



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

**Group Registration of Short Online  
Literary Works**

**Docket No. 2018-12**

**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 Proposed Rulemaking](#) (NPRM) published by the U.S. Copyright Office in the Federal Register on December 21, 2018, regarding a proposal to create a new group registration option for short online literary works (GRTX).

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 drafting the 1976 Copyright Act, Congress recognized the need for group registration options to ease “unnecessary burdens and expenses on authors and other copyright owners” and to encourage copyright registration among those who otherwise might forgo it.<sup>2</sup> Since that time,

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<sup>1</sup> These comments were filed with the U.S. Copyright Office on February 19, 2019.

<sup>2</sup> H.R. Rep. No. 94-1476, at 154 (1976); *see also* 17 U.S.C. § 408(c)(1).

the Office has implemented several group registration options including for contributions to periodicals, serials, daily newspapers, daily newsletters, published photographs, and databases, and has proposed additional group registration options for short literary works—the subject of this comment—and unpublished works. We recognize and appreciate that the Office is not required to provide these accommodations—with the exception of the group registration option for contributions to periodicals, which is mandated under section 408(c)(2) of the Copyright Act—but does so as a courtesy to copyright owners and to further the objectives of the copyright system. As such, we commend the Office for its responsiveness to the needs of those individual writers whose registration burden will be eased when this proposal becomes effective, and offer the following comments for consideration.

#### **A. ELIGIBILITY REQUIREMENTS**

As an initial matter, the NPRM makes several references to circumstances in which an examiner might have the discretion to refuse an application. These instances include where: (1) an applicant “asserts a claim in ‘text’ and another form of authorship”; (2) “a particular work appears to be less than 100 words” or greater than 17,500 words; (3) “an applicant submits more than 50 works”; (4) “the names provided in the author and claimant fields do not match each other”; (5) the “range of publication dates [fall] outside of a three-calendar-month period”; and (6) the claim is submitted using a paper rather than electronic application.

Refusals for technicalities and mistakes in the application should be an option of last resort. When an examiner discovers an error in an application the first step should be to attempt to contact the applicant to work to correct that error, not to outright refuse the application. In recent months, we have noticed an increase in complaints from our individual creator members about registrations being refused by the Office due to mistakes and technicalities, without the applicant having the opportunity to resolve the issue. Many of the individual creators who submit registration applications have limited income and limited knowledge of the copyright law. They often struggle with the complex legal definitions and other aspects of the application process and are fearful that if the application is not in perfect form, it will be refused and they will lose the application fee without any notice. This works as a significant deterrent to these creators registering their works in the first instance. Further, allowing examiners this kind of discretion

creates the possibility that applicants would receive different and inconsistent treatment depending on the particular examiner. While we understand that examiner-applicant communications raise pendency, we strongly oppose immediate refusals as a means for reducing pendency.

To the extent possible, registration forms should be automated to prevent submission of an electronic application that fails to meet the requirements for a particular type of registration, for example, claims too many works. In addition, the Office should provide a clear and detailed FAQ section explaining eligibility requirements and other pertinent issues.

### **1. Works That May Be Included in the Group**

The NPRM limits eligibility for this group registration option to literary works containing no less than 100 and no more than 17,500 words. We understand that the lower limit was chosen as a matter of efficiency since “[e]xamining an extremely short work requires careful review” to determine copyrightability and “[i]t is not feasible to conduct this level of analysis when dozens of works are included within the same claim.” However, we urge the Office to consider a lower limit of 50 words to better accommodate a variety of short literary works. For example, is not uncommon for poems—including some of the most renowned—to fall well below 100 words.<sup>3</sup> Additionally, irrespective of the minimum number of words required for eligibility for GRTX, we ask that the Office make abundantly clear that the 100 (or 50) word limit is in no way meant to define a threshold for copyrightability (i.e., what is or is not a “short phrase”), and instead was selected purely as a means for examination efficiency.

Likewise, the Office should consider increasing the limit of 17,500 words to at least 20,000 words. Freelance articles written for online publications are sometimes greater than 20,000 words, and online novellas are often as long as 40,000.

Most significantly, the proposed rule limits eligibility for GRTX to works “first published online.” There are three concerns with this requirement. First, ideally, this group registration option would be available not just for works disseminated *online*, but for other written works

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<sup>3</sup> See, e.g., Robert Frost, *Fire and Ice* (1920); Emily Dickinson, *Hope is the Thing with Feathers* (1891); Langston Hughes, *Harlem (A Dream Deferred)* (1951).

created by individual writers that do not qualify as contributions to periodicals, such as print anthologies. We see no reason why works not distributed online should be excluded from this group registration option.

Second, eligibility should not turn on whether a work is published or unpublished, as defined under the law. Copyright owners seeking to register their works regularly struggle to understand this complicated and confusing distinction, and this would further exacerbate that confusion. Rather than building the GRTX on the foundation of what is already a confusing and archaic distinction in copyright law, the Office should base eligibility on whether the work has been “publicly disseminated” instead of its publication status. If the Office believes it must distinguish between published and unpublished because of the requirements of Section 409, then it should include clear guidance as to what it considered to be published and unpublished in the online environment. We understand from the January 2019 letters to the House<sup>4</sup> and Senate<sup>5</sup> Judiciary Committees, regarding copyright and visual works, that the Office will be studying this issue in the near future. We hope this study results in greater clarity on the distinction between published and unpublished and improved guidance.

Third, the requirement that the work be *first* published online—or simultaneously online and in physical form—adds an unnecessary hurdle. Imagine a writer who distributes an article to an outlet. This outlet—which distributes content both digitally and physically—may run the article in physical form one day and online the next, simply based on its own print schedule. Would this qualify as “simultaneous” publication? If not, would this writer be prevented from utilizing the GRTX based on the outlet’s decision to publish it in physical form first? A freelance writer would generally have little say about an outlet’s print schedule, and might not even know which of the two formats would be made available first.

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<sup>4</sup> Letter from Karyn A. Temple, Acting Register of Copyrights and Director, U.S. Copyright Office, to Chairman Lindsey Graham and Ranking Member Dianne Feinstein, U.S. Senate Committee on the Judiciary (Jan. 18, 2019), <https://www.copyright.gov/policy/visualworks/senate-letter.pdf>.

<sup>5</sup> Letter from Karyn A. Temple, Acting Register of Copyrights and Director, U.S. Copyright Office, to Chairman Jerrold Nadler and Ranking Member Doug Collins, U.S. House Committee on the Judiciary (Jan. 18, 2019), <https://www.copyright.gov/policy/visualworks/house-letter.pdf>.

Furthermore, because the definition of “publication” is unclear, the requirement that the work be *first* published online presents additional challenges. Take, for example, a writer who offers to distribute an op-ed to multiple online media outlets in hopes that one will agree to publish it (in the colloquial sense) online. Under section 101 of the Copyright Act, even this “offering to distribute copies ... to a group of persons for purposes of further distribution, public performance, or public display” constitutes a “publication.” But would this offering constitute an “online” publication, such that the work would qualify as “first published online” for purposes of the GRTX?

For these reasons, the GRTX should not be limited to works *first* published online.

## **2. Number of Works That May Be Included in the Group**

The proposed rule provides that “an applicant will be allowed to include up to 50 literary works in each submission.” We understand that this number was chosen to balance the interests of writers with the administrative capabilities of the Office, and believe that in no instance should this limitation be reduced below 50 works. Nonetheless, we request that the Office consider allowing groups of up to 90 works to accommodate those writers who disseminate work online daily or almost daily.

## **4. Author and Claimant**

The NPRM excludes works made for hire from eligibility for the GRTX. While we understand that the rule “is intended to benefit individual writers ... [who] do not have the time or resources to register their works with the Office,” the Copyright Office should nevertheless consider expanding the rule to include works made for hire. Many small companies and other organizations that regularly disseminate written content online, likewise, find the cost of registering each written work individually cost-prohibitive, such that those works never get registered. Therefore, we do not think that works made for hire should be excluded outright. At the very least, the Office should allow works made for hire for small and micro businesses and non-profits.

The NPRM also states that “in all cases, the author must be named as the copyright claimant, even if a different party actually owns the copyright in each work” for the sake of

efficiency. Although this practice is consistent with the Compendium, it is unclear, as a practical matter, why the Office would request information that fails to accurately reflect ownership of the works claimed on the application.

### **C. DEPOSIT REQUIREMENTS**

The proposed rule would require applicants using the GRTX to upload each work individually, as separate digital files. Since the works deposited using this registration option will necessarily be “short,” we anticipate that this will not be overly burdensome to applicants—assuming that the Office’s IT system is sufficient to allow each of these files to be uploaded in a matter of seconds. Nonetheless, as the Office continues to modernize and look for ways to encourage registration, it should understand that the requirement that each work be uploaded individually, as separate digital files, is not feasible for larger works, even if those works are disseminated online. We therefore do not object to this requirement in the context of this particular group registration but would object in other contexts.

### **Conclusion**

We thank you for the opportunity to submit these comments, and for the Office’s dedication to making copyright registration more affordable and cost effective. Please let us know if we can provide additional input or answer any further questions.

Respectfully submitted,

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