BEFORE THE
U.S. COPYRIGHT OFFICE

Online Publication Reply Comments	**Docket No. 2019–7**

COMMENTS OF THE COPYRIGHT ALLIANCE

The Copyright Alliance appreciates the opportunity to respond to comments filed during the initial comment period regarding the U.S. Copyright Office's Notice of Inquiry (NOI) on 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.

Altering the Definition of Publication

We caution against attempts to amend the definition of publication, particularly without an in-depth study on how changing the definition would impact other provisions of the Copyright Act, as well as Copyright Office practices and regulations, where publication status is directly or indirectly relevant. Even the most clearly articulated definitions and statutory provisions often leave some ambiguities that need to be explained by the courts or the agency that administers the law. Consequently, while alterations to the definition of publication may be intended solely to clarify the definition, in reality they could have the effect of inadvertently broadening, narrowing or otherwise altering the interpretation and/or application of the term resulting in unintended consequences. 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 greater detail in our Initial Comments, we believe there are numerous other ways that the Office can clarify how to apply the definition without needing to change the statutory language.[1]

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. Although the specific concerns are valid and need to be addressed, we think the best way to address them is through (i) minimizing the harm for inadvertent mistakes on a registration application that fall short of bad faith,[2] and (ii) making it easier and more efficient for applicants to complete the registration application by providing improved guidance,[3] not by changing the definition.

Assisting Applicants in Determining Publication Status of Online Works

Despite some comments which suggest that the law should presume online works to be published, or that the Copyright Office should take the position that all online works are published—a position that would be antithetical to the existing definition—there is no reason that online works that are mere performances or displays should be treated as published for the sake of convenience. The same is true in response to comments suggesting performances and displays posted on social media should be deemed published based *solely* on the terms of use (which may or may not be enforceable). Suggesting that all works posted online should be treated as published—knowing that, in the digital age, creators who wish to remain competitive in the marketplace *must* post performances and displays online—is simply an attempt to chip away at the protections that have been afforded to unpublished works. While terms of use *may* be an indicator of intent to publish a work or not, online performances and displays should continue to be afforded the same safeguards as traditional performances and displays.

[1] *See* Copyright Alliance, Comment on Notice of Inquiry on the U.S. Copyright Office's Methods of Determining a Work's Publication Status for Registration Purposes 2-3 (March 19, 2020), https://copyrightalliance.org/wp-content/uploads/2020/03/CA-Online-Publication-Comments-FINAL.pdf.
[2] *See id.* at 7-8.
[3] *See id.* at 2-3, 5-7.

The best approach would be to empower creators to better understand and appropriately apply the existing definition. In addition to regulatory guidance, 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, more digestible (e.g. in modern formats like short, illustrated videos, FAQs, virtual chats, etc.), more visible (e.g. highly publicized through social media, Copyright Office presence at events frequented by these applicants and other means) and more easily understood, as discussed in greater detail in our Initial Comments.[4]

Copyright Owner's Authorization for Others to Distribute or Reproduce a Work That Is Posted Online

One comment posits that online works that lack technological constraints to download or redistribute should constitute publication. This interpretation would suggest that works posted online are, by default, published, absent some affirmative act by the rights holder to demonstrate otherwise. However, the act of displaying or performing a work does not amount to a grant of permission to distribute or reproduce the work—whether online or offline. Therefore, unless the copyright owner authorizes others to distribute or reproduce the work *expressly* or through some *affirmative act*, the work should be treated as a mere display or performance and thus, not a publication. The only difference between the online and offline context is that the internet lends itself more easily to unauthorized reproductions and distributions. However, the mere fact that electronic performances and displays may be more susceptible to *unauthorized* uses (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." In fact, greater susceptibility to infringement online is good reason to strengthen copyright protection, not force copyright owners to give up certain rights and protections.

Another comment suggests that works that use public licenses (such as Creative Commons licenses) should always be considered published "notwithstanding [digital rights management (DRM) or technological protection measures (TPMs) or other measures that may be used in connection with sharing the work." Of course, this would depend on the scope and enforceability of the license. However, as a general matter, use of DRM and TPMs in an online environment in a

[4] *See id.* at 2.

manner intended to prevent or control copying, distribution, performance or display should be a clear signal that the copyright owner has not authorized such use of the work and thus not published the work online.

Satisfying 409 by Allowing Applicants to Designate Work as "Published Online"

The NOI asks about "allow[ing] copyright applicants to satisfy the registration requirements of section 409 by indicating that a work has been published 'online'." In light of the difficulty individual creators and small businesses face in applying the definition of publication, and the draconian effects of failing to correctly identifying a published work, the "published online" proposal may be beneficial. If the Office chooses to implement such a change, it should be optional, meaning that an 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 of the work's legal publication status. Paired with additional guidance to assist applicants in answering the publication question on the application, this could further help alleviate existing confusion and give creators the *option* to voluntarily waive the benefits under the law associated with an unpublished work (rather than forcing that on them by, for example, declaring all online works published).

Conclusion

We appreciate the opportunity to comment on this important issue, and to respond to other comments. Please let us know if we can provide additional input or answer any further questions.

Respectfully submitted,

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