BEFORE
U.S. COPYRIGHT OFFICE

Request for Comments: **Deferred Registration Examination**	**Docket No. 2021-7**

COMMENTS OF THE COPYRIGHT ALLIANCE

The Copyright Alliance appreciates the opportunity to submit comments responding to the questions raised in the Notice of Inquiry (NOI) published in the Federal Register on December 10, 2021, regarding the Copyright Office's public study to evaluate the merits of providing an option to defer examination of copyright registration application materials until a later request by the applicant (i.e., deferred examination option).

The Copyright Alliance is a non-profit, non-partisan public interest and educational organizationrepresenting 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 thecreation and distribution of new copyrighted works for the public to enjoy.

A. PURPOSE OF DEFERRED EXAMINATION OPTION

1. What specific perceived deficiencies in the current registration regime could a deferred examination option address?

While the current copyright registration regime has worked well in general, it is not without its deficiencies. Some of these deficiencies include an inability to register dynamic website content, the lack of a group registration option for illustrations, the limitation of 750 photographs for a group registration for photographs, and the requirement (under the Supreme Court's *Fourth Estate* decision) that the Office issue or reject a copyright registration application before a copyright owner can bring suit in federal court. None of these deficiencies would be addressed by deferred examination option.

One perceived deficiency with the current registration regime is that the registration system is too costly for individual creators and small businesses, as well as for creators that produce large volumes of copyrighted works. One of the primary reasons creators decide not to register their copyrighted works with the Copyright Office is the expense of registration[1] combined with a perception that the expense outweighs the benefits.[2] 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 cannot afford the expense of registering every work they create. It's often also difficult for them to predict which of their works will have enough value or have the potential to be infringed to warrant going through the full registration application process, 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.[3] Quite

[1] Copyright Alliance, *Copyright Registration Fee Survey* (2018). Of those creators who reported having not filed a copyright registration application with the U.S. Copyright Office within the five years before the survey, 37% said that they have not done so because "it's too expensive."

[2] Another 24% of those surveyed said they have not registered because "It's not worth it since I can't afford to sue for infringement anyway." That was the second most popular choice, behind "It's too expensive." *See id.*

[3] Of course, the new Copyright Claims Board (CCB) created by the CASE Act will give them an alternative to federal court, but CCB participation is voluntary.

simply, for these individual creators and small businesses, 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 applications and registrations, because the cost to the Copyright Office to examine an application exceeds the amount recovered by the Office from the application filing fee, the Copyright Office is reliant on congressional appropriations to cover the difference. As a result, the more registration applications the Office receives, the more money it needs from Congress. For example, if the Copyright Office were to double the number of registration applications it receives annually from roughly a half million to a million, on the one hand the Office would be triumphantly achieving its registration goals—which would obviously be a great thing—but on the other hand, its expenses would rise steeply, and it would be in need of a congressional bail out. Any changes the Office makes under the existing system to increase the number of registrations will have a negative impact on the Office's budget and require additional appropriations from Congress[4] unless the Office does not examine these additional applications or it otherwise finds a way to lower its examination costs. To some extent, the Office has taken steps to address concerns with the expense of registration over the years, for example, through new group registration options, but these changes have increased the Offices expenses. Thus, the best way to solve *both* the Office's budgetary issues and concerns over the expense of registration is through a Deferred Examination Application (DEA) system as we propose in our answer to question three, below.

To be clear, there is certainly more that can be done to address concerns relating to expense of registration and to increase registrations beyond just a DEA option. In addition to the deferred examination option, some other solutions that come immediately to mind are creation of an annual subscription, API access, and small entity fees—all of which we have previously recommended to the Office.

[4] The "Office has traditionally recovered approximately 60% of its costs through fees; the remainder is provided through appropriated dollars from the U.S. treasury." Copyright Office Fees, 83 Fed. Reg. 24,054-01, 24,5055 (May 24, 2018) (codified at 37 C.F.R. pt. 201).

The DEA system not only would help creators by lowering fees, but it would also help them determine what to register. When copyright registration becomes too expensive copyright owners are forced to guess which of their works are most valuable or most likely to be infringed and then register works that meet that criteria—to the extent they can afford it. That determination is often very time consuming and difficult. And (as discussed in more detail in our answer to question nine, below), sometimes it is impossible to know whether a particular copyrighted work has enough value or is likely to be infringed until many years after its creation.

A properly implemented deferred examination system (in which the fees to file a deferred application are much less than the current fees for the same type of filing) would likely encourage copyright owners to file copyright applications on more of their works not only because it reduces their "per work" cost to file[5] but also because, importantly, they would not need to make an immediate determination regarding which works to request to be examined until a much later date, when they should have a better idea which of their works will be most valuable or most likely to be infringed.

By only examining a portion of the applications the Office receives, the DEA system would help achieve the goals of increasing the number of copyright applications, lowering expenses for creators, providing creators with more time to decide what they want to register without penalizing them, and reducing the negative impact the Office's budget (since the Office will not incur the additional expense of examination for deferred examination applications and can charge a conversion fee for those DEAs that are eventually examined).

2. What are the potential benefits and drawbacks to offering a deferred examination option? Responses should consider the positive and negative effects on both copyright owners and

[5] Group registration also reduces the "per work" cost to register, but group registration is expensive for the Copyright Office to implement because it takes much more of the examiner's time to examine each work in the group and the group registration fee pays less of the Office's expenses that an equivalent fee for an application for a single work. The deferred examination system achieves the similar goal—of reducing the applicant's "per work" cost to register—but does it in a much more efficient way and, unlike group registration, is not more expensive for the Copyright Office to implement. In fact, as discussed later in these comments, its actually less expense for the Office to implement because there is no initial examination cost.

users, as well as on the registration system itself, and should include any empirical data or other evidence relevant to your assertions. Responses should also consider whether, or to what extent, a deferred examination option might either further or impede the purposes of registration.

There are at least three problems that the DEA 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.[6] This is especially true for works that can be registered in groups, like photographs, which are more likely to be filed by individual creators and small businesses. 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 DEA were permitted, the Office could set the fee for a DEA to approximate the cost of the initial processing of 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 five 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). Despite increases in the number of creators, smaller rights holders are not registering as frequently (or at all) because they cannot afford to and see little value in registering their copyrighted works.[7] The DEA option will help incentivize those who want to register but cannot afford to do so under the existing system. And when combined with other changes that the Office could make, could lead to a dramatic increase in the number of applications the Office receives. For example, the subscription model—which would increase the number of works and number of creators

[6] Copyright Office Fees, 83 Fed. Reg. at 24,5057 *https://www.govinfo.gov/content/pkg/FR-2018-05-24/pdf/2018-11095.pdf*.

[7] Because registration plays an important role in creators' ability to enforce their copyrights against infringement, this also means that wealthy organizations and other high-earning creators are afforded greater privilege within the copyright system than low-income creators and creators from marginalized backgrounds who are unable to enforce their copyrights because of their inability to afford registration.

applying for copyright on a regular basis—could be more agile and affordable with the availability of DEA.

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 and inaccurate, as they predominantly and disproportionately reflect the contributions of corporate entities and other high-earning creators, to the exclusion of contributions from low-income creators and creators from marginalized backgrounds.[8] 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.

If implemented as we suggest in these comments (see our responses to question three and the questions that follow), there can be numerous benefits to the deferred examination system. These benefits include:

- Increase in applications 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;

- Increases in applications resulting from DEA would make the public record more comprehensive, which will benefit archivists, historians, researchers, and others, and would more accurately reflect the creative community;

[8] Because only registered works are included in the public record, when someone is looking to license a copyrighted work and accesses the public record to do so, they are much more likely to find the works of wealthy organizations and other high-earning creators who can afford to register their works than low-income creators and creators from marginalized backgrounds who cannot. This creates an even playing field.

- Increases in applications resulting from DEA would increase the number of deposits for the Library to add to its collections;

- Registration processing times (*i.e.*, pendency) should decrease or at the very least stay the same.[9] 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 DEAs are not being examined, at worse, they should have no effect on pendency, and at best, may actually lower pendency because there are fewer requests for examination and thus fewer applications to examine;

- It will be easier for the Copyright Office to balance its budget by allowing the Office to use congressional appropriations on modernization, improving the database or other projects or 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 increased 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 DEA option would lower the amount that needs to be offset and thereby (hopefully) lower other application fees because they would no longer need to be artificially inflated;

- It would further the purposes of registration by making it easier and more cost effective – which will lead to better understanding of the value of copyright by smaller creators who could not afford to register their works.

[9] This assumes the Office does not reduce the examination staff or take other steps that increase pendency. See our response to question 18 for more details.

If implemented correctly, we do not envision any significant drawbacks to owners or users. That is not to say that there would not be any complications that will arise if and when a DEA option is implemented by the Office. As is the case with any significant change to a well-known process, it will take some time for applicants and others to understand it, which may lead to initial confusion. But that's not a reason not to do it. Instead, it's a reason to invest in education. In this regard, the DEA system is not unlike the provisional patent application system created by the U.S. Patent and Trademark Office (USPTO). No doubt, there was some confusion by inventors and others when the provisional patent application was first implemented, but that did not prevent the USPTO from implementing what is now, years later a very effective and well-known system.

Some groups might voice concerns that the public record might be inaccurate because there will be a mix of DEAs and registrations in the Office's database. As discussed more fully below, those concerns can easily be addressed during implementation. For example, there could be two separate databases and/or the type of application (DEA vs. traditional) could be clearly and conspicuously stated on the record itself to avoid confusion.

B. PROCEDURAL ISSUES

3. If you are advocating for a deferred examination option, describe the specific legal or regulatory framework you envision. Would any statutory amendments be necessary?

The legal framework that the Copyright Alliance is proposing would work as follows:

If the deferred examination system is implemented as we propose, it would result in their being two general categories of applications:

> (1) applications that will be examined by the Office after the initial intake process is completed by the Office and without the applicant needing to make a specific request for the examination to take place (*i.e.*, a traditional application); and

(2) applications that will not be examined by the Office after the initial intake process is completed by the Office unless and until the applicant makes a specific request for the examination to take place and complies with any other requirements imposed by the Office (*e.g.*, pays the fee, reviews and updates the application, certifies the accuracy and currentness of the information in the application) (*i.e.*, a deferred examination application (DEA)).

This first type of application is the application that we have today, and our DEA proposal would not change these traditional applications at all. Applications in which the examination is deferred would be a completely new type of application. Like all applications, because DEAs are not registrations, they would not get any of the statutory benefits of registration provided in sections 410 through 412 of title 17. The main benefits of these applications are that (i) they are much less expensive to apply for, and (ii) they give the copyright owner more time to decide which if their copyrighted works to pay the additional expense to get examined and registered.

A DEA would be identical to a traditional application in all ways except: (i) a DEA would not be examined by the Copyright Office unless examination is requested by the applicant; (ii) the fee associated with the DEA would be significantly less than the fee for a similar traditional application; (iii) an extra deposit copy must be provided; and (iv) the deposit copy must be in electronic/digital form. If a rights holder wants to bring an infringement suit in federal court for a work that is subject of a DEA, the rights holder would have to first convert the DEA to a traditional application by requesting examination of the DEA and then wait until the Office issues a registration certificate.[10] The rights holder would have to pay a conversion fee to do so (these fees ae discussed in more detail in our answer to question six, below).

The effective date of registration is the date that the DEA was filed, not when the request was made to examine the DEA and convert it into a traditional registration. If a request to examine the DEA is not made within a specific period of time, the applicant would lose the ability to claim the effective date of registration as the DEA filing date. We propose that time be 50 years

[10] See our response to question 14 for more detail on this.

(see answer to question nine for more on this). Once converted and a certificate is issued by the Office, registrations that began as DEAs would be treated the same as a traditional registration, which means generally they would be eligible to obtain the benefits provided for in sections 410 through 412 of title 17.

The DEA would require the same three elements required of a traditional registration application. Two differences are that the deposit copies must be in digital form and that the applicant must provide an additional copy. One of these deposit copies would be made available to the library immediately for inclusion in the Library's collections if so selected. (More details on the deposit copy issues are provided in our response to questions 9 and 13) Information in a DEA application would be included in a DEA database that would clearly explain to any user of the database the differences between a DEA and a traditional application and registration (more details on the information issues are provided in our response to questions 10-12).

Amendments to the law might be needed to accommodate a DEA system but we do not think amendments would be necessary because the law does not state whether, when or how long the Office must take to examine a copyright registration application (and we are not proposing that the DEA would be availed of any benefits of registration unless/until the work is examined and registration granted).[11] If the Office determines that amendments are necessary, we do not think those amendments would be extensive. The sections of the law most relevant to this inquiry are:

- Section 408(b) might need to be amended to reflect the additional deposit requirement for a DEA. However, since the additional copy would be provided to the Library for its collections and the Office has discretion to regulate this area, this might be able to be fully addressed in the Office's regulations.

- Section 704(d) might need to be amended to ensure that the Office does not destroy a DEA deposit copy before a timely request for examination of the DEA is made. However, since the Library and Copyright Office are given discretion to

[11] Section 410(a) states what the Office must do after an examination occurs, but not while the application is pending.

determine if and when published deposit copies are destroyed this can likely be addressed in regulations.

4. ***Should a deferred examination option have any work-based, applicant based, or other eligibility restrictions? For example, should the availability of the option depend on whether the work belongs to a specific class of works (e.g., photographs), is published or unpublished, and/or is deposited in physical or electronic form?***

There should be no eligibility restrictions. The DEA option should be available to all copyright owners and all types of copyrighted works regardless of the class of work or whether the work is published or unpublished.

As noted elsewhere in our comments, the deposit copy that accompanies a DEA must be in electronic (*i.e.*, digital) form. In our view that is a requirement to participate in the DEA system that is imposed to account for concerns relating to storage, the Library collections, potential examination of the deposit copy, and operational efficiency. It is not an eligibility restriction.

5. ***How should deferred examination operate in connection with an application to register multiple works?***

By "an application to register multiple works" we assume this question refers to group registration applications (*e.g.,* for photographs and short online literary works) and applications to register collective works (in which the individual works within that collective work are covered by a single application). These types of applications should be available for DEAs just as they are presently available for traditional applications.

The one exception would be the 750 limitation for a group registration of photographs. That limitation was put in place because the Copyright Office deemed it too costly to examine more than 750 photographs in one group registration application in comparison to the fee it collects for

that application. Because the photographs in a DEA group would not be examined, the justification for the 750 photographs limit would not seem to be applicable to a DEA group registration.

When a DEA group registration is converted to a traditional group registration, the Office could charge a fee that is based on the number (or percentage) of works in the group that are being requested to be examined. For example, if a photographer were to include 500 photographs in a DEA and then later request that a number of those 500 be examined, the Office could charge one (small) fee if the number is between 1-50 and a different (larger) fee if the number is 50 or more.[12] This approach reflects the fact that: (i) given more time to determine the value of their works and the likelihood of infringement, copyright owners should be in a better position to determine which of the works in the group registration they want to secure the benefits of sections 410-412 for and should be more willing to pay the conversion fee for those works; (ii) if the copyright owner wanted a traditional registration for all or most of its works it would been more cost effective for them to have used a traditional group application, not the DEA option; and (iii) the examination costs for a group registration are higher than for other applications du ethe the sheer volume of works being examined for one fee.

6. How should the filing fees be determined for a deferred examination option, including both for the initial submission and later examination, and how should they compare with fees where examination is not deferred?

It is essential that the filing fee for a DEA be lower than the fee for a traditional application in order to encourage the filing of registration applications and because it should reflect the fact that the Copyright Office's costs are significantly less since the application is not being examined.

[12] For group registrations, we do not think that it should be an all or nothing choice. Allowing the applicant to choose which works within a group registration that she wants to have examined will be more efficient and cost effective for the Office because it is less expensive and time consuming for the Office to examine a small percentage of the works in a group registration rather than every work in the group registration. This efficiency and cost savings can be passed on to the applicant by charging a lower conversion fee.

The DEA fee could better approximate the actual costs of the DEA application process than is presently the case with traditional applications.

When a copyright owner requests that a DEA be examined, the Office should charge a conversion fee. The conversion fee should also be smaller than the fee for a traditional application because (i) the Office has already received the DEA fee and (ii) the Copyright Office's costs are significantly less (than a traditional application) because it only needs to examine the DEA for copyrightability and other legal and formal requirements and then issue a registration certificate because the other steps that comprise the registration process would have already been completed by the Office when the DEA was first filed. The conversion fee that is charged by the Office would be the conversion fee in effect at the time the examination is requested; not the conversion fee in effect at the time the DEA is initial submitted. For example, if the conversion fee is $40 at the time the DEA is submitted but is $50 ten years later when the examination is requested, the copyright owner would pay $50. Of course, we anticipate that this might lead to lots of requests for examinations of DEAs between the time that the Office announces any fee increases and the time that the fee increase goes into effect. We think this is a good thing because it will naturally prompt DEA applicants to reconsider their portfolios in order to take advantage of the lower fee. Similarly, if the Office were to implement a small entity fee but that fee was not made available until after a DEA is filed, an eligible copyright owner should be able to take advantage of the small entity fee when it makes its request for examination of the DEA.

The *sum* of the initial DEA filing fee and the conversion fee will likely be higher than the fee for a traditional application. The higher combined fee would help the Office come closer to offsetting the Office's actual costs of registration. For example, the fee for a single application is $45.[13] Using the numbers from the Booz Allen Hamilton 2017 Fee Study,[14] the "calculated

[13] To be clear, the reference here is to a single application (which requires there be a single author, the same claimant, only one work, and that he work not be a work made for hire), and not the standard application. Although the same example could apply similarly to a standard or other type of application by changjng the fees accordingly.

[14] Booz Allen Hamilton, *2017 Fee Study Report,* U.S. Copyright Office (2018), https://www.copyright.gov/rulemaking/feestudy2018/fee_study_report.pdf

transaction cost" for a single application is $86. That means that for every single application filed, the Office runs a deficit of $41. The report assumed a volume of 130,710 (single) applications filed (based on the $45 fee). Based on that number, the Office's annual deficit would be $5,359,110 (*i.e.,* $41 x 130,710).

Now consider the same example, but adding the DEA option into the calculations. If we assume the cost of the DEA is $25 for a single application (which is a little more than half the existing fee) and the conversion fee is $35, the total fee to register that work in a single application would be $60. Using the $86 transactional cost from the 2017 study, the Office deficit is $26 per application, instead of $41. And if we use the same volume assumption of 130,710, the annual deficit is $3,398,460, instead of $5,359,110. In other words, the DEA model lowers the Office's deficit by close to $2 million.

Of course, these numbers assume that: (i) there would be the same number of DEAs as traditional applications—but in reality, there will likely be more DEAs since they will be much less expensive to file; and (ii) that every DEA will be converted into a traditional registration, which is unlikely to be the case. So, to get a more accurate picture, let's assume that there would be 200,000 single application DEAs, 100,000 of which are converted. In this scenario, the Office would collect $5 million (*i.e.*, 200,000 x $25) in DEA fees and $3.5 million ($100,000 x $35) in conversion fees, for a total fee collection of $8.5 million, which is over $2.5 million more than the $5,881,950 the Office collects in the existing system.

Copyright owners would be willing to pay the larger per work fees because while they will be paying more for certain works to be registered, their total expenditure would be lower. In addition, presumably copyright owners will be willing to pay more to register these works since they have determined that they have commercial value that they deem worthy of the monetary investment. For example, let's assume a copyright owner today files 10 single applications at a cost of $45 each for a total cost of $450. Now assume that under the DEA system the same copyright owner files 10 DEAs for a cost of $25 each or a total cost of $250, and then decides to request examination on 4 of the 10 at a conversion cost of $35 each, or a total conversion cost of $140. Adding the DEA filing fee of $250 and the conversion cost of $140, results in the

copyright owner expending $390. Thus, although copyright owners are paying more on a per work basis, their total costs are less because they are only pursuing the works that are most valuable to them. Of course, at some point (in this example, its between 60-70%) it does make more sense from a cost perspective to file a traditional application. But in our view that is exactly how the process should work.

7. ***Should applications for deferred examination undergo any kind of initial review (e.g., to verify the accuracy of the filing fee, that the application is complete, that the deposit is in the correct form, etc.)?***

Yes, applications for deferred examination should undergo an initial review. The initial review of a DEA should be identical to the intake review of a traditional application that takes place today.[15] It is our understanding that when a traditional application is submitted today before the application is forwarded to an examiner the Office reviews the application to ensure that:

- the application is complete (*i.e.*, all the necessary information is provided);
- the application is signed by the applicant;
- the proper fee is included; and
- a deposit copy is included, that it is in the proper form, and that it matches the subject of the application (*e.g.*, if a book is the subject of the application that the deposit copy is a book and not a photo or film).

[15] We believe that at least part of this initial review takes place within what was formerly known as the Receipt, Analysis, and Control Division (RACD), and was renamed during the 2021 re-organization and is now known as the Materials Control and Analysis Division (MCA). See *Copyright Claims Applications: The Role of the In-Processing Section of the Copyright Office*, Smithsonian Office of Policy & Analysis (November 2009*)*, https://soar.si.edu/sites/default/files/reports/09.11.locrac.final.pdf"; U.S. Copyright Office FOIA Requester Service Center, *U.S. Copyright Office employee-only Intranet home page and connected web pages* (July, 31 2017), https://www.governmentattic.org/24docs/CopyrightOfcIntranetPages_2017.pdf ("The Receipt Analysis and Control Division's mission is to support and sustain the nation's Copyright registration and recordation system by effectively managing the initial receipt and processing of registrations and other service requests; deposit copies, and to employ fiscal integrity and accountability of payments."); Technical Amendments Regarding the Copyright Office's Organizational Structure, 86 Fed. Reg. 32640-02 (June 22, 2021) (codified at pts. 201–03, 210, 370).
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It is our further understanding that once the application is approved by those in the Office who are responsible for the initial review and is then forwarded to the examiner, the examiner's primary responsibilities are to ensure that: (i) the application is completed correctly; and (ii) the work is satisfies originality requirements. In both instances, the examiner does not undertake any independent investigation. So, for example, the examiner will not search the Copyright Office records, the internet or *other* resources to determine if an identical work has already been registered or if the work is a copy but may compare the copyright notice on the deposit copy of the work to the information contained in the application. Perhaps, some of the work presently done by the examiner could be done during the intake process but (if our understanding of the division of labor between the examiner and the intake process is correct) we think that is unlikely and unnecessary.

It is our understanding that the present filing fee more than covers the Copyright Office's expenses associated with the intake process/review (but not the examination process). If this is correct, the fee for a deferred examination application could be significantly lower than the present registration fee while also still offsetting the cost to the Copyright Office of the intake process. As a result, any increase or decrease in the number of deferred examination applications would not adversely affect the Copyright Office operating budget.

8. Who should be permitted to request examination of a deferred examination application package? For example, should such a request be limited to an author or copyright owner, or should other interested parties also be permitted to request examination?

The only people who should have the right to request an examination of a DEA are: (i) the person who filed the DEA with the Office ("the DEA applicant"); (ii) the applicant's agent (if any); (iii) the copyright owner identified in the application and any party that owns an exclusive right to the work; and (iv) the DEA applicant's successor in interest. For example, in the event the DEA applicant dies before a request is made, an heir could make the request. An exclusive licensee would also have the right to make the request so that they can bring a copyright infringement suit if necessary.

We do not believe that any interested party beyond those listed in the above paragraph should be allowed to request an examination of the DEA. Today, copyright protection exists whether or not a registration is ever submitted. The Office does not allow a third party to request that the Office examine a copyrighted work. The DEA does not afford any rights beyond those that exist in a non-registered copyright so there is no reason that third parties should be allowed to request that a DEA be examined.

9. ***Should there be a time limit for requesting examination (e.g., one year)? If so, what should be the ramifications of failing to request examination within the prescribed period? Responses should consider the implications for the Office's administration of the registration system, including the retention and storage of deposits and other application materials, as well as the governing principles that should apply to an eventual examination.***

The time limit for requesting examination should be 50 years. The ramifications of failing to request an examination within that time are that the DEA could no longer claim the effective date of registration (EDR) and thus could not be eligible for the benefits of sections 410-412.

The reason we selected 50 years is that often times the value of a copyrighted work may not be realized until many years in the future or the end of a creator's career or life. For example, John Doe, a professional photographer, is hired to take photographs at an event in which sixteen-year-old Jake Savage is performing. Savage toils in obscurity for much of his life but at age 40 he decides to revisit his passion of singing. He appears in and wins a hugely popular reality singing contest and becomes an "overnight" success. The public is hungry for anything relating to Jake Savage. At this time, Doe realized that he took photographs of Savage years ago and lucky for him he filed a DEA right afterwards. Doe requests an examination of the DEA so that he can protect himself against infringements (which he knows are sure to ensue given the "Jake Savage craze") as he seeks to license these works.

We understand that 50 years is a long time, but it is also a reasonable amount of time given the purpose of the DEA system. We also understand that 50 years may be a long time to ask the Office to retain the application and deposit materials in a manner that they can easily be accessed by the Office when a DEA examination request is made and that for any DEA system to be successful it must effectively address this burden on the Office. One way to address the storage concerns would be to require that the deposit copies be in electronic/digital form. It will be much easier and less expensive to store and retrieve applications and works that are in digital form. If necessary—in order to ensure the Office adopts a 50-year time limit—costs associated with such storage could be accounted for in determining what the appropriate conversion fee is. For example, either (i) the conversion fee could be based on the length of time between with DEA filing and the examination request, whereby the conversion fee increases the longer it takes to make the examination request; or (ii) a fee could be imposed after a period of years (*e.g.*, 30 years after the DEA was filed with the Office, the DEA applicant could be required to pay a small fee for the Office to retain the application and deposit copy for the remaining 20 years).

10. How, if at all, should a deferred examination option account for any changes in the required application information that occur between submission and examination (e.g., a change in ownership or publication status)?

At the time that a request to examine the application and convert it to a traditional application is made, the requester (*i.e.*, the applicant or other person identify in our response to question eight) should be responsible for reviewing the DEA for accuracy and currentness and be responsible for updating and correcting the DEA as necessary. These updates should include updates necessitated by changes in: (i) the information that the DEA applicant included in the DEA, such as changes in ownership information; (ii) the information requested in the application form; and (iii) the law or regulations.[16] For example, if (sometime after the DEA was submitted) the Copyright Office began asking for demographic information, like race and gender—information that we encourage the Copyright Office to begin requesting applicants to voluntarily include in

[16] If it's not too difficult or costly, the Office could routinely inform all DEA applicants (by email) of changes in application requirements as they occur so that they are aware of them after their submissions are made.

applications—then the applicant would need to provide any non-voluntary information and could add any voluntary information when they requested the conversion. Another example might be if the definition or application of the term "work made for hire" is changed (by the courts or Congress) after the DEA submitted, the applicant would be responsible for updating the application, if necessary, to reflect this change. The applicant should be required to review all the information in the (updated) application and re-certify to its accuracy at the time the conversion is requested.

The one exception to the requirement to update the information in the DEA application should be updating the publication status. DEA applicants should be required to correct any errors in the publication status made at the time of the original application. However, unless and until Congress and/or the Copyright Office fixes the problems associated with determining publication status in a registration (as we detail in previous comments submitted to the Office), the DEA applicant should not be required to update the publication status when requesting an examination for the purposes of converting the DEA to a traditional registration. To decide otherwise would exacerbate the many problems with determining publication status not just over a few years but for as long as the DEA is pending.

11. How, if at all, should any deficiencies in the application materials discovered during examination be addressed with respect to the EDR and the current requirements of section 410?

We believe that, absent a showing of fraud, a deficiency in the applicational materials should not impact EDR—regardless of whether the application is a DEA or a traditional application. In both instances the applicant should be able to cure the error without effecting the EDR. Today, an inaccuracy in the application information may cause the Office to reject the application and the applicant to re-file. When that happens, the applicant will lose their original EDR. With a traditional application the applicant may still have time to re-file in time and get an EDR that allows them to claim some or all of the benefits of section 410-412. But with a DEA, if the applicant defers examination for too long, they may not have time to re-file in time to get an

EDR in which they can avail themselves of these benefits. That is an unduly harsh result and highlights the reason why the standard must be changed across the board.

It is our hope and belief that the new electronic registration system will significantly reduce the number of deficiencies contained in registration applications. We also hope that the Office, and to the extent necessary Congress, will address problems with the impact of getting the definition of "publication" incorrect in an application—as that is the primary "deficiency" found in application materials. Ultimately, the solution is to make the application process (regardless of the type of application) easier to understand and harder to trip over the requirements. The DEA system provides the Office with a great opportunity to review the whole system with the aim of achieving this goal.

C. IMPACT

12. How, if at all, would a deferred examination option affect the public records maintained by the Office? For example, should information about a work submitted for registration using a deferred examination option be indexed into the public catalog prior to the claim being examined and registered? What are the potential benefits and drawbacks to such an approach? For example, how, if at all, may it affect the integrity and reliability of the public record?

Our response to this question is contingent on how the Office chooses to answer question nine, above, regarding whether there is a time limit for requesting examination and if so, what that limit is. If the Office limits the time to one to three years, we do not think the DEA information should be made publicly available.

If the time limit chosen by the Office for a DEA is close to application pendency for traditional applications, DEAs should be treated like traditional applications as much as possible. Presently, the Office does not make information in a traditional application public unless and until that application matures into a registration. In the past, average registration processing times (*i.e.*,

registration pendency) for traditional registration applications has been as long as about ten months. During that time the information in these pending applications was not made publicly available by the Office presumably because it made little sense to do so when the application would be registered soon enough and at that time the information would be made available to the public and there was more certainly that the information was correct. The same rationale would seem to apply to DEAs that have a short time limit. Therefore, if the Office limits the time to one to three years, we do not think the DEA information should be made publicly available.

On the other hand, if there is no time limit or the time limit is a decade or more, then making the information in a DEA publicly available makes more sense because it more closely resembles a traditional *registration* (albeit one that is not examined) rather than a traditional *application solely in the context of considering the rationale for making the information publicly available*.

There are several benefits to making the information in a DEA publicly available. These include:

- Since many of the works may never have been registered under the existing system, having a database of DEA information would help address orphan work concerns;

- Having a database of DEA information would enable potential licensees to search the database and contact copyright owners to attempt to license their works; and

- Having a database of DEA information would be invaluable to archivists, historians, researchers and others who otherwise might never be able to locate the information contained in the DEA database.

If DEA information is made publicly available, it is essential that it be done correctly to avoid any confusion with traditional registration information. Because information in a DEA is not examined there is greater chance that some of the information contained in a DEA may be incorrect. For that reason, we think that there should be two databases: one for traditional registrations and one for DEAs. The databases could be linked so that if a DEA graduates to be a

traditional registration a link between the DEA and the traditional registration can be made between the databases. The DEA database should very clearly explain the differences between a DEA and a traditional registration. That difference should be noted whenever someone accesses the DEA database and whenever someone pulls up a particular record in the DEA database. In noting the difference, the Office should make clear that because DEA are not examined the information contained in the database is not as reliable as information the existing public database of traditional registrations.

If the Office chooses to ignore this recommendation and instead intermingles DEAs and traditional registrations in the same database, we think the integrity and reliability of the existing database could be impaired. We therefore strongly urge the separation of the databases, but if the Office chooses to combine them, we urge that even more precautions be taken to distinguish DEAs and traditional registrations due to the greater likelihood of confusion by those accessing the database.

The Office should also take steps to ensure that DEAs are not confused with traditional registrations when they are referenced outside the context of the database, such is in contracts or cease and desist letters. One possible way to do this would be for the Office to assign a unique serial number to a DEA—one that looks very different then the serial number assigned to a traditional application or a traditional registration. For example, the DEA serial number could include a unique letter or combinations of letters, the month and year the DEA was filed (which will help others to determine if the time limit has lapsed without doing any outside research) and other numbers that comprise the serial number, such that when someone is referencing a DEA it is clear that it is a DEA and not a traditional registration merely by seeing the serial number. If the steps outlined here (and others) are taken to clearly distinguish DEAs and traditional registrations, we do not see any drawbacks to making the information publicly available.

13. How, if at all, might a deferred examination option affect the ability of the Library of Congress to maintain and grow its collections? For example, should a work submitted for registration using a deferred examination option when the claim has not yet been

examined and registered be eligible for selection for the Library's collections? What are the potential benefits and drawbacks to such an approach?

A DEA application should include the same elements required of a traditional application: (i) a completed and signed application; (ii) a fee; and (iii) deposit copy (or copies).

Our response to the question about potential availability of the deposit copy to the Librarian is contingent on how the Office chooses to answer question nine regarding whether there is a time limit for requesting examination and if so, what that limit is. Similar to our analysis regarding application information in question twelve, if the Office limits the time to one to three years, we think the DEA deposit copy should be eligible for selection into the Library's collections to the same extent and at the same time as a deposit copy that is included in a traditional application. It is our understand that presently, the deposit copy is not eligible for selection into the Library's collection until after the Office completes its examination of the application and issues a registration. In the past, average pendency for traditional registration applications has been as long as ten months. During that time the deposit copy was not eligible for selection into the Library's collection because it made little sense to do so when the application would be registered soon enough, at which time the deposit copy would be eligible. That process enables the Office to examine the copy and then, after the Office has completed its examination, to transfer the copy or copies to the Library if the copy is selected by the Library. The same rationale would seem to apply to DEAs that have a short time limit. Therefore, if the Office limits the time to one to three years, we do not think the DEA deposit copy should be eligible for selection to the Library's collection until after the Office completes its examination.

On the other hand, if there is no time limit or the time limit is a decade or more, then making the deposit copy readily available to the Library makes more sense because it more closely resembles a traditional registration (albeit one that is not examined) and the Library should not have to wait to see if a request to examine the DEA is made in order to select the deposit copy for its collections.

There are several benefits to making the DEA deposit copy eligible for selection into the Library's collections. One of the main benefits of the deferred examination system would be to improve the Library's collections. Because this new DEA system should lead to many more applications being filed (by virtue of the lower fee) and thus more deposit copies, the Library should have access to many more deposit copies then it presently has, which in turn should help the Library to exponential increase its collections at no additional cost to the Library, the Copyright Office or taxpayers.[17]

There is one potential drawback, but we think that can easily be addressed. It is our understanding that presently the Office does not make the deposit copy available to the Library until after the examination process has been completed because until that time, the Office needs the copy so it can examine it. But if the deposit copy included with a DEA is selected by the Library and a request is subsequently made to examine the DEA, the Library will have the deposit copy (or copies), not the Copyright Office, and therefore the examiner will not have a copy to examine. This is easily addressed by (i) (as already stated in our answer to question nine) requiring that deposit copies that accompany a DEA be in digital form so they can be easily stored and accessed; and (ii) requiring that one additional deposit copy be provided to the Office than is presently required (*e.g.*, if the Office regulations requires two copies, the DEA applicant must provide three copies). The providing of an additional deposit copy in digital form should not be a significant burden for most DEA applicants, but for those whom it is burdensome on, in lieu of providing multiple deposit copies, the Office can give them the option to check a box on the registration form to indicate that they authorize the Copyright Office or the Library of Congress to make one or more copies of the deposit copy for the sole purpose of satisfying the deposit requirements in sections 407 and 408 of the Copyright Act.

Lastly, although it was not asked, we want to respond to the related question—to what extent the DEA deposit copy should be made available to third parties by the Office. It is our understanding that presently the Office access to deposit copies is limited to litigants and potential litigants and

[17] The DEA system may actually reduce the Library's acquisition costs because it might not be as reliant on making demands for works under section 407.

that they can only access the copy at the Office and under strict restrictions. The same processes and rules ought to apply to DEA deposit copies.

14. How, if at all, might a deferred examination option affect the ability to bring suit in light of the Supreme Court's decision in Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC? For example, should a later request for examination be sufficient to bring suit? What are the potential benefits and drawbacks to such an approach?

In *Fourth Estate* the Supreme Court held that the applications need to be examined and the Office needs to then render a decision on issuance of the registration application before a copyright owner can bring suit in federal court. Although we do think the Copyright Act should be amended to address the problem created by the *Fourth Estate* decision, the deferred examination process would not do anything to address this problem. Because a DEA is not examined and a decision on registrability is not rendered by the Office, a DEA would not enable the copyright owner to bring suit in federal court. If the DEA later matures into a traditional registration (and is therefore examined by the Office) the resulting traditional registration (or rejection) would be sufficient to bring suit in federal court. The mere request for the Office to examine the DEA would not be sufficient.

In addition, if the result of the *Fourth Estate* holding is overturned or altered by Congress, we believe a DEA should still not be sufficient to bring a suit unless and until the request and fee for examination are submitted and it becomes a pending traditional application.

15. Could a deferred examination option be used for improper purposes, such as to obtain an official record for material that is non-copyrightable in an effort to harass or defraud others? If so, how might such abuses be prevented?

Any procedure can be subject to abuse. The best the Office can do is to take precautions to make sure that such abuse is highly unlikely. As we noted in our response to question twelve, the

Office should take steps to distinguish the DEA from a traditional registration. If those steps—clearly identifying the DEA and its limitations in the database and the individual records and giving DEAs a unique serial number so it's apparent on its face that an abuser could not enforce the DEA in federal court—we think the opportunities for abuse will be severely diminished. There are also existing provisions in the Copyright Act that penalize those who engage in fraud on the Office, including criminal penalties,[18] that should serve as a deterrent.

If concerns still remain, there may be other steps that the Office can take to reduce the opportunity for abuse. By way of example, prior to passage of the CASE Act there were numerous groups that were concerned that the small claims system could be subject to abuse. To address those concerns, numerous safeguards were included in the CASE Act to prevent abuse. If the safeguards mentioned in the first paragraph are insufficient to address real concerns of abuse, the DEA system could incorporate additional safeguards targeted at specific type of abuses.

If someone wanted to use the DEA system to create an official record for non-copyrightable material, it's not clear why or how that would be advantageous to them, given the protections we have noted in our responses. There are also several checks and balances to make sure that could not occur. For example, the applicant would first have to get through the intake process. Although that process does not review for originality, it could still identify works that are non-copyrightable subject matter and other types of abuses.

16. How, if at all, might a deferred examination option affect enforcement of a copyright by the U.S. Customs and Border Protection?

U.S. Customs and Border Protection (CBP) has the "authority to detain, seize, forfeit, and ultimately destroy merchandise seeking entry into the United States if it bears an infringing copyright" that has been registered with or is subject to a pending registration with the U.S.

[18] 17 U.S.C. § 506(e) (2006)

Copyright Office, and has subsequently been recorded with CBP.[19] Copyright owners may record pending copyright registrations for a period of six months by providing proof that they have filed an application with the U.S. Copyright Office. Significantly, for the purposes of this study, CBP will record and enforce copyrights registrations that are pending at the U.S. Copyright Office to the same extent as registered copyrights.[20] These CBP recordations are valid for a period of six months and can be extended once for 90 days. Since CBP is already enforce pending applications, we see no reason why DEAs should be excluded. We are not aware of any abuse of this system so it's unlikely that a DEA system would lead to abuse. Even if there was abuse, it is unlikely that the DEA system would increase this abuse since like traditional applications CBP would only act on them for a maximum of six months and 90 days. Moreover, the costs of recordation and re-filing for extensions is significant in comparison to registration costs which also factors into abuse being unlikely.

D. Alternative Approaches

17. Could the same goals that a deferred examination option is meant to achieve be accomplished through alternative means, such as by amending the preregistration regime or the eligibility for statutory damages, or by reducing filing fees or adding new or expanded group registration options? Responses should discuss the potential benefits and drawbacks of any alternatives and why they may or may not be preferable.

The same goals that a deferred examination option is meant to achieve could not be achieved in the same efficient manner by: (i) altering the pre-registration system; (ii) amending eligibility for statutory damages, (iii) reducing filing fees, or (iv) expanding group registrations because:

[19] U.S. Customs & Border Protection, *How to Obtain Border Enforcement of Trademarks and Copyrights*, U.S. Customs & Border Enforcement e-Recordation Program, (last visited Jan. 20, 2022), https://iprr.cbp.gov/.

[20] *See* 19 U.S.C. § 4343 (2016).

Pre-Registration

There are some significant differences between the DEA system and the existing pre-registration system that make altering the pre-registration to achieve the same goals ill-advised. First, the existing pre-registration system only applies to:

- motion pictures, sound recordings, musical compositions, literary works, computer programs, and advertising or marketing photographs;
- unpublished works; and
- works that are being prepared for commercial distribution.

On the other hand, the DEA system is intended to apply to all types of work, published and unpublished works, and works that are intended for commercial distribution as well as those that are not.

Second, the existing pre-registration system filing fee is $140, which is significantly higher than the existing fee for a traditional registration. The fees for a DEA are intended to be lower than a traditional registration application (not higher) in order to encourage the filing of more applications with the Office.

Third, no deposit copy is required for a pre-registration application (although a deposit copy is eventually required when the follow up registration application is filed). One of the primary benefits of the DEA system is to provide the Library with more works for its collections. That benefit would not be possible if a deposit copy was not included as part of a DEA.

Lastly, the pre-registration system requires a follow up registration be filed with the Office within a very brief period of time. The reason for this is that, as the Office states in the compendium, a "preregistration is merely a placeholder for or a prelude to an actual registration."[21] This is different from the DEA system in which the DEA may never be followed up by a traditional registration, and the time limit for following up is much longer than with a pre-registration application.

[21] U.S. Copyright Office, Compendium of U.S. Copyright Office Practices § 1604.1 (3d ed. 2021).

In short, the DEA system and the pre-registration system share no commonalities. That is due largely because the two systems are intended to address two very different problems. Even a somewhat altered pre-registration system would fall well short of achieving the same goals intended by the DEA system.

Statutory Damages

The DEA system is not intended to be a vehicle to increase or decrease the eligibility for statutory damages. Nor should it work that way in practice. We propose that the effective date of registration (EDR) for a DEA be the date the DEA is submitted to the Office as opposed to the date a request is made to convert the DEA to a traditional registration quite simply because if that was not the case and the possibility of statutory damages was effectively eliminated for DEAs that would be a huge disincentive to the DEA system and very few, if any, creators would use it. Although many works covered by DEAs will never be the subject of infringement litigation, some will be and more often than not, the copyright owner does not know which ones will and won't be at the time the registration application is submitted to the Office. To ensure the statutory damages incentive to register works equally in the context of the DEA system, it is important that the EDR for the DEA be the date the DEA is submitted to the Office, just like the EDR for a traditional registration is the date the traditional registration application is submitted to the Office.

Making changes to the statutory damages regime would not achieve the same goals as a DEA system. Changes will likely not lower fees, increase applications, increase deposits, improve the public record system, address the orphan works problem etc.

Filing Fees

Lowering filing fees for traditional registrations—which could be done through lowering of fees for applications for all applicants or creating a new small entity fee category that would lower fees for individual creators and small businesses—would help achieve the goal of lowering the per work cost of registration. Unlike the DEA system, the lowering of fees approach achieves this goal at great expense to the Copyright Office because the Office would be collecting less

money from application fees but would still be incurring the same expense associated with examination. To make up the difference between the new, lower filing fees and the cost of operations (*i.e.*, intake, examination and registration expenses), the Copyright Office would need to receive more money from Congress. Unlike lowering filing fees for traditional registrations, filing fees for DEAs can be lowered without expanding the Copyright Office deficit because the DEA system does not require an examination, which is the primary cause for the deficit.

Group Registrations

Expanded group registrations—which we interpret to mean adding new group registrations and/or allowing more works to be registered under existing group registrations—does achieve the goal of lowering the per work cost of registration which DEA would also achieve. Unlike the DEA approach, the group registration approach would achieve this goal at great expense to the Copyright Office because the Office would be collecting less money to examine more works. For example, the Booz Allen Hamilton 2017 Report[22] explains that group registration for photographs costs the Office $296 to process, examine and register, while the fee collected for that registration is much less.[23] To make up the difference between the examination expenses incurred through additional or expanded group registration, the Copyright Office would need to receive even more money from Congress to make up the deficit. Unlike the group registration approach, DEAs can lower per work registration costs without the Copyright Office incurring additional expenses because the DEA system does not require an examination.

E. Other Issues

18. Please identify any pertinent issues not referenced above that the Office should consider in conducting its study.

There were a few issues that were not referenced above that bear mentioning:

[22] Booz Allen Hamilton, *supra*.

[23] The report proposed it be $100, but it is $55.

Pendency

The DEA system should have a positive impact on registration processing times (*i.e.*, pendency) for traditional applications because it's the examination process (and more specifically, communication with the applicant during examination) that usually impacts processing times the greatest and if not all applications are examined, then pendency of those applications that are being examined should improve. Of course, if the Office reduces the number of examiners significantly, that could undermine any improvements in pendency generated by a DEA system. Thus, we would very concerned if the Office would reduce the workforce as a result of the improvements to the system stemming from a DEA option.

Copyright Claims Board (CCB)

We do not believe that anything in the DEA proposal would impact the new Copyright Claims Board.

Other Improvements to the Registration System

The DEA option is just one of many changes to the registration system that we believe would improve the system for all. We urge the Office, or as necessary Congress, to take additional steps to improve the system, such as:

- allowing copyright owners to file suit in federal court when a (traditional) application has been filed but it has not yet been registered or rejected by the Office;
- making registration of dynamic website content possible and easy;
- creating a group registration option for illustrations;
- removing the limitation of 750 photographs for a group registration for photographs at least in DEA applications;
- collecting demographic information (*e.g.*, gender and race) about applicants, voluntarily, so the copyright system can be improved in ways that ensure that it works for all types of creators;

- creating an annual subscription for certain creators, like photographers and those that publish daily periodicals;
- providing API access so that certain creators (like photographers) can submit applications and deposit copies with a click of a button;
- creating small entity fees to better distinguish between those that can better afford the cost of registration and those that cannot;
- allowing combined registration of published and unpublished works;
- allowing free correction of good faith registration errors without losing the original effective date of registration; and
- taking steps to help minimize good faith errors made by applicants regarding publication status or at least minimize the impact when good faith errors are made.

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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