple, continuous transactions like registrations and recordings.

Pay.gov is also an inadequate substitute because it is much more burdensome to use. While a deposit account requires entry of only one data field—the account name—Pay.gov requires the user to enter data in nine different fields *for each* transaction. Pay.gov may work well for users of Library services, but is not appropriate for use with Copyright Office services; it's yet another example of how the IT needs of the Library and the Copyright Office diverge in connection with their respective purposes and goals. It is therefore vital that decisions on matters such as these be left to the Copyright Office experts and not to the Library's technical team, which has no background or experience with the copyright system.

***Other proposals to improve the efficiency of the Office's registration processes for populations with limited access to computer and internet technology***

In addition to working with public libraries to make paper applications available to those in need, the Office should partner with public libraries to provide educational resources on copyright registration, to assist those who file copyright registration or recordation applications through a library computer due to otherwise limited access to a computer or internet technology.



### **3. Electronic Certificates**

***Should the Office issue electronic certificates and offer paper certificates for an additional fee?***

The Copyright Alliance supports the Office’s proposal to issue electronic certificates in lieu of paper copies and only offer paper certificates for an additional fee, provided that the Office ensure that electronic certificates are acceptable by the courts. Not only should this change facilitate greater efficiency and minimize the amount of time it takes for a registrant to receive her certificate, it should also result in a reduction of the application fee since the cost of issuing a paper certificate is presently included in the application fee. Additionally, the Office could offer various types of paper certificates—for example, a basic certificate, and various specialized certificates for framing and display—as an additional source of revenue to offset other costs.

### **4. Dynamic Pricing Models**

***Should the Office replace the Single, Standard, and group applications with a dynamic pricing model that scales fees based on the number and type of works submitted for registration?***

The Copyright Alliance supports the proposal for a dynamic pricing model that is both efficient and cost-effective, and strongly urges that the Office make this a top priority. In addition to scaling the fees based on the number and type of works, the fees should be prorated—e.g., if a photographer wishes to register 1500 images, the fee should not merely be double the fee for registering 750 photographs because the processing and examination of the application will take less time—and thus cost the Office less—since only one application, rather than multiples, will need to be processed.

For certain works that incorporate elements of different types of copyrighted works—like video games, which combine elements of computer software, audiovisual works, musical works, and 2D artworks—this dynamic pricing model could be used to streamline the registration process by adopting policies that would effectively reduce registration redundancy so that multiple forms are no longer required to separately register the various elements encompassed within a single work (e.g. for video games this would mean registering all works associated with one game title at one time, including multiple platforms, music, and 2D design elements

(including box art)). The application should allow the applicant to clearly indicate what elements the applicant wishes the registration to cover (e.g. for video games whether the registration extends to audiovisual material, the computer program, or both).

In addition, as the Office works to develop new registration forms, it should consider how easy it is to answer a question incorrectly using the current forms, and address that issue by creating forms that are more intuitive and responsive. For example, the new electronic forms should utilize dropdown menus to maximize consistency and searchability, as well as branching logic so that when an applicant gives a specific answer to a question, the potential responses to follow up questions could change and be limited in the context of their earlier answer.

The Office may also want to develop some alternative models, and then survey stakeholders and have open dialogue discussing the different options to determine which options and pricing levels would best accommodate applicants.

***Should the Office offer a subscription service that would let authors register a specific number of works over a designated period?***

The Copyright Alliance strongly supports this proposal and urges the Office to make this a top priority.

***The Office requests comments on any other alternative methods for calculating fees that would sustain the Office, provide equity to users, and encourage registration.***

We strongly urge the Copyright Office to adopt what we refer to as a “Delayed Examination Registration”<sup>11</sup> as discussed below.

### **Why a Delayed Examination Registration is Needed**

One of the primary reasons creators decline to register their copyrights with the Copyright Office is the expense combined with a perception that the expense outweighs the benefits. A significant number of individual creators and small businesses choose not to register their works because, although they value their work and are often harmed by infringement, they

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<sup>11</sup> We use the term “Delayed Examination Registration” throughout as a placeholder, but recognize that there may be other names that are more appropriate. In the past, we’ve used the term “Provisional Registration/Application.”

cannot afford the expense of registering every work they create, and it's difficult to predict which of their works will have some value or have the potential to be infringed, especially when the work is newly created or hasn't (yet) been published. The incentives associated with registration do little to alter this perception, because few individual creators and small businesses can afford to enforce their rights in federal court. Quite simply, for these small creators, registration does not make financial sense.

At the same time, while one of the objectives of the Copyright Office is to increase the number of copyright registrations, due to the cost of examination the Office currently loses money on each registration application it receives—so increased filings leads to a greater deficit. As a result, any changes the Office makes under the existing system to increase the number of registrations will have an adverse effect on the Office's budget and require additional appropriations from Congress. The only way to solve this problem, and the cost problems discussed above, is with a new approach that we refer to as the “Delayed Examination Registration.”

The Delayed Examination Registration would address both of these issues. Below we propose a basic framework for the Delayed Examination Registration that can be more fully developed through public comment and regulations.

### **What is a Delayed Examination Registration**

A Delayed Examination Registration would be identical to an existing registration application in all ways except: (i) a Delayed Examination Registration would not be examined by the Copyright Office, so no certificate would be issued; and (ii) the fee associated with the Delayed Examination Registration would be significantly less than the fee paid associated with an examined application.

The legal effect of a Delayed Examination Registration would also be different from the legal effect of an examined registration since, unlike an examined registration, a federal court could not hear a copyright infringement case where the copyrighted work infringed is the subject of a Delayed Examination Registration. If a rights holder wants to bring an infringement case, the rights holder would have to convert the Delayed Examination Registration to an examined registration, which would necessitate: (i) the Office examining the Delayed Examination

Registration and approving its conversion into an examined registration, and (ii) paying a conversion fee.<sup>12</sup>

For purposes of determining other benefits provided under the copyright law<sup>13</sup> the effective date would be the date that the Delayed Examination Registration was filed, not when the request was made to convert the Delayed Examination Registration to an examined registration. However, if the Delayed Examination Registration is not converted into an examined registration within a specific period of time,<sup>14</sup> the applicant would lose the legal benefit of filing the Delayed Examination Registration.

An ancillary purpose of the Delayed Examination Registration approach is to increase the Office's efficiency by eliminating the need to fully review every single application that comes through the door and thus also lower the Copyright Office expenses and improve pendency.

**There are three problems that the Delayed Examination Registration option would address:**

Copyright Office Budget Challenges: Currently, the Office loses money on each registration application it receives. The largest expense for the Office is the cost of examination.<sup>15</sup> This is especially true for works that can be registered in groups, like photographs, which are more likely to be filed by smaller creators. One objective of the Copyright Office is to increase application filings and registrations. But doing so has the perverse effect of increasing the Office's expenses. This results in the Office cutting other programs or charging larger fees in other areas to make up the difference. If Delayed

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<sup>12</sup> With respect to group registrations, the conversion fee should be prorated if the registrant elects to convert some, but not all, of the group of works covered by the Delayed Examination Registration. As a result, the sum of the conversion fee and the Delayed Examination Registration fee should not exceed the regular application fee in that scenario.

<sup>13</sup> For example, the date of the Delayed Examination Registration could serve as the effective date of registration for availability of statutory damages and attorneys' fees.

<sup>14</sup> Our members' views differ regarding the particular length of the "specified time period." Some of our members believe the time period should be as long as the term of protection, while others believe it should be as short as 1 year. At this time, the Copyright Alliance takes no position as to what that specified time period should be.

<sup>15</sup> U.S. Copyright Office, Library of Congress; Copyright Office Fees, 83 Fed. Reg. 24,057 (May 24, 2018), <https://www.govinfo.gov/content/pkg/FR-2018-05-24/pdf/2018-11095.pdf>.

Examination Registrations were permitted, the Office would could set the fee for a Delayed Examination Registration to be equal to the cost of processing the application, thereby allowing the Office to benefit from increased filings without losing money.

Decrease in Registrations: Since 2004—during which time the Office increased fees four times—there has been a relatively steady decline in the number of copyright registration applications filed (of close to 75,000 applications; a 12% decrease). Smaller rights holders are not registering because they cannot afford to and see little value in registering. The Delayed Examination Registration option will help incentivize those who want to register but cannot afford to do so under the existing system.<sup>16</sup>

Incomplete Public Record: Because the deposit system is tied directly to copyright registration, fees that are too expensive also result in the public record and Library’s collections being incomplete, as they predominantly and disproportionately reflect the contributions of corporate entities and other high-earning creators. An incomplete public record also exacerbates 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.

### **Benefits of the Delayed Examination Registration Option:**

In sum, the Delayed Examination Registration would provide the following benefits:

- Increase registrations by smaller rights holders who presently do not register or register infrequently.
- Encourage rights holders to register more quickly and not wait to determine which of their works are commercially valuable or infringed before registering.
- Improved pendency or at least retaining existing pendency. Increasing the number of registration applications would normally increase application pendency across the board (unless the number of examiners is increased as well), but since these

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<sup>16</sup> For example, the subscription model—which would increase registrations—could be more agile and affordable with the availability of Delayed Examination Registrations.

registrations are not being examined, at worse, they should have no effect on pendency, and at best, may actually lower pendency.

- It will be easier for the Copyright Office to balance its budget by allowing the Office to use congressional appropriations on modernization or other expenses, rather than to subsidize registration examinations.
- It should result in lowering of registration fees of all applicants. The Office presently artificially inflates certain fees in order to subsidize the cost of other, more elastic, application fees. For example, the Office is proposing increasing the fees paid to register databases because these databases are often owned by large companies that can afford to pay a larger fee. This larger fee is intended to offset examining costs in other areas. A Delayed Examination Registration option would lower the amount that needs to be offset and thereby (hopefully) lower other registration fees because they would no longer be needed to be artificially inflated.
- The increase in registrations would improve the public record.<sup>17</sup>
- An increase in registrations would increase the number of deposits for the Library.

### **Additional Suggestions:**

The Copyright Office should also 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.

Finally, the fee charged should continue to take into account the type of work being registered, where appropriate. For example, the fee charged for registering one photograph or one newspaper should not be the same as the fee charged to register a motion picture. This type of distinction should be retained in any new system implemented by the Office.

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<sup>17</sup> The Office could easily include a distinction between Delayed Examination Registrations and examined registrations in the database, so as to make clear which works have been examined.

## **Application Information: The Information Requested on the Application for Registration**

As a general matter, the Copyright Office should take steps to minimize confusion and the potential for mistakes and eliminate unnecessary barriers to registration by simplifying the registration application, and requiring applicants to submit only the information that is absolutely essential to completing the registration. The application should avoid being a “trap for the unwary” applicant, who may, for example, inadvertently or unknowingly limit the scope of a valid claim in a work in subsequent litigation by incorrectly answering a legal question on the application. An applicant should be able to complete the registration application without the assistance of an attorney, so inquiries in the application should be aimed at fact-finding rather than legal conclusions—e.g. “published vs. unpublished” and inquiries about whether a work is a “derivative” (which should be avoided). Applicants should be asked to answer specific, pointed, and simple fact-based questions—providing examples and multiple choice options where applicable—that steer them toward the appropriate responses. In that regard, the Office should, as a threshold matter, only require information necessary for the examination process. In addition, while we understand that the paper and electronic applications may need to be different, they should be the same to the extent possible—i.e., use the same terminology, same order, and same inquiries.

### **5. Authorship Statements and Administrative Classifications**

***Should the Office eliminate the “Author Created” and “Nature of Authorship” sections in all of its applications, and instead, allow the applicant to provide a general statement that appropriately describes the work as a whole?***

Application inquiries regarding the applicant’s authorship in the claim and material that should be excluded from the claim should be completely revamped. Requiring the applicant to articulate both what is included in the claim and what is excluded from the claim is redundant and in some cases may be confusing to applicants. An alternative approach might be to begin by asking the applicant if the work they’re seeking to register contains a work or elements created by someone else, or is based on a pre-existing work. Only those applicants who indicate in the affirmative should be prompted further in this regard (it should be assumed that those who indicate otherwise intend to register the entirety of the work). After responding affirmatively, the

applicant should have the option to *either* describe the material that should be included in the claim—i.e., the authorship in the claim—*or* describe the material that should be excluded from the claim. This approach takes into account that in some cases and for some works it will be easier for the applicant to identify what part of the work she created and in other instances and for other works it may be easier to instead identify what part of the work she did not create. This will vary on a case-by-case basis and should be left up to the applicant to decide.

***Should the Office eliminate the “Author Created” and “Nature of Authorship” sections in all of its applications, and instead, allow the examiner to add a statement that appropriately describes the work submitted for registration?***

See previous response.

This proposal to eliminate the “Author Created” and “Nature of Authorship” sections in all of its applications, and instead, allow the examiner to add a statement that appropriately describes the work submitted for registration would result in more work for the examiners, which would likely result in greater expenses for the Copyright Office, greater fees for applicants, and increased pendency, with little benefit to show for it.

***Should the Office modify the current administrative classes or create additional or alternative class structures?***

Unless the Office plans to have examiners, rather than applicants, classify the work, the classifications should be modified because they are too confusing to applicants. The current classifications are administrative classifications that make sense to the Copyright Office and its examiners but don’t necessarily make sense to applicants, particularly novice applicants. In addition, the classifications do not reflect or align with the categories of copyrightable subject matter in the statute.<sup>18</sup> For example, many novice applicants won’t intuitively understand that a newsletter is a serial and not a textual work. Because the classification system is used for internal purposes—to assign the applications to the appropriate examiner—the Office should consider creating a department within the Office responsible for correctly classifying and assigning applications. This would allow the Office more flexibility in modifying the classification structures.

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<sup>18</sup> Accurate and intuitive classifications should also enhance searchability.



## 6. Derivative Works

***Should the Office require users to explicitly identify whether a work submitted for registration is a derivative work?***

No. The Office should not require users to explicitly identify whether a work submitted for registration is a derivative work. We have concerns that novice applicants might be confused about how to answer such a question. For example, identifying a work as derivative would require an understanding of the nuance between “transformation” as it is used in fair use, and “transform” as it is used to define a derivative work. It would also require the applicant to easily discern between elements in the preexisting work that are protectable under copyright law and those that are not. What would be the legal implications of a user mistakenly labeling, or failing to label, their work as a derivative? Application inquiries should be aimed at gathering the necessary facts to complete the examination, not having the applicant draw legal conclusions.<sup>19</sup>

See approach outlined on pages 15-16.<sup>20</sup>

## 7. Simplifying Transfer Statements

***Should the Office restrict the transfer statement options to “by written agreement,” “by inheritance,” and “by operation of law”? Should the Office add “by operation of law” to the list of acceptable transfer statements and remove the “Other” space?***

We are unclear about why the Copyright Office needs to know *how* a copyright was transferred at this level of specificity. Why wouldn’t the simple fact that the work was obtained through a transfer be sufficient for registration purposes without the need for more specificity? While additional specificity might be helpful in theory, practically it will be confusing for applicants if the different options are not clearly defined and the differences between the three choices are not clearly delineated. Giving common examples of each, along with definitions could help eliminate some of the potential confusion. For example, for a claimant who acquired

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<sup>19</sup> Although we recommend the Office refrain from asking applicants to explicitly state whether a work is derivative, if the Office decides otherwise, at the very least, novice users of the system should not be required to answer.

<sup>20</sup> See the answer to the question “*Should the Office eliminate the ‘Author Created’ and ‘Nature of Authorship’ sections in all of its applications, and instead, allow the applicant to provide a general statement that appropriately describes the work as a whole?*”

their rights through a will, it may be unclear which choice is the appropriate answer as there is some degree of overlap among them.

## **8. In-Process Corrections**

***Should the Office permit applicants to make in-process edits to open cases prior to the examination of the application materials?***

The Office should permit applicants to make in-process edits to open cases at any point *prior* to the examination of the application materials, provided that the Office clearly warns applicants prior to making changes that a modification could alter the effective date depending on the type of change and explains the types of changes that would result in change in the effective date. It might even be worthwhile to require applicants to affirmatively consent via a check box prior to allowing such a modification to the application. The Office should also clearly indicate the status of the application in the applicant portal—e.g., application received, pending review, application under review, etc. Since edits can only be made prior to examination, this increased transparency is important so that applicants have some idea of approximately how much time they have to amend the application before it's too late. Also, since it can take months for the Office to complete an examination and issue a registration certificate, it is important for applicants to have access to the status of their applications so that they can confirm that the application was received and is being processed.

In addition, prior to implementing this feature, the Office must first improve the applicant portal to make it easier to input changes to pending applications. Presently, finding and updating information is generally difficult because of flaws in the online registration user interface.

## **9. The Rights and Permissions Field**

***Should the Office allow authorized users to make changes to the Rights and Permission field in a completed registration?***

Yes, the Office should permit authorized users to make changes to the Rights and Permission field in a completed registration.<sup>21</sup>

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<sup>21</sup> Note that the Rights and Permissions field, which deals with who to contact to acquire rights and permission to use the work, is separate and distinct from recordation, which deals with transfers of ownership.

***Should the Office build a user interface that will let users update Rights and Permissions information, as necessary, without having to submit a formal written removal request and fee and without having to seek a supplementary registration?***

Yes, the Office should build a user interface that will allow users to update Rights and Permissions information, as necessary, without having to submit a formal written removal request and fee and without having to seek a supplementary registration. Since this would not require additional work by the examiners, there should not be an additional fee for making an update.

***How would this proposal affect the user's decision to provide Rights and Permissions information in an application for registration?***

It is not clear that this proposal would have any effect on the user's decision to provide Rights and Permissions information in an *application* for registration. However, the proposal should dramatically increase the number of users who update their Rights and Permissions information in a completed registration and the frequency that they do so, especially if there is no fee attached.

***How would this proposal improve the quality of the Online Public Record?***

Making it easier to change this information will improve the accuracy, completeness and currency of the online public record, which would benefit not only creators, but also licensees, researchers, archivists and other users.

***Should this option be limited to the party that submitted the initial application or the account associated with that submission to prevent third parties from making unauthorized changes to the record?***

Third parties should not be permitted to make changes. The ability to make these changes should be restricted to accounts belonging to the rights holder (including a previous rights holder's verified successor in interest) or their agent.<sup>22</sup> This important restriction would protect rights holders and users of the public record from fraud, misrepresentation, inadvertent mistakes

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<sup>22</sup> Since a successor in interest is not required to record a transfer of ownership, the Office should address how it would ensure that a previous rights owner, acting in bad faith, could not make unauthorized changes to record.

and unauthorized changes to the record by third parties. It is also vital that the Office implement robust security measures to prevent hacking and other fraud that might enable unauthorized changes.

## **10. Additional Data**

***What additional data should the Office collect on applications for registration? For example, should ISBNs or other unique identifiers be mandatory?***

It is acceptable for the Office to request additional information so long as this information is optional and not mandatory. Making additional information mandatory would create additional barriers to registration, so it is vital that there not be any direct or indirect “penalty” for not providing this information and no benefit for doing so to ensure that it is wholly voluntary. In addition, errors must not result in a refusal of the registration because doing so would discourage applicants from adding this voluntary information. Registrants should be able to update this information at any point while the application is pending, or to a completed registration, without incurring an additional fee or having to submit a supplementary registration. In some instances, it can take months for a unique identifier to be assigned.<sup>23</sup>

The registration application should also include optional fields where applicants could include identifiers for multiple other related works.

Any identifiers requested in the application should be “standard” identifiers.

***Should the Office accept other optional data? (e.g. page numbers in book, image or sound clip)***

Yes, the Office may accept other optional data, subject to our response above.

***Should the Office allow applicants to voluntarily upload low-resolution images or sound bites of their works to appear in the Online Public Record?***

Yes, the Office should allow applicants to voluntarily upload low-resolution images or sound bites, assuming applicants would be uploading these files to the application and not

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<sup>23</sup> ISBNs are helpful for the record, but again should be optional for books. Not all books have ISBNs anymore. Many self-published books only use the Amazon assigned numbers. Those should be optional additional information as well.

directly to the online public record, and that adequate security would be in place to protect those uploads.

***Should the Office make it mandatory for applicants to provide unique identifiers for published works if a number or code has been assigned when the claim is submitted? Or alternatively, should the applicant be required to add an identifier to the record if it appears in or on the deposit copy submitted with the application for registration.***

No. It is essential that any additional information requested by the Office must be optional, not mandatory. Making additional information mandatory would create additional barriers to registration, so it is vital that there not be any direct or indirect “penalty” for not providing this information and no benefit for doing so to ensure that it is wholly voluntary.

***Should the Office accept additional identifiers in the new system, such as the Interested Parties Information (“IPI”), International Standard Name Identifier (“ISNI”), and the Plus Registry? (recognizing that standard identifiers are not static)***

Yes, the new system should be built to be flexible, provided of course, that this information must be optional as provided above.

## **11. Application Programming Interfaces (“APIs”)**

***What considerations should the Office take into account in developing APIs for the electronic registration system?***

The development of APIs for the electronic system is critical to any modernization of the registration system. The Copyright Alliance strongly supports 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. An Office interface that, for example, allows creators, particularly individual creators and small businesses, to seamlessly upload and register their work “with one click”—from the software programs<sup>24</sup> they use to create, edit, and store their works—while also automatically syncing certain Copyright Office

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<sup>24</sup> We encourage the Office to reach out to companies like Adobe, Camera Bits, Capture One, ACDSee, and other key players for image management software for their input how best to accomplish this. For example, the Sept. 21, 2018 comments of Camera Bits provided some guidance in response to the Copyright Office Fees, Proposed Rule, Docket ID:COLC-2018-0005. <https://www.regulations.gov/document?D=COLC-2018-0005-0098>

information (such as copyright status, registration numbers, etc.) back to the applicant would create a registration process that is easier and is less time consuming, and would increase registrations.<sup>25</sup>

The APIs should provide broad a set of functionalities for all types of users, including submission of the application, submission of deposit materials, and payment of the required fee. In addition, APIs should support messaging between the applicant and the Office about a submitted application or registration, preview of a draft registration certificate, download of both certified and uncertified copies of registration certificates, automated validation of an application, and submission of updated rights and permissions information. The APIs should also allow the general public to view the Online Public Record and to generate reports about application processing times and other public information.

***How should the Office utilize APIs to integrate external data into the official registry?***

The Office should not use APIs to integrate external data into the official registry. The integration of external data by the Office into the official registry may only cause confusion and raise legal questions. However, as we answer below, the Office could provide functionality to allow third parties access to registry data to facilitate enhanced information and services.

***How should the Office utilize APIs to export internal data from the Office's registry to facilitate enhanced services offered by private entities.***

The Office could provide API access to the data to allow third parties to integrate registration information with their own data and/or build apps around the data. The Office should consider charging for access to bulk, machine readable data through APIs, similar to how sites like Twitter operate.<sup>26</sup>

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<sup>25</sup> 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,” and 13% said “it takes time away from my work as a creator.” Copyright Alliance, *Copyright Registration Fee Survey* (2018).

<sup>26</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).

***What factors should the Office consider?***

Many photographers and other visuals artists use third parties, like ImageRights, to register their work rather than register directly through eCO because these third-party platforms automatically track the registration status and add the copyright registration number to each individual photo that is submitted, and the creator can easily search for and filter that information. Using these third parties saves photographers an abundance of time to manage and determine which images they have submitted, and which images have been registered, etc. An effective API should work well with these existing solutions as well as encourage the creation of new solutions.

Additionally, modern-era API's, such as those in the RESTful category, should be considered, as well as the functionality entailed in authentication via OAuth 2 protocols.

***Should the Office limit API access to verified entities to minimize spam submissions and deter predatory behavior?***

Yes, the Copyright Office should create terms of service for access to its API to accomplish both goals while allowing it to block access to APIs from third parties who abuse the APIs.

***Should the Office initiate API access through a pilot program, similar to past initiatives?***

We take no position on this, but encourage the Office to consider "hack-a-thons" when API access is available to promote its APIs to the developer community.

**Public Record: How Users Engage and Manage Copyright Office Records**

The Copyright Office's registration system provides public notice of ownership information, akin to a County Recorder. The administration of a comprehensive database for licensing and business transactions is best left to the private sector. In this regard, the Copyright Office could study the existing copyright licensing landscape and continue to engage stakeholders to identify areas for potential improvement. That said, many copyright holders have extensive metadata attached to their work that would enhance this historical record, and they

should be given the option of including that metadata in their registration in a manner that stays with the deposit—so long as the inclusion of metadata remains optional.

## **12. The Online Registration Record**

*Should the Office expand the Online Public Record to include refusals, closures, correspondence, and appeals?*

It may be beneficial to include closures, correspondence, and appeals, but the Online Public Record should not include refusals.

## **13. Linking Registration and Recordation Records**

*What considerations should the Office take into account in expanding the Online Public Record to connect registration and recordation records and provide chain of title information?*

The systems should be fully integrated, such that an update to the registration record, recordation record, or rights and permissions should be reflected in the database seamlessly. The recordation system should be designed to allow new records to be integrated with existing records to provide useful chain of title information. From a legal perspective, the databases should be the same—the registration record together with the relevant recorded document comprises the legal record of ownership—but because presently the systems are separate and do not speak to each other, the practical reality does not comport with the legal reality. One overarching focus of any modernization effort should be to remove that artificial divide.

## **14. Unified Case Numbers**

*Should the Office issue one case number to track and identify a work or group of works through the registration and appeal process?*

Yes, we support this change, as it would increase transparency, and alleviate much of the confusion for applicants and examiners caused by the current practice of assigning various identification numbers.



## **Deposit Requirements: The Deposit Requirements for Registration and Related Security Considerations**

As a threshold matter, we encourage the Library of Congress and the Copyright Office to work together to determine to what extent the Library wants or needs deposits of various kinds. For example, it is not uncommon for a wedding photographer to take 1,500 for a single wedding, but receiving these photographs may not be a real priority for the Library, is a burden for the photographer to upload and would easily and quickly overwhelm the Copyright Office storage capacity (if the registration process is modernized and improved to such a degree that it results in many more photographers registering their works).<sup>27</sup>

### **15. Digital First Strategy**

*Should the Office require only electronic and identifying material for all deposits for registration, thereby eliminating the need to submit physical deposits for purposes of registration?*

Our primary concern with regard to mandating electronic deposit copies is security. Before the Office can mandate electronic deposit copies, the Office must adopt and implement a secure system to prevent cyberattacks that might result in unauthorized access to deposit copies. Until that time, where there is both a physical and electronic version of a work, the applicant should be permitted to select which version to submit as the deposit copy. It is critical that the Library's IT infrastructure be updated to support a large number of digital deposits and ensure that adequate, effective, and commercially reasonable security measures are in place before mandating electronic deposits.

Once proper security measures are in place, the Office must also accept a wide range of different formats if it is going to require electronic copies. Limiting the type of acceptable formats will be burdensome on applicants and dissuade them from registering. In addition, to the extent electronic materials are required they should only be required for works that are available electronically/digitally. For example, some magazines are only printed in hard copy and it is a burden to have to scan them to create a deposit copy. Presently, an applicant can request special

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<sup>27</sup> Photographers report spending close to 5.5 hours *per application* uploading .raw image files. Similarly, video games and other software files are often very large and thus uploading them may be burdensome to the applicant. In such instances, the applicant should be given alternative deposit options.

relief to deposit a different version/format. That option should continue to be made available even if the Office switches to electronic-only deposits.

Any electronic-deposit registration system must take into account the applicants' current production processes. For example, in order to develop a solution to the diminishing supplies of microfilms, the news publishers have in the past ten years ran two pilot projects with the Office and the Library of Congress to modernize the formatting requirements to register and deposit newspapers via PDF uploads. Newspapers are today produced and printed using highly automated processes, and an FTP upload option would greatly improve the efficiency and incentives for news organizations to register their content. Consequently, during the second pilot, completed in 2017, the news publishers were able to submit their deposits using a largely-automated FTP upload option. This option was not, however, included in the final rule on the group registration of newspapers that went into effect in March 2018, leaving many news publishers in a difficult position. While the current system allows publishers to select multiple files when submitting an application, this solution is still highly manual and time-consuming. In developing its Digital First Strategy, the Office should take into account the operational requirements of all applicants – particularly those registering potentially hundreds of works at a time, multiple times a year – and adopt an FTP-like upload option that imposes minimal set-up costs on the applicants and can be easily integrated into their existing processes. This should be done in addition to potentially developing an API, which would require some applicants to extend potentially considerable time and resources on system integration.

***Should, pursuant to its authority under section 408(c)(1), the Office, for all classes of works, accept only, or preferentially, electronic copies or phonorecords and identifying material to satisfy the deposit requirement for registration?***

By default, the Office's requirements for deposit copies under §408 should be consistent with the requirements for legal deposits under §407 so that an applicant can satisfy both requirements when registering a copyright. However, the Office does have flexibility under §408(c)(1) to provide for registration deposit requirements that differ from the requirements for deposits under §407, and it should exercise that authority whenever the Office deems it appropriate—particularly where doing so would reduce examination costs and pendency, reduce

burdens on applicants, and in cases where the class of works in question are not necessarily desired for legal deposit under §407.<sup>28</sup>

***How would this digital approach incentivize or not incentivize the routine registration of copyrighted works and improve the efficiency of the registration system?***

If effective security measures are in place and the other criteria (e.g., wide variety of formats accepted, easy process to upload etc.) we mentioned above are satisfied, it will be much easier to register and thus likely lead to increased registrations.

## **16. Deposit Security**

***The Office requests comment on the current and future state of the Office's deposit security as well as any additional approaches to this issue.***

See our comments on page 25 regarding security for electronic deposits.<sup>29</sup>

Today, there are concerns with security for hard copy deposits. The post-examination security measures are adequate. The bins in the hallways that are filled with post-examination deposits that are in route to either the Library's acquisitions department, or the Office's Landover storage facility are *generally* covered and locked. The deposits in the bins are all barcoded with a label that the Capitol Police are trained to look for when searching bags as people (including the staff) leave the building. Even if someone were to pilfer a deposit copy from an unlocked, unattended bin, there is still a layer of protection. However, the pre-examination security measures are much more concerning. There needs to be improved security for when deposits come in through the loading dock; when deposits are opened and sorted for their respective registration departments; when deposits sit in mail bins waiting to be picked up/distributed to an examiner, and when the examiner has them in their open carrels for registration. All of these are possible points of disappearance. Certain works that are relatively small and can be easily hidden when exiting the Office are especially susceptible to theft. Pre-examination deposit theft is especially problematic because it can adversely affect the

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<sup>28</sup> We note that the Register of Copyrights always maintains the ability to demand deposits of works under §407 even if not required for deposit under §408.

<sup>29</sup> See the response to “*Should the Office require only electronic and identifying material for all deposits for registration, thereby eliminating the need to submit physical deposits for purposes of registration?*”

registration date. A digital deposit requirement would alleviate these specific concerns, but presents many additional new concerns previously raised in these comments.

## **Additional Considerations**

There are other important changes that the Office should consider but those may require changes in the law, including eliminating the distinction between published and unpublished works in the registration application and redefining “publication” in a way that makes sense. We urge the Office, to develop a list of improvements to the registration system that they would like to implement but cannot unless Congress changes the law, and share that with stakeholders and the Senate and House Judiciary Committees. It may also be helpful to issue a Notice of Inquiry asking stakeholders to develop similar lists.

The Office may also want to consider bringing in industry experts to help teach and train registration staff on creation and development of certain works like video games, software, database, etc.) to provide examiners with greater insight, which in turn might help improve the examination process. We would be happy to help organize this.

## **Conclusion**

The Copyright Alliance appreciates the opportunity to share our views on this NOI. Please let us know if we can provide any additional input or answer further questions.

Respectfully submitted,

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