



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

Online Publication

Docket No. 2019-7

COMMENTS OF THE COPYRIGHT ALLIANCE

The Copyright Alliance appreciates the opportunity to submit the following comments in response to the [Notice of Inquiry](#) (NOI) published by the U.S. Copyright Office in the Federal Register on December 4, 2019, regarding the determination of a work’s publication status for registration purposes.

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.

1. Section 409(8) of the Copyright Act requires applicants to indicate the date and nation of first publication if the work has been published. What type of regulatory guidance can the Copyright Office propose that would assist applicants in determining whether their works have been published and, if so, the date and nation of first publication for the purpose of completing copyright applications? In your response, consider how the statutory definition of publication applies in the context of digital on-demand transmissions, streaming services, and downloads of copyrighted content, as well as more broadly in the digital and online environment.

From a process standpoint, regulatory guidance would be a good start, but the applicants who are struggling to determine whether their works have been published are unlikely to read regulations or the Compendium (or even the circulars). While regulatory guidance is an important first step, the applicants most in need of assistance in this area (e.g. individual creators and small businesses) would benefit from additional forms of guidance that communicate the information articulated in the regulations and Compendium in a way that is more accessible, digestible (e.g. in modern formats like short, illustrated videos, FAQs and virtual chats), visible (e.g. highly publicized through social media and other tools) and easily understood. These additional forms of guidance could include:

- Frequently Asked Questions (FAQs) and short, educational videos specific to determining whether particular works are considered published, including a discussion of the factors that are important to making that determination;
- Icons and “help” panels incorporated within online applications that would expand to display explanatory text and information about terms and concepts that may be a source of confusion;
- Skilled assistance at the help desk, along with a virtual “live chat” support feature;
- A virtual, interview-style Q&A (similar in format to the TurboTax app) that applicants could use to help determine whether a work is published, and if applicable, the date and nation of publication.¹

We do not think it is necessary to amend the statutory definition of publication because we think there are better means for helping applicants understand whether a work is published or unpublished. The primary source of the confusion for individual creators and others is in

¹ The Office could do this in a way that makes clear that this is not legal advice and cannot be relied on as dispositive for litigation purposes but is simply a tool to help applicants complete the form.

understanding how to *apply* the definition in varying contexts, so we suggest that the Office continue working to address areas of confusion through updates to the Compendium as necessary. For this to be effective, it is imperative that the Office also communicate the guidance that is presently in, or added to, the Compendium in ways that are accessible and easily understood, as discussed above.

When the statute and the Compendium (see chapter 1900 and section 1008.3) are read together, we believe it is clear that on-demand transmissions, streamed works and posting a work on a website do not, standing alone, constitute publication but that works that are offered for sale or license to end users, or otherwise authorized for download online would constitute a publication.

2. Specifically, should the Copyright Office propose a regulatory amendment or provide further detailed guidance that would apply the statutory definition of publication to the online context for the purpose of guiding copyright applicants on issues such as:

i. How a copyright owner demonstrates authorization for others to distribute or reproduce a work that is posted online;

Further regulatory amendment is not necessary but further guidance here would be beneficial. For example, it would be helpful for the Office to clarify that such authorization would need to be express or provided for through some affirmative action by the rightsholder, and not simply implied (for example, by the default ability to “right-click” copy content posted online).

ii. The timing of publication when copies are distributed and/or displayed electronically;

This question is unclear because the statutory definition of publication makes clear that a mere display of content does not constitute publication. If this question is asking whether the definition of publication should be amended to include mere online display, as the NOI suggests is the position in Paul Goldstein’s treatise,² we would oppose such an amendment. The NOI highlights three of Goldstein’s arguments, none of which is compelling. Each argument provides

² Paul Goldstein, *Goldstein on Copyright* §3.3.3 (3d ed. 2016).

a policy rationale for treating unpublished works as published but gives no valid explanation as to why creators should lose the protections that have always been afforded to unpublished works simply because the performance or display takes place online. None of the arguments are unique to online performances and displays, and do not, therefore, justify treating online performances and displays differently than traditional performances and displays. For example, Goldstein argues that allowing internet works to be deemed unpublished could avail those works of 120 years of copyright protection rather than 95 years.³ The fact that unpublished works may sometimes be subject to a longer term of protection is not a valid rationale for treating them as published, either in the online or the offline world. Goldstein also argues that deeming online performances and displays as unpublished would dilute incentives to early and regular registration.⁴ However, the fact that there are greater incentives for early registration of published works is not a reason to treat unpublished works as published, whether those works are performed or displayed online or offline. Finally, Goldstein argues that one of the reasons Congress deemed performances and displays not to constitute publication was that they were more difficult to reproduce than other manifestations of a work, something he argues is not true for online content, which can easily be downloaded.⁵ However, the mere fact that electronic performances and displays may be more susceptible to *unauthorized* reproductions (i.e. infringement) is no more a reason to treat those works as “published” than the advent of the camcorder was reason to treat live performances as “published.”

Regarding the timing of publication when copies are distributed, further regulatory amendment is not necessary but further guidance here (e.g. by providing specific examples) could be beneficial.

³ Online Publication, 84 Fed. Reg. 233, 66332 (Nov. 26, 2019) (to be codified at 37 C.F.R. ch. II) (“First, because the copyright term for works made for hire is 95 years from publication, or 120 years from creation, to treat internet works as “unpublished” would effectively extend copyright protection for many internet works for an additional 25 years.”).

⁴ Online Publication, 84 Fed. Reg. 233 at 66333.

⁵ Online Publication, 84 Fed. Reg. 233 at 66333.

iii. Whether distributing works to a client under various conditions, including that redistribution is not authorized until a “final” version is approved, constitutes publication and the timing of such publication;

Further regulatory amendment is not necessary but further guidance regarding the impact of various conditions on determining publication status and timing of publication would be beneficial.⁶

iv. Whether advertising works online or on social media constitutes publication; and/or

Whether an advertisement, online or offline, constitutes a publication would depend on whether the advertisement would rise to the level of an “offer” for distribution. In most cases, an advertisement is merely a means of promoting or calling attention to a product, but is not, itself, an offer for distribution. Even in the rare case where an advertisement rises to the level of an offer for distribution, the question then arises whether such offer is made specifically for “purposes of further distribution, public performance, or public display.” In most cases, an advertisement alone would not rise to the level of a publication. In the rare instance where it might, further regulatory amendment is not necessary but further guidance would be beneficial.

3. Can and should the Copyright Office promulgate a regulation to allow copyright applicants to satisfy the registration requirements of section 409 by indicating that a work has been published “online” and/or identifying the nation from which the work was posted online as the nation of first publication, without prejudice to any party subsequently making more specific claims or arguments regarding the publication status or nation(s) in which a work was first published, including before a court of competent jurisdiction?

In addition to providing assistance to applicants in answering this question on the application, the Copyright Office should do what it can to reduce the draconian effects of

⁶ For example, if a photographer provides 100 photographs to a magazine with the understanding that the magazine will select 5 of those photographs for inclusion in its next print edition, but will not use any of the other photographs, would the Office consider the other 95 photographs to be published or unpublished? Would the timing of publication for those 5 photographs occur when the photographer submits the 100 photos to the magazine? When the magazine publisher receives the 100 photos? When the 5 photos are affirmatively selected by the magazine publisher for inclusion in the magazine? Or when the magazine is published? And since the facts in each case may be different, what are the relevant factors for determining the answer? While this example is for a photographer, it could just as easily apply to a songwriter, freelance journalist or other author who is working with a publisher or other third-party that is responsible for ultimately deciding what and when the work will be distributed.

answering incorrectly. Section 411(b) provides that a certificate of registration satisfies the registration requirement of §411(a) regardless of whether the certificate contains any inaccurate information, unless (1) “the inaccurate information was included on the application for copyright registration with knowledge that it was inaccurate,” and (2) “the inaccuracy of the information, if known, would have caused the Register of Copyrights to refuse registration.” 17 U.S.C. § 411(b)(1). Some courts have invalidated registrations, causing infringement claims to be thrown out, when the applicant has failed to properly identify a published work on the registration application. It seems antithetical to the purposes of copyright law to allow a technicality such as this to adversely affect the registration and enforcement of copyrights. To ensure that invalidation is applied only where the offense warrants such a harsh penalty, we support a statutory amendment changing the requisite scienter under section 411(b)(1) from “knowledge” to a bad faith intent to defraud the Copyright Office. We also support amending 411(b) to eliminate the inquiry into “whether the inaccurate information, if known, would have caused the Register of Copyrights to refuse registration.” Registrations can be refused for a number of reasons, including due to technicalities that have more to do with conserving Copyright Office time and resources than the severity of the mistake or whether the inaccurate information is material to the copyrightability or ownership of the underlying work. While there may be a narrow set of circumstances in which it may make sense to refuse a registration for these sorts of errors, invalidation of a registration is so severe a penalty that it should be reserved only for actions that rise to the level of a bad faith intent to defraud the Office.

Likewise, as we describe in our answers to questions 4 and 5, we support a change in the group registration process that would enable groups of published and unpublished works to be registered together through one application. This would prevent registrations from being invalidated under 411(b)(1) simply because a published work was inadvertently included in a group registration for unpublished works, or vice versa.

Allowing applicants to satisfy the registration requirements of section 409 by indicating that a work has been published “online” and/or identifying the nation where the work is made available online as the nation of first publication may also help alleviate the draconian effects of answering incorrectly.⁷ If the Office chooses this route, this should be optional, meaning that an

⁷ Consistent with 612.7(J) of the Compendium, where a work was first made available in the United States and another country (or countries) on the same date, the United States would be the nation of first publication.

applicant whose work is posted online is not required to indicate that the work has been “published online” (since in many instances the work may be posted online but technically not “published” under the law) but can choose to do so where they are unsure, essentially waiving any benefits under the law associated with an unpublished work. The Office would also need to ensure that applicants who select this option understand that they are not only indicating that the work was published online, but that the work was *first* published online, and that the date and nation in question correspond to the first instance of publication.

4. Applicants cannot currently register published works and unpublished works in the same application. Should the Copyright Office alter its practices to allow applicants who pay a fee to amend or supplement applications to partition the application into published and unpublished sections if a work (or group of works) the applicant mistakenly represented was either entirely published or unpublished in an initial application is subsequently determined to contain both published and unpublished components? What practical or administrative considerations should the Office take into account in considering this option?

At minimum, the Copyright Office should alter its practices to allow applicants who pay a fee to amend or supplement applications to partition the application into published and unpublished sections if a work (or group of works) the applicant mistakenly represented as either entirely published or unpublished in an initial application is subsequently determined to contain both published and unpublished components. In fact, we believe that the Office should go a step further and allow published and unpublished works to be registered together on a single application, which would obviate the need for applicants to amend or supplement those applications to partition the application into published and unpublished sections. As we explained in our response to question 3, this would also address our concerns about registrations being invalidated in a group registration due to a misapplication of the definition of “publication” that falls short of “bad faith.”

- 5. For certain group registration options, should the Copyright Office amend its regulations to allow applicants in its next generation registration system to register unpublished and published works in a single registration, with published works marked as published and the date and nation of first publication noted? What would the benefits of such a registration option be, given that applicants will continue to be required to determine whether each work has been published prior to submitting an application? What practical or administrative considerations should the Office take into account in considering this option?**

As discussed above, we strongly urge the Copyright Office to amend its regulations to allow applicants to register unpublished and published works in a single registration, with published works identified as published and the date and nation of first publication noted. In addition to obviating the need for applicants to go back and amend or supplement an application to partition the application into published and unpublished sections as proposed in question 4, and addressing concerns about registrations being invalidated due to misunderstanding whether a work is published or unpublished, making this change would be more cost-effective for applicants without imposing an undue burden on the Office, and improve the ease and efficiency of registration, especially if the Office allows registration through APIs, widgets and/or subscription. Allowing published and unpublished works to be registered together in a single registration would also relieve some of the anxiety surrounding copyright registration for creators who perceive knowing or not knowing the publication status of a work as a “deal breaker.” The fact that published and unpublished works currently cannot be registered together sends the message that the distinction is of paramount importance and causes some creators to avoid the registration process altogether.

6. *[There is no question 6 in the NOI]*

- 7. Is there a need to amend section 409 so that applicants for copyright registrations are no longer required to identify whether a work has been published and/or the date and nation of first publication, or to provide the Register of Copyrights with regulatory authority to alter section 409(8)’s requirement for certain classes of works?**

The requirement to include publication status on a registration application can serve as a burden or even barrier for some copyright owners, particularly visual artists. Addressing that burden could encourage more copyright owners to register their works. We suggest several ways to address this burden in our answers to question 1 regarding additional guidance and in our

answer to questions 4 and 5 regarding group registrations, and take no position at this time regarding whether further changes, such as changes to section 409 may be appropriate.

8. Is there a need for Congress to take additional steps with respect to clarifying the definition of publication in the digital environment? Why or why not? For example, should Congress consider amending the Copyright Act so that a different event, rather than publication, triggers some or all of the consequences that currently flow from a work's publication? If so, how and through what provisions?

We caution against attempts to amend the definition of publication, particularly without an in-depth study on how changing the definition would impact each and every provision of the Copyright Act, as well as Copyright Office practices and regulations, where publication status is directly or indirectly relevant. Any alteration to the definition of publication could inadvertently broaden, narrow or otherwise alter the interpretation of the term and could present new questions or unintended consequences. Even the most clearly articulated definitions and statutory provisions may leave some ambiguities that need to be explained by the courts or the agency that administers the law. In addition, amending the definition of publication could also have the consequence of making online works subject to mandatory deposit with the Library of Congress, which would be unfeasible and unduly burdensome for many creators. As explained in our answers to questions above, we believe there are numerous other ways that the Office can and should clarify the definition without needing to change the statutory language.

There are specific concerns regarding how to apply the current definition of “publication” under 17 USC § 101, particularly in the case of works first made available to the public through online display, and also for individual, high volume creators, such as professional photographers and visual artists. The definition is not always easy to apply in such instances, and we believe the most fruitful avenues for addressing these ambiguities in the definition involve (i) minimizing the harm for inadvertent mistakes on a registration application that fall short of bad faith, as indicated in our responses to questions 4 and 5, and (ii) making it easier and more efficient for applicants to complete the registration application by providing improved guidance, as discussed in our answers to questions 1 and 3.

We’ve considered the possibility of Congress amending the Copyright Act so that a different event, rather than publication, triggers some or all of the consequences that currently

flow from a work's publication but concluded that that approach would lead to more confusion and unintended consequences.

9. The Copyright Office invites comment on any additional considerations it should take into account relating to online publication.

Section 115, which creates a compulsory license for the making and distribution of nondramatic musical works embodied in phonorecords, only applies if a phonorecord of the musical work has "previously been distributed to the public in the United States under the authority of the copyright owner of the work." While eligibility for the Section 115 compulsory license isn't premised on publication, see 17 USC 115(a)(1)(A)(i), the conditions are related closely enough that it should be made clear that no changes to the definition of publication in the statute, regulations or compendium should be read to impact distribution under Section 115. The same is true for Sections 112 and 114. *See* 17 U.S.C. §§ 112(e)(1)(D), 114(d)(2)(C)(vii).

Conclusion

We appreciate the opportunity to submit these comments, and for the Copyright Office's attention to this issue. Please let us know if we can provide additional input or answer any further questions.

Respectfully submitted,

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