



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

**Public Draft of the Compendium of U.S.  
Copyright Office Practices, Third Edition**

**Docket No. 2019-3**

**COMMENTS OF THE COPYRIGHT ALLIANCE**

The Copyright Alliance appreciates the opportunity to submit the following comments in response to the [revised draft](#) of the *Compendium of U.S. Copyright Office Practices, Third Edition* (draft Compendium) released by the U.S. Copyright Office on March 15, 2019.

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.

Since publication of the first edition in 1967, the Compendium has transformed from a 43 page<sup>1</sup> document primarily intended for use by Copyright Office staff, to a comprehensive, 1200+ page manual, serving the dual purpose of informing Office staff and providing expert guidance to the public. As the Compendium has grown, so has its importance, as it serves as a point of reference for copyright

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<sup>1</sup> The 1973 revision was 43 pages.

applicants, practitioners, scholars, the courts, and members of the general public seeking to better understand Copyright Office practices and related principles of law.<sup>2</sup>

For that reason, we appreciate the Office’s diligent effort in making sure that the Compendium continues to reflect newly implemented regulations, Office practices, and court decisions, to the extent such updates are warranted to provide accurate and beneficial information to those who use the Compendium. In connection with this most recent draft, the Office hosted a webinar discussing the proposed changes, and made both the recording of the presentation and the accompanying slides available for review online. This webinar, along with several others hosted by the Office in recent months, is a great example of the kind of transparency, use of technology, and interpersonal communication vital to cultivating strong ties between the Office and its constituents. We again applaud the leadership of the Office for these efforts.

Substantively, the draft Compendium incorporates several of the kinds of changes discussed above—those necessary to keep the information up-to-date regarding regulations, Office practices, and case law—and provides helpful clarifications and guidance. However, some of the changes do raise significant concerns. Our concerns are explained below.

#### I. Registration Specialists’ Discretion Regarding Communication with an Applicant and Refusal of an Application

Two categories of updates that appear throughout the draft regarding refusals of applications, and whether and to what extent registration specialists will correspond with applicants, raise the most significant concerns. In some instances, like sections 603.2(C), 625.1, and 1114.1— which state that the registration specialist “may” communicate with the applicant—the draft Compendium gives registration specialists discretion to decide whether to contact the applicant and allow them to correct a mistake, or to outright refuse the application. There are several issues with this policy change. Section 603.2(C) states that this discretion is triggered in instances where there are “numerous variances or deficiencies,” without regard to the nature of these variances or deficiencies. This contradicts language in 603, which explains that material variances fall into two categories: those that are *resolvable* after review of the registration materials as a whole, and those that *require communication* with the

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<sup>2</sup> U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES, Introduction (3d ed. 2017).

applicant. In fact, the heading for section 603.2(C) is “Material Variances *Requiring Communication* with the Applicant” (emphasis added). It follows, then, that the registration specialist should be required to “return the claim to the applicant, and instruct the applicant to correct and resubmit the claim”—unless the variances are “resolvable after review of the registration materials as a whole,” in which case, the specialist should be able to resolve those issues. There is no reason that the specialist should be permitted to refuse an application with variances that can be resolved with further review or communication with the applicant. As an additional matter, the draft Compendium is unclear about the meaning of “deficiencies,” as used in 603.2(C). If “deficiencies” are meant to describe only those “variances” that make the application for registration “deficient” or inadequate under the regulations, the Compendium should clarify the kinds of “variances” that would be considered both “material” AND “deficient.”

In section 625.1, it states that if an applicant uses “the wrong form, completed the form incorrectly, or attempted to register multiple works with the same form” the specialist can choose to communicate with the applicant about those mistakes, or refuse the registration. Likewise, under section 1114.1, if an applicant submits more than 750 photographs in a group registration, the specialist has discretion to either instruct the applicant to exclude the additional images, or refuse the registration. In other instances, like sections 625.2(B), 1105.3, 1405, and 1508.1, the draft Compendium instructs the registration specialist to refuse the application—for example, when deposit copies are submitted in the wrong file format or when the applicant mistakenly attempts to register a work using the Single Application—without providing the applicant an opportunity to correct the mistake. In some sections, like 1105.3, the draft even deletes language that previously required the specialist to communicate with the applicant about how to amend the claim, replacing it with instructions to refuse the application. We respectfully request the Copyright Office to design the modernized registration system to prevent these types of mistakes whenever possible right from the outset.

Over the last several months the Copyright Alliance, as well as many of our member organizations, have received a number of unsolicited complaints from individual creators about applications being refused due to mistakes, without being given the opportunity to correct those mistakes. These creators are especially frustrated because these refusals occur unexpectedly, after months of waiting, and result in time wasted and a forfeiture of the filing fee.<sup>3</sup> As we explained in the

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<sup>3</sup> These frustrations are heightened in light of the Office’s recent proposal to increase registration fees.

comments we filed regarding the Office’s proposal to adopt a new fee schedule, many creators already struggle to afford the cost of registration. Requiring creators to file an entirely new application and pay an additional filing fee, rather than simply instructing them on how to correct the mistake, means doubling their cost of registration, and further delaying an applicant’s ability to sue for infringement. These concerns are elevated for publishers who sometimes are contractually obligated to register a work within three months of publication. Refusing an application for non-substantive reasons, which could be resolved via correspondence, can have far-reaching implications and consequences for these publishers, their authors and other applicants.

We suspect that these practices were implemented in order to decrease registration pendency times, and while reducing pendency is an important goal, this is not an appropriate way to achieve that goal. It is essential that applications not be refused before a registration specialist first attempts to contact the applicant to notify the applicant of the problem and to give the applicant a reasonable amount of time to rectify it. Correspondence with the Copyright Office is instructional and helps applicants learn the registration process. Some of our members review their prior correspondence with the Copyright Office to ensure that they do not commit the same mistakes when submitting a new registration application. Reducing correspondence would hamper this kind of instructional exchange and ultimately lead to a less efficient copyright registration system where applicants are not certain of the specific mistakes they may have made and will be unable to improve in future applications. Rejecting applications without first communicating with the applicant discourages applicants from filing future applications and will, ultimately, lead to a weaker and less accurate public record.

In our registration modernization comments, we explained that, “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.” In those comments, we recalled the objectives of the copyright system, which include making registration more attractive, making timely registrations easier to achieve, increasing the number of registrations, and processing applications in a timely manner.<sup>4</sup> As important as reducing pendency is, it should not occur at the

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<sup>4</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>.

expense of the other objectives of the copyright system, and to the detriment of the registration process or applicants, or the public record.<sup>5</sup>

## II. Unit of Publication

Additionally, section 1103.1(C), as well as other subsections of 1103, state that the unit of publication option is only available for works “packaged together and distributed to the public in a physical form” to the exclusion of works combined and distributed digitally. We expressed concern with this revision of the unit of publication when it was first implemented in the 2017 draft revision, and we continue to oppose this change.<sup>6</sup> For example, digital distribution is the only feasible option for many independent musicians. Those independent artists need the ability to register digital units of publication together, just as a physical CD may be registered along with its album artwork, photographs, and/or liner notes on one application. Requiring that they register each element separately increases the cost of registration and creates an additional and undue burden on independent artists, and will only act as a deterrent to registration. The draft cites to 37 C.F.R. § 202.3(b)(4) for support, but nothing in that section of the Federal Regulations suggests a distinction between works distributed in physical form and works distributed digitally. At a time when digital distribution of recorded music has become the dominant form of distribution, there is no justification for treating digital bundles differently than physical bundles. We recognize that the Office’s recent proposal to create a new group registration option for musical works, sound recordings, and certain other works contained on an album (GRAM) *may* address some of these concerns, but we would need to review that proposal more thoroughly before reaching a conclusion. For this reason, and because it’s unclear when, if, or in what form the GRAM proposal would become effective, we continue to assert the concerns discussed above.

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<sup>5</sup> Moreover, pendency metrics that are artificially reduced by refusing applications and having the applicant re-file, in lieu of communicating with the applicant to fix the application without the need to re-file would not be an accurate representation of pendency rates because in reality applicants will be waiting sometimes twice as long as they would have otherwise to receive their registration.

<sup>6</sup> Copyright Alliance, Comments on 2017 Update to Compendium of U.S. Copyright Office Practices, Third Edition 2-3 (July 2017), <https://copyrightalliance.org/wp-content/uploads/2017/09/CA-Compendium-Comments.pdf>.

### III. Collective Work Registration

In our comments in response to the 2017 draft revision of the Compendium, we discussed a concern about section 312.2<sup>7</sup> which states that “the Office generally will not register a compilation containing only two or three elements, because the selection is necessarily *de minimis*.” In response to our concerns, the Office stated “contrary to the Copyright Alliance’s suggestion, the Office does not have a bright line rule regarding the number of tracks that must be present to qualify as a collective work.” However, based on the experiences of our members—and the Compendium’s own words that a collective work containing less than four individual works is “necessarily *de minimis*”—it appears that even if there is no *de jure* rule, there is a *de facto* rule preventing registration of compilations containing less than four works.

We disagree with the Office’s conclusion that the selection, arrangement, or coordination authorship that goes into these collective works is necessarily *de minimis*. In support of this contention, the Office cites to a single relevant example in the legislative history of the 1976 Act, which states that a compilation of “three one-act plays, where relatively few separate elements have been brought together” does not qualify for registration as a collective work.<sup>8</sup> This example is incongruent with the scenario we described involving the selection of, for example, three tracks (or two tracks plus artwork and/or liner notes) for an EP, where the crux of the creative selection lies not in the number of tracks included, but in the process of identifying those particular tracks (and excluding others) from the dozens of recordings an artist has created in order to execute or convey a certain theme, sound, mood, or message. If the Office is unsure whether a collective work containing fewer than four individual works constitutes copyrightable subject matter based solely on the number of works, the registration should be granted in accordance with the Rule of Doubt, which would preserve the applicant’s claim to the collective work, while noting the Office’s reservations with regard to the presumption of validity.

### IV. Email Correspondence

Section 605.4 was updated to say that “[i]f the applicant fails to include the specialist’s entire email message as part of the reply, the case number/service request number and the THREAD ID will

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<sup>7</sup> Copyright Alliance, Comments on 2017 Update to Compendium of U.S. Copyright Office Practices, Third Edition 1 (July 2017), <https://copyrightalliance.org/wp-content/uploads/2017/09/CA-Compendium-Comments.pdf>.

<sup>8</sup> H.R. REP. NO. 94-1476, at 122 (1976).

not be included in the message. As a result, the reply will not be connected with the relevant registration record, and the claim will be closed for failure to respond in a timely manner.” Although this should not be a problem in most cases since many email systems are set up so that the previous message automatically appears below the response, it would make sense to give applicant the option of *either* including the entire message, or providing the case number/service request number and the THREAD ID in the response. In either case, it’s vital that the registration specialist make clear in their communications with applicants what information must be included in order to avoid having the claim closed.

## V. Inconsistent Office Practices

In its comments, the NMPA identifies an issue regarding inconsistent application of section 602.4E, where music publishers with interest in the same composition will both attempt to register the work. Due to the length of pendency, the second registrant has no way to know that another application has already been filed. In some instances, that second registrant is notified that their application was rejected with instructions to file a supplementary registration and submit another filing fee. Other times the registrant is instructed to remove the co-author and co-claimant from their application so it can be registered as a separate work, resulting in two separate registrations with different ownership information for the same work, and an inaccurate public record. We suspect that once the registration system is modernized, the application portal could alert a registrant when they are about to file an application to register a work for which a separate application is already pending, giving that registrant the option to continue, or to port the information onto a supplementary application. We support the NMPA’s proposal that, in the meantime, the Office consider allowing applicants to submit supplementary registrations for no additional fee in these situations.

AAP has also brought to our attention an issue regarding illustrated children’s books, where the Copyright Office will sometimes change the category of the work from *literary work* to *visual arts* in the certificate of registration, without providing an explanation for the change. Under section 625.1 of the draft Compendium, an applicant that does not submit the right form may simply have their application refused. It is unclear whether the Office will continue its current practice moving forward or how it will go about implementing this proposed update given that the Office has not been consistent in switching the category in registrations involving illustrated books.

## VI. Information Not Included in the Draft Compendium

The Copyright Office website also states that “[t]he final version of the *Compendium* will include information about [specified] amendments if the Office issues a final rule in [those] proceedings before this update goes into effect. The final version will also be updated to reflect the Supreme Court’s recent decision in *Fourth Estate v. Wall-Street.com*.” We would appreciate the opportunity to review any proposed revisions to the Compendium, including those, before they go into effect.<sup>9</sup>

Finally, there are no changes in the draft to reflect any of the new procedures regarding pre-1972 recordings (e.g., filing pre-1972 schedules, filing notices of noncommercial use, filing opt-outs, etc.), and many of the references to pre-1972 sound recordings in the draft Compendium are either out-of-date or inaccurate.<sup>10</sup> We suggest that the Office create a new chapter addressing the various policies, procedures, forms, and other relevant updates relating to the pre-1972 sound recordings and update all information regarding the status of these works under the law.

We thank you for the opportunity to submit these comments. Please let us know if we can provide additional input or answer any further questions.

Respectfully submitted,

Keith Kupferschmid  
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<sup>9</sup> U.S. Copyright Office, *Copyright Office Releases New Version of the Compendium of U.S. Copyright Office Practices, Third Edition*, <https://www.copyright.gov/comp3/announcement.html>.

<sup>10</sup> See, for example, 803.5(D)