



**The Register of Copyrights of the United States of America**

United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000

The Honorable Thom Tillis  
United States Senate  
113 Dirksen Senate Office Building  
Washington, DC 20510

August 1, 2022

Dear Senator Tillis:

I am writing to report on the results of our study pursuant to your request on the feasibility, benefits, and costs of the Copyright Office creating a new option for copyright registration whereby examination of a claim may be deferred until requested by the applicant (referred to herein as “deferred registration examination” or “DRE”).<sup>1</sup> In response to your request, we undertook a review of the current registration system, including its policy objectives, solicited public comments on the potential merits and drawbacks of implementing a DRE option, and evaluated operational and administrative practicalities. We also considered the interests of copyright claimants, as well as those who rely on the copyright public record, and the impact of a DRE option on all stakeholders. After careful evaluation, the Office does not recommend moving forward with this option. We appreciate the concerns raised by the proponents of DRE, however, and are committed to addressing them, including through the alternative approaches identified below.

Congress created a copyright registration system that offers significant benefits to copyright owners. In order to make that system accessible to as many members of the public as possible, the Office is engaged in efforts to minimize or eliminate any barriers that may exist to wider participation. As part of those efforts, we are now in the midst of a multiyear process to thoroughly modernize our information-technology (“IT”) systems, with the goal of increasing efficiency and expanding access. This will enable us to build a more responsive, user-friendly, and inclusive registration system.

With these considerations in mind, we took a close look at the challenges DRE proponents stated they currently experience with the registration system and concluded that a DRE option would not provide the hoped-for resolution. In fact, offering a DRE option could have the opposite effect, potentially leading to a costlier and less efficient system, while also creating new concerns, including with regard to the public record. As a result, we do not believe

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<sup>1</sup> Letter from Sen. Thom Tillis, Ranking Member, S. Comm. on the Judiciary, Subcomm. on Intell. Prop., to Shira Perlmutter, Register of Copyrights, U.S. Copyright Office at 1–2 (May 24, 2021) (“DRE Study Request”), <https://www.copyright.gov/policy/deferred-examination/5-24-21-Ltr-USCO-Copyright-Examination-and-Registration-Requirements-Studies-Final.pdf>.

that DRE provides the best avenue to meet either the goals of its proponents or the larger goals of the registration system.

Notwithstanding these conclusions, the Copyright Office is committed to continuing our work to identify and implement ways to ensure that the copyright registration system is meeting the needs of copyright owners of all types, as well as supporting the interests of the public and the Library of Congress. As part of the modernization process, we are exploring a number of alternatives, as described below.

## **I. U.S. COPYRIGHT REGISTRATION SYSTEM**

In May 2019, the Office briefed Congress on the U.S. copyright registration system in response to letters from the Chairmen and Ranking Members of the House Judiciary Committee and Senate Judiciary Committee Subcommittee on Intellectual Property. The Office's *Explanation of U.S. Copyright Office Registration Processes and Challenges* included a detailed discussion of the role of copyright registration, processing challenges then facing the Office, and our initiatives to address those challenges.<sup>2</sup> As a result of those initiatives, the Office has continued to significantly improve registration processing times, even during the disruptions caused by the COVID-19 pandemic. For example, the overall average processing time for all claims has fallen from about eight months in the first half of FY2018 to about 3.6 months in the first half of FY2022, with eService Claims (*i.e.*, online applications with uploaded digital deposits) that do not require correspondence currently being processed in about one month on average.<sup>3</sup>

### **A. Benefits of Registration**

Under the Copyright Act, copyright protection attaches automatically to an original work of authorship as soon as it is created and fixed in tangible form.<sup>4</sup> Registration of a claim to

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<sup>2</sup> U.S. COPYRIGHT OFFICE, EXPLANATION OF U.S. COPYRIGHT OFFICE REGISTRATION PROCESSES AND CHALLENGES (May 31, 2019) (“2019 REGISTRATION EXPLANATION”). The 2019 Registration Explanation was attached to letters the Office sent in response to questions about registration from members of Congress. Letter from Karyn A. Temple, Register of Copyrights & Dir., U.S. Copyright Office, to Sen. Thom Tillis, Chairman, S. Comm. on the Judiciary, Subcomm. on Intell. Prop., and Sen. Christopher A. Coons, Ranking Member, S. Comm. on the Judiciary, Subcomm. on Intell Prop. (May 31, 2019), <https://www.copyright.gov/laws/hearings/response-to-march-14-2019-senate-letter.pdf>; Letter from Karyn A. Temple, Register of Copyrights & Dir., U.S. Copyright Office, to Rep. Jerrold Nadler, Chairman H. Judiciary Comm., and Rep. Doug Collins, Ranking Member, H. Judiciary Committee (May 31, 2019), <https://www.copyright.gov/laws/hearings/response-to-april-3-2019-house-letter.pdf>.

<sup>3</sup> U.S. COPYRIGHT OFFICE, REGISTRATION PROCESSING TIMES (OCTOBER 1, 2021–MARCH 31, 2022), <https://copyright.gov/registration/docs/processing-times-faqs.pdf>; 2019 REGISTRATION EXPLANATION at 8; *see also* U.S. COPYRIGHT OFFICE, REGISTRATION PROCESSING TIMES (OCTOBER 1, 2017–MARCH 31, 2018), <https://copyright.gov/registration/docs/processing-times-faqs/october-1-2017-march-31-2018.pdf>.

<sup>4</sup> 17 U.S.C. § 102(a) (“Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression.”); *see id.* § 302(a) (“Copyright in a work created on or after January 1, 1978, subsists from its creation.”).

copyright is not required.<sup>5</sup> However, the Copyright Act provides substantial incentives to encourage prompt registration of copyright-protected works.

First, a certificate of registration issued by the Office after examination of the work and other application materials constitutes *prima facie* evidence of the validity of the copyright and the facts stated in the certificate, if the registration is made before or within five years of the work's first publication.<sup>6</sup> Second, the Act provides that copyright owners are eligible to obtain statutory damages and attorney's fees in an infringement suit if the effective date of registration ("EDR") is within three months of first publication or before the infringement commenced.<sup>7</sup> Finally, a civil action for copyright infringement involving a U.S. work may not be instituted until registration has been made or refused by the Office.<sup>8</sup>

As discussed in more detail in our 2019 Registration Explanation, Congress envisioned registration primarily furthering three important policy objectives:

First, "[r]egistration . . . enables the Copyright Office to compile a public record of copyright claims, and the deposited copies provide definitive evidence of what the work was at the time of registration." This record thus "serves as a valuable resource for those seeking to use copyrighted works lawfully." Second, registration "gives courts the benefit of the Register's expertise on issues of registrability, and serves judicial economy by narrowing the issues that must be litigated." Finally, registration "serves as a major source of the Library's acquisitions," since deposit copies are ordinarily transferred into the Library of Congress' collections.<sup>9</sup>

## **B. The Role of Examination in the Current Registration System**

Examination is a major component of the registration process. It is part of Congress's deliberate and considered design of the system, which filters copyright claims through the Office, resulting in an improved record for the courts and public at large to rely upon. Congress intended "to give the Register of Copyrights authority to elicit all of the information needed to examine the application and to make a *meaningful* record of registration."<sup>10</sup>

Under the current system, to apply for registration, an applicant must deliver to the Office a completed application form, the applicable filing fee, and a deposit consisting of a complete

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<sup>5</sup> *Id.* § 408(a) ("Such registration is not a condition of copyright protection.").

<sup>6</sup> *Id.* § 410(c).

<sup>7</sup> *Id.* § 412. Section 410(d) states that the EDR "is the day on which an application, deposit, and fee, which are later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration, have all been received in the Copyright Office." *Id.* § 410(d).

<sup>8</sup> *Id.* § 411(a); see also *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 892 (2019).

<sup>9</sup> 2019 REGISTRATION EXPLANATION at 3–6 (quoting Brief for the United States as Amicus Curiae Supporting Vacatur and Remand at 4, *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010) (No. 08-103)).

<sup>10</sup> H.R. REP. NO. 94-1476, at 155–56 (1976) (emphasis added).

copy (or copies) of the work to be registered.<sup>11</sup> Upon receipt of these materials, the Office examines both the material deposited and the application in determining whether registration should be granted.<sup>12</sup> This examination includes: (i) confirming that the correct filing fee was submitted; (ii) confirming that applicable Office regulations and practices have been complied with (*e.g.*, whether the type of registration applied for is available for the applicant’s claim);<sup>13</sup> (iii) reviewing the application to ensure that the facts stated there are not contradicted by each other or by information in the deposit or elsewhere in the materials submitted;<sup>14</sup> and (iv) determining whether the work constitutes copyrightable subject matter. If the examiner concludes that the registration requirements have been met, the Office will register the claim and issue a certificate of registration.<sup>15</sup>

The Office also maintains an official public record of all copyright registrations in its searchable online records catalog and, upon request, makes the deposit material available for public inspection.<sup>16</sup> The public record for a registered work includes key facts relating to the authorship and ownership of the claimed work, including the title, year of creation, date of publication, and type of authorship.<sup>17</sup> If the Office determines that a work is not copyrightable or that the claim is invalid for any other reason, it will refuse registration and will not issue a certificate or create an entry in the public catalog.<sup>18</sup> In recent years, the Office refused between about 4% and 4.6% of applications (an average of about 23,000 applications each year), and between about 4.7% and 9% of applications were abandoned by the applicant during the examination process (an average of about 39,000 applications each year, respectively).<sup>19</sup> During the examination process, the Office frequently corresponds with registration applicants, including to cure deficiencies that likely would otherwise result in a refusal—representing between about 24% and 30% of all applications in recent years (an average of about 150,000 applications each year). Consequently, the examination process serves to weed out incomplete, abandoned, and dubious copyright claims, which helps to minimize potentially detrimental public record errors, to ensure a reliable resource for the public regarding the status of a work, and to prevent judicial inefficiencies that would occur if such defective claims were not otherwise precluded from registration.

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<sup>11</sup> 17 U.S.C. §§ 408, 409, 708; *see also* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 204 (3d ed. 2021) (“COMPENDIUM (THIRD)”).

<sup>12</sup> 17 U.S.C. § 410(a).

<sup>13</sup> COMPENDIUM (THIRD) §§ 206, 602.4.

<sup>14</sup> *Id.* §§ 206, 602.4, 603, 609.

<sup>15</sup> 17 U.S.C. § 410(a).

<sup>16</sup> *Id.* § 705(a)–(b).

<sup>17</sup> The Office’s online public records catalog is available at <https://cocatalog.loc.gov>.

<sup>18</sup> 17 U.S.C. § 410(b).

<sup>19</sup> A claim is abandoned, and thus closed by the Office, if the Office does not receive a response to written communication within the time period specified by the Office. *See* COMPENDIUM (THIRD) § 605.7.

### C. The Setting of Registration Fees

Copyright registration applicants must pay a fee to the Office for registration.<sup>20</sup> The Office conducts an analysis of its fees for services on a regular basis and adjusts them to account for changing costs and work processes.<sup>21</sup> At the same time, the Office is sensitive to the impact of its fees on copyright owners, including the practical availability of the registration system to individual claimants. Accordingly, the Office’s registration fees are set below the level that would cover all of its related costs. As we explained in 2019:

The Copyright Office has two main budgetary sources that fund most of the Copyright Office’s core operations: (1) fees for its services; and (2) congressional appropriations. Historically, fees have made up a majority of the Copyright Office’s budget, ranging from 59% to 67% between 2009 and 2014. This funding balance reflects the fact that many Copyright Office services benefit not only individual copyright owners but also the general public by, among other things, incentivizing cultural development and providing the public with a searchable database of copyright registration and ownership information. *Further, based on the outside consultant’s analysis, it would not be possible to fully fund the Office’s operations through user fees, since the requisite fee hike would depress participation in the system beyond the levels necessary to recoup the desired amount of fees.*<sup>22</sup>

The Office is committed to supporting authors who endeavor to enforce and license their works and understands that fees must be affordable so that individual creators are not discouraged from registering and fully participating in the copyright system. But the Office also “must ensure that fee receipts are sufficient to anticipate the requisite level of Office operations, taking into account fluctuations in filing volumes, whether brought on by increased fees and/or other economic factors in the marketplace.”<sup>23</sup>

Reflecting this need for balance, the current registration fee for the Single Application (designed for individual creators) is \$45, and the Standard Application is \$65. These fees are estimated to achieve only a 49% and 69% cost recovery, respectively.<sup>24</sup> The Office also has adopted several group registration options designed to expand accessibility to registration for those copyright owners challenged by the regular application process.<sup>25</sup> For example, even the

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<sup>20</sup> 17 U.S.C. § 708(a)(1).

<sup>21</sup> *See id.* § 708 (establishing Register of Copyrights’ authority to set fees, as well as fee setting standards). The Copyright Office last adjusted its fees in 2020. *See* Copyright Office Fees, 85 Fed. Reg. 9,374 (Feb. 19, 2020).

<sup>22</sup> U.S. COPYRIGHT OFFICE, PROPOSED SCHEDULE AND ANALYSIS OF COPYRIGHT FEES TO GO INTO EFFECT IN SPRING 2020 at 3 (Oct. 16, 2019) (“FEE STUDY”) (emphasis added) (citations omitted), <https://www.copyright.gov/rulemaking/feestudy2018/proposed-fee-schedule.pdf>.

<sup>23</sup> *Id.* at 19.

<sup>24</sup> 85 Fed. Reg. at 9,379.

<sup>25</sup> *See* 37 C.F.R. § 202.4 (prescribing conditions for issuing a registration for a group of unpublished works, serials, newspapers, newsletters, periodicals, photographs, short online literary works, works on an album, and secure test items).

fees for the Standard Application or Single Application can be a hurdle for high-volume creators like photographers. In response to this concern, the Office offers a \$55 fee for the registration of a group of up to 750 photographs (working out to as little as about \$0.07 per photograph), which is estimated to achieve a cost recovery of only about 20%.<sup>26</sup>

#### **D. Registration and the Office’s Strategic Goals**

Many of the goals that the proponents of a DRE option identified align with the Office’s four mission-critical goals laid out in our 2022–2026 *Strategic Plan*.<sup>27</sup> First and foremost among these is “copyright for all”—including ensuring that our services are available to all creators, large and small. As the *Strategic Plan* explains, the Office seeks to make the copyright system as “accessible to as many members of the public as possible, including individuals and small entities as well as historically underserved communities.”<sup>28</sup> The Office is focusing on outreach and inclusivity, conducting “research on how the system is used and by whom,” and establishing “partnerships with organizations to help reach wider audiences.”<sup>29</sup> This should lead to a “copyright system that truly works ‘for all,’ ultimately enriching the volume and diversity of the creative content available to the public.”<sup>30</sup>

Another goal is to enhance the development and use of data in the Office’s policymaking and overall operations.<sup>31</sup> In the course of administering its services, the Office collects many types of valuable copyright-related information.<sup>32</sup> By using this data as an evidentiary foundation for its decisions and making it accessible to both internal and external audiences, “the Office can more effectively determine how best to shape policies and set budgets and fees.”<sup>33</sup> Leading this initiative is the Office’s recently hired chief economist who is actively building a research agenda to support our registration and other services.<sup>34</sup> The Office’s fee studies further this goal.

Lastly, as part of the goal of “continuous development,” the Office’s modernization initiative is well underway and has already made an impact on both external services and internal work processes. In partnership with the Library, the Office is “building a new Enterprise Copyright System (ECS) to make all of the Office’s services digitized, interconnected, searchable, and easy to navigate.”<sup>35</sup> ECS will include a “redesigned and easier to use registration

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<sup>26</sup> FEE STUDY at 23 & App. B.

<sup>27</sup> See U.S. COPYRIGHT OFFICE, STRATEGIC PLAN 2022–2026, FOSTERING CREATIVITY & ENRICHING CULTURE (2022) (“STRATEGIC PLAN 2022”), <https://www.copyright.gov/reports/strategic-plan/USCO-strategic2022-2026.pdf>.

<sup>28</sup> *Id.* at 5.

<sup>29</sup> *Id.* at 6.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 9.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 7.

system” and “substantial improvements to the copyright public records system” through a “user-centered, flexible design, providing a consistent interface with easier public access and use.”<sup>36</sup> We expect these changes to have a positive impact on individual creators seeking to register their works.

Although the Office does not recommend the adoption of a DRE option, our strategic goals reflect an ongoing focus on initiatives to address many of the underlying concerns raised by DRE proponents. As discussed in more detail below, the Office is, and has been, actively working to make the registration system more accessible.

## II. STUDY REQUEST AND PUBLIC COMMENTS

### A. Study Request and Notice of Inquiry

By letter dated May 24, 2021, you requested the Office’s “expertise and guidance regarding adjusted copyright examination and registration requirements.”<sup>37</sup> You asked that the Office complete “a study regarding the feasibility, benefits, and costs of creating an option for deferring examination of an application.”<sup>38</sup> Your letter further provided:

The study should focus on adding an option for registering a work in which the registrant can obtain an effective date of registration upon submission of an application and deposit, while choosing to defer the examination of the submitted work until the registrant subsequently requests such an examination. It should also consider and address what, if any, statutory changes would be necessary to enable applicants who are given such an effective date of registration to be able to commence a civil lawsuit in light of *Fourth Estate Pub. Ben. Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881 (2019). . . . [T]his study must also take particular account of the needs of the Library to maintain and grow its collections.<sup>39</sup>

In response, on December 10, 2021, the Office published a notice of inquiry soliciting further public input beyond the comments previously received about DRE in other proceedings.<sup>40</sup> The Office received thirteen relevant comments in response. The commenters expressed differing views about what DRE would entail and raised a number of questions about its practical implementation and effect.

While the concept of a delayed examination of a registration application and its deposit materials may appear straightforward, the details of such a process are more complex. Even those commenters supporting some form of DRE—mostly organizations representing visual

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<sup>36</sup> *Id.*

<sup>37</sup> DRE Study Request at 1.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 1–2. Because we do not recommend adopting a DRE option, we do not recommend any statutory changes. Moreover, a majority of commenters, including most of those supporting DRE, did not propose any statutory changes to the pre-litigation registration requirement addressed in *Fourth Estate*.

<sup>40</sup> Deferred Registration Examination Study: Notice and Req. for Pub. Comment, 86 Fed. Reg. 70,540, 70,541–43 (Dec. 10, 2021) (“DRE NOI”) (summarizing previous comments).

artists—failed to agree on how deferred examination would work. Other commenters—including the Library Copyright Alliance (“LCA”) and the Computer & Communications Industry Association (“CCIA”)—opposed it. Finally, the Motion Picture Association (“MPA”) and the Recording Industry Association of America (“RIAA”) submitted a joint comment expressing neutrality as to whether a DRE option should be adopted, but urging caution regarding the exact manner of its implementation, reflecting concerns about the impact on the public record and the registration system generally.

The issue on which most commenters agreed was that the Office should review its fee structure and related tools to determine whether a reduction in fees is feasible for individual applicants with a large number of claims. As the MPA and the RIAA noted in their joint comments:

This is essentially a financial problem; registration fees are too high for [photographers and other visual artists] to afford to register many of their works. Thus the simplest, most direct solution to the problem is financial as well: the cost of registering photographs and similar works needs to be lower. Commenters believe that the best way to do this is directly: the Office should study whether the fee structure can be adjusted to make it cheaper to register high volumes of low-dollar-value works.<sup>41</sup>

As discussed later in this letter, the Office is currently considering the possibility of alternative fee structures to address this issue.

## **B. Proponents’ Arguments in Favor of a DRE Option**

Similar to comments received in other proceedings, most proponents of DRE identified registration fees as a principal concern with the current system and the motivation for their support.<sup>42</sup> For example, the Copyright Alliance said that “[o]ne of the primary reasons creators decide not to register their copyrighted works with the Copyright Office is the expense of registration combined with a perception that the expense outweighs the benefits” since “few individual creators and small businesses can afford to enforce their rights in federal court.”<sup>43</sup> Proponents reasoned that the fee for DRE applications would be “significantly lower” than traditional registration, based on the assumption that the cost for initial processing of a DRE

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<sup>41</sup> MPA & RIAA Comments at 4 (“Commenters believe that the financial problem faced by photographers and other visual artists is best addressed with a financial solution—which will target the problem more precisely, while avoiding the complications and potentially harmful consequences of a major structural change to the registration system.”).

<sup>42</sup> See Am. Intell. Prop. Law Ass’n (“AIPLA”) Comments at 3, 6; Ass’n of Med. Illustrators (“AMI”) Comments at 3–6; Coal. of Visual Artists (“CVA”) Comments at 10; Copyright Alliance Comments at 12–13; Graphic Artists Guild (“GA Guild”) Comments at 1; Robert Brauneis & Zvi Rosen Comments at 1, 4, 5; Shaftel & Schmelzer Comments at 12.

<sup>43</sup> Copyright Alliance Comments at 2 (citing Copyright Alliance, *Copyright Registration Fee Survey* (2018), which was submitted as an appendix with initial comments in Copyright Office Fees, Dkt. No. 2018-4 available at <https://copyright.gov/rulemaking/feestudy2018/>).



application would be much less than the full review and examination performed on a regular application.<sup>44</sup>

Proponents also identified the “Office’s budgetary issues”<sup>45</sup> as a concern, explaining that since “the Copyright Office loses money on each registration transaction,” “[t]he Office is left dependent on subsidies from Congress to perform its registration function, which leaves it perpetually underfunded.”<sup>46</sup> Proponents suggested that a DRE option could address budgetary challenges and reduce costs because DRE “may be less taxing to the Office’s resources” since it “eliminat[es] the need to [fully] examine every application upon arrival.”<sup>47</sup> According to commenters, such a “reduction in cost could benefit the Copyright Office” because “it would make it easier for the Copyright Office to recoup more of its expenses through registration application fees.”<sup>48</sup>

DRE supporters also argued that several other potential benefits would flow from the adoption of a DRE option, including improved processing times<sup>49</sup> and increased filings,<sup>50</sup> which would lead to an increase in deposits for the Library to add to its collections<sup>51</sup> and an expanded, more comprehensive public record containing the works of creators who presently cannot afford registration.<sup>52</sup> Commenters also noted that a DRE system could provide creators with more time

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<sup>44</sup> *Id.* at 5, 16; *see also* AIPLA Comments at 2; AMI Comments at 3; CVA Comments 10–11; GA Guild Comments at 1–2; Robert Brauneis & Zvi Rosen Comments at 4–5.

<sup>45</sup> Copyright Alliance Comments at 3.

<sup>46</sup> Robert Brauneis & Zvi Rosen Comments at 2–3; *see also* Copyright Alliance Comments at 3 (“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 unless the Office does not examine these additional applications or it otherwise finds a way to lower its examination costs.”).

<sup>47</sup> AIPLA Comments at 2; *see also* Copyright Alliance Comments at 4, 12; Robert Brauneis & Zvi Rosen Comments at 4.

<sup>48</sup> Robert Brauneis & Zvi Rosen Comments at 4. The Copyright Alliance also discussed the possibility of the Office using congressional appropriations “on modernization, improving the database or other projects or expenses, rather than to subsidize registration examinations” if the DRE option is adopted. Copyright Alliance Comments at 7.

<sup>49</sup> CVA Comments at 7 (“A deferred examination would hopefully free up resources for the Copyright Office so that it can continue to lower its overall pendency rates across all classes of works.”); Copyright Alliance Comments at 31 (“The [DRE] system should have a positive impact on registration processing times (i.e., pendency) for traditional applications because it’s the examination process . . . 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.”).

<sup>50</sup> AIPLA Comments at 2 (“A deferred examination system that makes it less expensive to register multiple works would encourage filings.”); AMI Comments at 3; CVA Comments at 6–8 (“[O]ver 80% of visual artists indicat[e] that they would consider using such a system to register their works.”).

<sup>51</sup> Copyright Alliance Comments at 7.

<sup>52</sup> CVA Comments at 7, 16; Copyright Alliance Comments at 6 (“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.”).

to decide which works are worth full registration without penalizing them.<sup>53</sup> We address many of these issues below.

### **III. STUDY RESULTS**

The Office has analyzed how a DRE option would impact the policy goals that Congress has set for registration (including the impact on the Library’s collections) and its practical effect on our operations and costs. We conclude that a DRE option would not necessarily result in any decrease in fees because of the costs inherent in administering a registration system, even without full immediate examination, and the efficiencies lost when full examination is delayed to a later date. At the same time, a DRE option creates the risk of adverse impacts and confusion regarding parties’ rights. In order to achieve the desired benefits of a DRE option, the Office intends instead to address the cost challenges faced by individual high-volume creators more directly. Our ongoing efforts in that regard are addressed at the end of this letter.

#### **A. Defining a DRE Option**

To analyze a DRE option, the first question is what exactly “deferred registration examination” means and how it would differ from the current registration process. The proponents differed on the details of such an option, while agreeing on its broad contours. In general, they envisioned DRE as follows:

- (1) An applicant could submit the application materials for full registration at a significantly discounted fee;
- (2) The Office would not immediately conduct a full examination;
- (3) If later requested, for an additional fee, the Office would fully examine all application materials and decide whether or not to register the work; and
- (4) If the Office registered the work after examination, the statutory benefits of registration would attach, with an EDR reflecting the date when the original application materials were received.<sup>54</sup>

These commenters generally contemplated that examination and full registration would typically be sought in connection with an infringement suit.<sup>55</sup> No commenter proposed eliminating the

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<sup>53</sup> Copyright Alliance Comments at 4 (“A properly implemented deferred examination system . . . would likely encourage copyright owners to file copyright applications on more of their works,” as “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.”); GA Guild Comments at 1 (noting that DRE would “empower[]” graphic artists “to target which works warrant the investment in conversion to a full registration”).

<sup>54</sup> *See, e.g.*, AMI Comments at 3; CVA Comments at 9; Copyright Alliance Comments at 8–10; GA Guild Comments at 1–2; Robert Brauneis & Zvi Rosen Comments at 7–8, 11–12; Shaftel & Schmelzer Comments at 13.

<sup>55</sup> *See, e.g.*, AIPLA Comments at 5; CVA Comments at 17; Copyright Alliance Comments at 25; Robert Brauneis & Zvi Rosen Comments at 19; Shaftel & Schmelzer Comments at 20.

current registration system, with its immediate examination and registration, as an option for all applicants.<sup>56</sup>

This high-level framework for a DRE option left many critical details undefined and without consensus. Examples of the areas of uncertainty and disagreement among commenters are provided below.

*Time Limit Between DRE Application and Full Examination.* There were different proposed approaches regarding the maximum length of time that a DRE application could be maintained before full examination of the application materials would have to be requested. Some proponents suggested a time limit of five years,<sup>57</sup> while others proposed fifty years,<sup>58</sup> and several proposed that there effectively be no time limit by allowing a DRE application to remain pending for the entire duration of the copyright.<sup>59</sup>

*Works Eligible for DRE.* There was disagreement over whether a DRE option should be available for all works or whether there should be eligibility restrictions based on the type of work. Some commenters advocated for having no restrictions “absent a compelling statutory or commercial reason to do so,”<sup>60</sup> while others wanted to reserve DRE for works in categories whose registration applications are infrequently rejected.<sup>61</sup> The latter commenters specifically recommended that any DRE option initially exclude works of visual art because “visual arts are rejected in dramatically higher numbers than those regarding works in other categories.”<sup>62</sup> Other commenters proposed reserving DRE for certain types of visual art works.<sup>63</sup> For example, the MPA and the RIAA stated that “[g]iven the novelty of such a [DRE] system, the likelihood of unintended and unanticipated consequences, and the lack of demonstrated need for it beyond those categories of works, any such system should be limited to [the photography and other pictorial and graphic works] categories.”<sup>64</sup>

*Inclusion in the Public Record.* The commenters in favor of a DRE option did not agree on how DRE applications should impact the public record. Some proponents said that

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<sup>56</sup> See, e.g., Copyright Alliance Comments at 8–9 (noting that its proposal “would not change . . . traditional applications at all”); Shafiel & Schmelzer Comments at 11 (“We also want the Copyright Office to keep the existing immediate examination system, too, for authors/creators who ask for it.”).

<sup>57</sup> AIPLA Comments at 4; Robert Brauneis & Zvi Rosen Comments at 14–15.

<sup>58</sup> Copyright Alliance Comments at 17–18.

<sup>59</sup> AMI Comments at 6; CVA Comments at 13–14; GA Guild Comments at 2.

<sup>60</sup> AIPLA Comments at 3; AMI Comments at 4; CVA Comments at 9–10; Copyright Alliance Comments at 11.

<sup>61</sup> Robert Brauneis & Zvi Rosen Comments at 9–10.

<sup>62</sup> *Id.* (also suggesting that the Office could “distinguish between subcategories of visual arts works” by “provid[ing] a deferred examination option for photographs, while delaying introduction of that option for other visual arts works”).

<sup>63</sup> MPA & RIAA Comments at 11; see also CVA Comments at 9–10.

<sup>64</sup> MPA & RIAA Comments at 11; see also CVA Comments at 9–10 (“[I]f the choice is between ‘watering down’ a deferred examination to get broader consent or providing a robust option limited more narrowly to those creators who most need it, we urge the latter.”) (emphasis omitted).

information about claims submitted through DRE applications should be indexed and made available for public viewing online, similar to the Office’s existing public catalog of registered copyright claims.<sup>65</sup> Among other things, they explained that this information could help address orphan works issues while assisting licensees, historians, and researchers alike.<sup>66</sup> Other proponents said that DRE application records should be made available only if such applications are permitted to remain pending without examination for a significant amount of time.<sup>67</sup> Relatedly, some suggested that DRE application records be accompanied by a prominent disclaimer and published with numbering conventions that distinguish them from registration records,<sup>68</sup> while another also proposed that if DRE application information is indexed into the public record before being examined and registered, such records should be maintained in a database that is separate from the database of registration records.<sup>69</sup>

*Inclusion in the Library’s Collections.* Comments were mixed as to how DRE should be implemented with respect to Library collections. While some proponents proposed that works submitted via DRE should be eligible to enter the Library’s collections prior to being examined and registered by the Office,<sup>70</sup> others disagreed. For example, one commenter more generally objected to any provision of deposits to the Library,<sup>71</sup> while another said that eligibility should depend on whether there is a time limit for how long examination of an application can be deferred.<sup>72</sup>

*Right to Demand Full Examination.* No consensus was reached regarding who should be permitted to seek full examination of a DRE application. Some proponents supported limiting that right to only authors, copyright owners, and exclusive licensees,<sup>73</sup> while others proposed that certain third parties, including those seeking declaratory judgments as well as recipients of demand or claim letters alleging infringement, also be permitted to do so.<sup>74</sup>

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<sup>65</sup> CVA Comments at 16; Robert Brauneis & Zvi Rosen Comments at 16–17; Shaftel & Schmelzer Comments at 19.

<sup>66</sup> Copyright Alliance Comments at 21; *see* Robert Brauneis & Zvi Rosen Comments at 16–17; Shaftel & Schmelzer Comments at 19; *see also* CVA Comments at 16 (explaining that if DRE applications are indexed in the public record, “the overall public registry would greatly expand, to the public’s overall betterment”).

<sup>67</sup> AIPLA Comments at 5 (“If the system permits deferred applications to remain pending for significant amounts of time, public transparency is important, particularly if third parties have an opportunity to request examination.”); Copyright Alliance Comments at 20–21.

<sup>68</sup> Robert Brauneis & Zvi Rosen Comments at 17; Shaftel & Schmelzer Comments at 19.

<sup>69</sup> Copyright Alliance Comments at 21–22.

<sup>70</sup> CVA Comments at 17; Robert Brauneis & Zvi Rosen Comments at 17–18; Shaftel & Schmelzer Comments at 19.

<sup>71</sup> AMI Comments at 8.

<sup>72</sup> Copyright Alliance Comments at 23 (“[I]f the Office limits the time to one to three years, we do not think the [DRE] deposit copy should be eligible for selection to the Library’s collection until after the Office completes its examination.”).

<sup>73</sup> AMI Comments at 6; Copyright Alliance Comments at 16 (adding that “[a]n exclusive licensee would also have the right to make the request so that they can bring a copyright infringement suit if necessary”).

<sup>74</sup> CVA Comments at 13; Robert Brauneis & Zvi Rosen Comments at 12–13; Shaftel & Schmelzer at Comments at 14.

*Review by the Office of a DRE Application.* Commenters differed regarding whether DRE applications should undergo some form of initial review. Some commenters supported having no initial review at all,<sup>75</sup> while others proposed that the Office should perform an initial intake review of the DRE application materials 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 proper form, and that it matches the subject of the application.”<sup>76</sup>

*Legal Effect of a DRE Application.* Most proponents agreed that, like any other registration application, a DRE application should not entitle a rightsholder to any of the statutory benefits of registration (including the ability to bring an infringement suit).<sup>77</sup> One commenter, however, advocated for a statutory amendment to make a “request to examine the deferred examination application materials sufficient for taking civil action for copyright infringement” even before the Office acts on the request.<sup>78</sup>

*Prioritization of Examination of DRE Applications.* Finally, the commenters diverged over whether the Office should prioritize examination of DRE applications when subsequently requested. While some advocated for copyright owners using the DRE option to “have the ability to ‘go to the front of the line’ to obtain an examination and Certificate of Registration on equal terms and fees as regular registrants” when the copyright owner intends to file an infringement action,<sup>79</sup> others said that “[i]f a deferred-examination applicant requests examination, that application should start at the end of the line of applications (both traditional and deferred-examination) that await review by an examiner.”<sup>80</sup>

## **B. Impact on Policy Objectives of Registration**

In considering a registration proposal like DRE, the Office must evaluate whether it is compatible with the policy objectives that Congress set for the registration system. We conclude that there are substantial risks that a DRE option would undermine these objectives.

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<sup>75</sup> AIPLA Comments at 4 (“AIPLA believes that [initial review] would defeat the purpose, place an undue burden on the Office, and likely resulting in higher initial filing fees.”); *see also* AMI Comments at 6 (“Applications for deferred examination should be fully automated and not burden the Copyright Office with initial review.”).

<sup>76</sup> Copyright Alliance Comments at 15; *see* CVA Comments at 12 (supporting Copyright Alliance proposal); Shaftel & Schmelzer Comments at 13 (supporting Copyright Alliance proposal); *see also* Robert Brauneis & Zvi Rosen Comments at 11–12 (“Due to those risks of delaying formal review, we are inclined to believe that the Copyright Office should continue to undertake such review even of registration applications for which deferred examination is requested.”).

<sup>77</sup> AIPLA Comments at 5; CVA Comments at 17; Copyright Alliance Comments at 9 (“Like all applications, because [DRE applications] are not registrations, they would not get any of the statutory benefits of registration provided in sections 410 through 412 of title 17.”); *see* Robert Brauneis & Zvi Rosen Comments at 18; Shaftel & Schmelzer Comments at 20.

<sup>78</sup> AMI Comments at 4 (emphasis omitted).

<sup>79</sup> CVA Comments at 17; *see also* AIPLA Comments at 5; Shaftel & Schmelzer Comments at 20.

<sup>80</sup> MPA & RIAA Comments at 14.

## 1. The Public Record

The public records created by the Office in connection with registration “provide the public with authoritative information about millions of vetted copyright claims” and “help[] the national and international copyright system [to] flourish by facilitating licensed uses of copyrighted works.”<sup>81</sup> Proponents of DRE explained that, because “[t]he primary purpose of a deferred examination option is to make registration less expensive and easier,” “the overall public registry would greatly expand, to the public’s overall betterment.”<sup>82</sup> Based on the record before it, the Office, like many commenters opposing DRE, has reached a different conclusion. For example, opponents of DRE generally expressed concerns that the implementation of a DRE option could diminish the quality of applications submitted, decrease the reliability of the public record, and also lead to a decrease in the number of new registrations entering the public record because copyright owners would be unlikely to seek examination of their DRE applications unless there was an infringement.<sup>83</sup>

While a DRE option offering a significantly reduced registration fee might well lead to an increase in *applications*, proponents have not provided any evidence that it will also lead to an increase in actual examined *registrations*. Indeed, the Copyright Alliance acknowledged that DRE could result in “fewer requests for examination and thus fewer applications to examine,” *i.e.*, fewer registrations.<sup>84</sup> As the Office understands proponents’ proposals, the primary incentive to request examination and obtain full registration would be in connection with the statutory requirement to register before initiating an infringement suit.<sup>85</sup> If that is the case, then it seems likely that the number of new registrations added to the public record may actually decrease—perhaps fairly significantly. For example, in recent years, about 500,000 new claims

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<sup>81</sup> 2019 REGISTRATION EXPLANATION at 4 (also noting that the Association of American Publishers once testified that “statutory incentives [to register] are *absolutely essential* to the public record envisaged by the registration system,” and that “[t]hese records can be extremely valuable not only for business transactions such as transferring rights, and obtaining permissions or licenses, but also for resolving legal disputes, providing biographical information, and so forth”) (quoting *Copyright Reform Act of 1993: Hearing on S. 373 Before the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary*, 103rd Cong. 89 (1993) (statement of Sandy Thatcher, Association of American University Presses and Association of American Publishers) (quotation marks omitted)).

<sup>82</sup> CVA Comments at 16; *see also* Copyright Alliance Comments at 6; Robert Brauneis & Zvi Rosen Comments at 16–17; Shaftel & Schmelzer Comments at 4, 8.

<sup>83</sup> *See, e.g.*, CCIA Comments at 4 (“If examination occurs only with respect to the relatively small number of works which are the subject of infringement litigation, the vast majority of the applications will never be examined and the errors they contain will never be exposed.”); LCA Comments at 2 (stating that DRE “would be devastating to the creation of an accurate public record” and explaining that “the errors in over 120,000 applications annually would never be detected . . . which in turn would undermine the . . . useful functions of [the Office’s official] records”); Sergey Vernyuk Comments at 1 (explaining that “the average quality of applications would significantly decrease because there would be a much-reduced incentive to prepare a proper application: there’s no initial examination that would catch and reject poor-quality applications”).

<sup>84</sup> Copyright Alliance Comments at 7.

<sup>85</sup> *See id.* at 4; GA Guild Comments at 1; *see also* 17 U.S.C. § 411(a).

were registered with the Office annually on average, covering millions of works. But fewer than 5,000 copyright lawsuits were filed each year on average.<sup>86</sup>

If only examined and registered works are included in the public record (as occurs today), the popularity of a reduced fee associated with a DRE option would also lead to a steep reduction in new registration entries in the public catalog. For example, visual artists—who are the primary proponents of DRE and therefore seem most likely to utilize it—submitted over 100,000 registration applications in 2021. If DRE were implemented as proponents requested, it is possible that it could become so attractive that it widely replaces traditional registration for a broad class of works.<sup>87</sup> The potentially severe reduction in new entries in the public catalog would mean far fewer creative works being recorded for public benefit.

The other alternative would be to include DRE applications in the public record, *prior to* examination and registration. However, that would undercut the ability of the public to rely on the copyright public catalog. The public record currently serves as a definitive statement of copyright registration. However, if DRE applications were included, the record would have significantly diminished accuracy and reliability. This is because of the likelihood that unexamined applications may have inaccuracies, incomplete information, or be deficient in other ways, such as involving works that are not copyrightable. Inaccuracies can include critical data, such as ownership, authorship, and date of creation and publication. Currently, during the examination process, the Office routinely corresponds with applicants to address deficiencies in their submitted materials—at a rate of between about 24% and 30% in recent years (an average of about 150,000 applications each year). In addition, many applications are rejected by the Office—between about 4% and 4.6% (an average of about 23,000 applications each year). If these applications were included in the public record without examination, it would undermine the reliability of the record. Given DRE proponents’ assertion that applications would increase significantly under a DRE option due to a low application fee, the number of problematic claims entering the public record could be even greater.

Other commenters suggested a hybrid approach. Under this approach, the Office would flag any DRE records in the public catalog or maintain them in a separate public database.<sup>88</sup> We do not believe that this suggestion would adequately address our concerns or the interests of the

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<sup>86</sup> ADMIN. OFF. OF THE U.S. COURTS, TABLE C-7: U.S. DISTRICT COURTS—INTELL. PROP. CASES, SECS./COMMODITIES/EXCHS. CASES, AND BANKR. APPEALS FILED, TERMINATED, AND PENDING, <https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables?tn=C-7&pn=All&t=All&m%5Bvalue%5D%5Bmonth%5D=&y%5Bvalue%5D%5Byear%5D=>; RACHEL BAILEY, LEX MACHINA, COPYRIGHT AND TRADEMARK LITIGATION REPORT 2021 at 5 (Gloria Huang & Jason Maples, eds., 2021), [https://pages.lexmachina.com/rs/098-SHZ-498/images/Lex\\_Machina\\_Copyright\\_and\\_Trademark\\_Litigation\\_Report\\_2021.pdf](https://pages.lexmachina.com/rs/098-SHZ-498/images/Lex_Machina_Copyright_and_Trademark_Litigation_Report_2021.pdf); *see also* LCA Comments at 2. We do not yet know what impact the Copyright Claims Board (“CCB”) may have on the frequency with which copyright owners may enforce their rights. The CCB is intended to increase access to dispute resolution for parties with copyright claims of a relatively low economic value as an efficient, less expensive alternative to federal court.

<sup>87</sup> *See* MPA & RIAA Comments at 11–12 (cautioning that a DRE option “must not be so great that the cost of traditional application appears exorbitant in comparison, and deferred examination thus becomes the norm rather than the exception”).

<sup>88</sup> *See, e.g.*, Copyright Alliance Comments at 21–22; Robert Brauneis & Zvi Rosen Comments at 17.

public in a reliable public record. For example, it does not directly address the risk that the volume of actual vetted registration records in the public catalog could sharply decline. While flagging or separating DRE application records may help to warn the public of possible defects, it is not a substitute for having an examined registration entry in the catalog that can be relied upon.

Additionally, flagging or separating DRE application records would not prevent the risk of DRE applicants using the record of an unexamined claim in the Office’s official public catalog to demand payments from unwary users or to send cease and desist requests that could chill creativity where authors abandon their endeavors in response.<sup>89</sup> Whether intentionally or mistakenly, DRE applications could be submitted for public domain, non-copyrightable, or edge-case material.<sup>90</sup> The recipient of a demand based on a DRE application appearing in the Office’s records would be unable to rely on an official determination of the legitimacy of the underlying copyright claim.

Ultimately, while DRE could benefit the public record if it increases the volume of *accurate and reliable* new catalog entries, DRE proponents have not established that this would be the likely result. On the contrary, the Office concludes that there are significant downside risks to the integrity of the public record under a DRE regime.

## 2. *Judicial Efficiency*

The current registration system benefits judicial efficiency by providing courts with the Office’s view on copyrightability and the other requirements of registration and, as a result of examination, narrows the issues for the courts to resolve. The delay in examination under a DRE option stands to impede this benefit to the courts. The Office takes note of one commenter’s observation that, in at least some cases, “if the examination is deferred until after the copyright owner has already decided to initiate litigation, it might be difficult to narrow the issues or avoid litigation altogether,” thus frustrating the goal of promoting judicial efficiency in infringement

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<sup>89</sup> See, e.g., AIPLA Comments at 2; CCIA Comments at 5–6 (“Trolls with unexamined registration applications could issue cease and desist letters to unsophisticated users who would be unaware that the application had not been examined by the Copyright Office, that no presumption of validity attached to the application, and that litigation could not yet be initiated by the troll. The unsophisticated user would be more likely to comply with the troll’s extortionate demands.”); MPA & RIAA Comments at 5–6 (“[T]he abusive tactics of some counsel demonstrate that concerns about fraud and other improper tactics are well-justified.”); Sergey Vernyuk Comments at 2. Notably, copyright claims for works of visual art have higher rejection and correspondence rates than the Office’s overall averages. For example, in recent years, the rejection rate for visual arts claims was between about 10% and 14%, whereas the overall rejection rate was between about 4% and 4.6%, and the correspondence rate was between about 28% and 35% for visual arts claims compared to between about 24% and 30% overall. Additionally, of the 283 Copyright Office Review Board opinions since 2016 published on the Office’s website, 261 (over 92%) concern visual arts claims. See *Review Board Opinions*, U.S. COPYRIGHT OFFICE, <https://copyright.gov/rulings-filings/review-board/> (last visited July 27, 2022). Regularly rejected visual arts claims include insufficiently creative logos, textile or jewelry designs, and useful articles. Thus, there appears to be a heightened risk particularly for visual arts claims that DRE may present an opportunity for mischief.

<sup>90</sup> See AIPLA Comments at 2 (“[A]n applicant may elect deferred examination and then seek to enforce claims that arguably extend beyond the scope of the application or for a work that may not be copyrightable.”); see also MPA & RIAA Comments at 5–6.



actions.<sup>91</sup> A number of issues, including factual questions or inconsistencies, can be resolved at the examination stage through communications between the examiner and the applicant. The delay of examination, which could potentially span decades, creates a risk that these issues may not be able to be resolved by the Office, requiring courts to address them in the first instance.

There are also unknown impacts that deferred examination could have on litigation, including underlying disputes regarding errors in the original application. The high-level framework for a DRE option assumes that any subsequent examination and registration will be entitled to the EDR of the initial application. However, the litigants may not be in agreement that a registration that underwent significant corrections during the deferred examination should obtain the EDR assigned to the original DRE application. Thus, a DRE option may result in additional litigation and uncertainty regarding the registration's effective date.

### 3. *The Library of Congress Collections*

Finally, the Office is concerned about the negative impact that DRE might have on the Library's ability to grow its collections through the copyright registration system. As noted above, copyright deposits are a major source of acquisitions for the Library, helping establish its unparalleled collections. Prior to the COVID-19 pandemic, the Office typically forwarded well over 200,000 registration deposits to the Library each year.

The commenters were not in agreement about how a DRE option would change the current process that the Office uses to identify works for the Library's collections. Currently, the Office's registration examination process operates concurrently with the selection process for the Library, with examiners making selection decisions using the Library's criteria and inputting information about the works for use in the Library's catalog.

With respect to physical deposits, allowing them to enter the Library's collections prior to examination would raise substantial challenges and uncertainty regarding the deposits' availability for examination if later requested.<sup>92</sup> Alternatively, if the Office maintains possession of the deposits until a request for registration and examination occurs, DRE would significantly delay works being made available for the Library's collections, possibly for years or even decades. Some commenters suggested that these concerns could be mitigated by expanding the use of digital deposits or requiring an additional deposit.<sup>93</sup> However, these suggestions involve

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<sup>91</sup> LCA Comments at 3; *see also* 2019 REGISTRATION EXPLANATION at 5–6 (discussing how, through examination, “a court receives the benefit of the Copyright Office’s findings with respect to the legal and formal requirements of the Copyright Act, including copyrightability, the appropriateness of the claim and facts stated in conjunction with the examination of the deposit, the sufficiency of the deposit, and many other statutory and regulatory nuances of registration”).

<sup>92</sup> *See, e.g.*, CIAA Comments at 5 (“Deferred examination would pose problems with transfer of a deposit copy to the Library of Congress for its collections of a work submitted for registration but not yet examined.”); LCA Comments at 1 (“Adoption of a deferred examination system would interfere with deposit of copies of monographs in the Library of Congress.”).

<sup>93</sup> *See* Copyright Alliance Comments at 24; Robert Brauneis & Zvi Rosen Comments at 17–18.

additional issues and challenges, which are currently being explored by the Office in a separate study.<sup>94</sup>

### **C. Feasibility of a DRE Option**

In addition to evaluating DRE from a policy perspective, the Office has examined the administrative and operational implications. Based on our review, implementing a DRE option would have a negative effect on the operation of the current registration system, including by imposing additional costs. As a result, the Office believes that DRE would aggravate rather than alleviate commenters' concerns with the current system.

#### *1. Cost and Fee Impacts*

While proponents reasoned that a DRE option could be offered at a significantly reduced fee because the Office would not have to immediately undertake full examination of all of the DRE application materials,<sup>95</sup> our analysis of the impact on the Office's costs leads to a different conclusion. This assessment indicates that DRE application fees (meaning just the initial fee, excluding a separate additional fee for any later examination) are unlikely to be substantially (if at all) lower than current registration fees, in most cases. The Office would still need to perform largely the same intake, initial processing, and review that we currently perform for all registration applications to ensure that, at minimum, applicants have submitted the appropriate form, required deposit, and correct fee. The Office does not believe it would be prudent to accept applications that have not at least been reviewed for this minimal procedural compliance, which we generally perform in some capacity even for other types of filings that do not require substantive review.<sup>96</sup> Indeed, many DRE proponents specifically advocated for some form of initial compliance review.<sup>97</sup> Additionally, since as noted above, current registration fees are already set substantially below the Office's costs, even if omitting portions of the review reduces the Office's costs, this would not necessarily translate into a fee reduction.

If the Office conducts a minimal initial compliance review of a DRE application, then the main difference between that and the full examination currently performed for a registration application would be the lack of an analysis for copyrightability, claim scope, and inconsistencies within the application materials.<sup>98</sup> Omitting that analysis while retaining the rest

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<sup>94</sup> See Best Edition Study: Notice and Request for Public Comment, 87 Fed. Reg. 33,836 (June 3, 2022).

<sup>95</sup> See AIPLA Comments at 3; AMI Comments at 5–6; CVA Comments at 10; Copyright Alliance Comments at 12; Robert Brauneis & Zvi Rosen Comments at 10; Shaftel & Schmelzer Comments at 13.

<sup>96</sup> See, e.g., 37 C.F.R. § 201.35(h) (providing that with respect to schedules of pre-1972 sound recordings, even though the Office “does not review schedules . . . for legal sufficiency, interpret their content, or screen them for errors or discrepancies,” the Office does review them to determine “whether the procedural requirements established by the Office (including payment of the proper filing fee) have been met”).

<sup>97</sup> See CVA Comments at 12; Copyright Alliance Comments at 15; Robert Brauneis & Zvi Rosen Comments at 12; Shaftel & Schmelzer Comments at 13.

<sup>98</sup> In addition to assessing a deposit for copyrightability, examining staff review the application to determine whether it clearly identifies the copyrightable authorship that the applicant intends to register. These authorship descriptions help to define the scope of the claim to copyright. Examining staff also review the application and deposit in conjunction to identify variances. The Office uses the term “variance” to refer to any instance where conflicting

of the Office’s review is unlikely to significantly reduce examiner workload and thereby materially reduce costs, except perhaps for group registration applications with high volumes of works. This is because the analysis for copyrightability, scope, and inconsistencies is typically performed simultaneously with the rest of the examiner’s review.<sup>99</sup>

The Office is further concerned that DRE may introduce a number of administrative inefficiencies and costs into the registration program that could lead to an overall increased combined fee for the initial DRE application and later examination as compared to current registration fees.<sup>100</sup> Some proponents of DRE acknowledged this potential result, and even endorsed it, stating that the “higher combined fee would help the Office come closer to offsetting the Office’s actual costs of registration.”<sup>101</sup> But it is unclear whether this offsetting could be realized in light of the likely increased costs of DRE, in part “[d]ue to the additional complexity of deferred examination.”<sup>102</sup>

One potentially significant administrative inefficiency that could increase overall costs is the double examination that would effectively be conducted under DRE (*i.e.*, an initial review and a later full examination). In many cases, the efficiencies of the current regime, whereby, as noted above, examiners can review for multiple requirements concurrently, would be lost. The overall amount of time needed for both initial review and later examination of a DRE application could be significantly greater than the amount of time it would take to perform the full examination all at once. Related inefficiencies could include additional time needed to recall the records multiple times and the likelihood that different examination staff would perform each review. Another cost concern stems from DRE proponents’ suggestion that, as part of a request for examination, applicants be permitted to provide updated or revised application information.<sup>103</sup> While the Office is supportive of applicants making corrections, this could require us to re-review information already looked at during the initial intake review, and if such information conflicts with other facts provided in the original DRE application, it could complicate and prolong the examination process.

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information is present in or among the registration materials submitted by the applicant. Depending on the nature of the conflicting information, the Office has certain practices for addressing variances. For example, material variances that substantially affect the information required to be included in the application must be resolved before the Office may complete a registration. COMPENDIUM (THIRD) §§ 603–603.2. Examples can include conflicting information concerning a work’s status as a work made for hire, whether the work is published, and other discrepancies concerning authorship or claim limitations.

<sup>99</sup> The Copyright Alliance’s understanding that the initial review described above takes place before the application materials reach the examiner is incorrect. *See* Copyright Alliance Comments at 15. The examiner performs a significant amount of this review, notably, to confirm the sufficiency of the application and deposit.

<sup>100</sup> *See* CCIA Comments at 1 (“A deferred examination system would result in logistical challenges, and a surge in costs for both applicants and the Office, with no significant benefits.”).

<sup>101</sup> Copyright Alliance Comments at 13; *see also* Robert Brauneis & Zvi Rosen Comments at 10 (“[T]he sum of the initial fee and the examination request fee should probably be higher than the fee for an application that requests immediate examination.”).

<sup>102</sup> Robert Brauneis & Zvi Rosen Comments at 10.

<sup>103</sup> AIPLA Comments at 4; CVA Comments at 15.

A DRE option may also lead to increased costs by introducing new legal complexities to the deferred examination. For example, at least one DRE proponent proposed that, if there are any changes in the statute, regulations, or Office policies or practices over time, examination should be governed by those in effect when the DRE application was originally submitted.<sup>104</sup> Taking that approach, if DRE applicants were allowed to defer examination for a significant amount of time, as several commenters proposed,<sup>105</sup> examiners could be required to apply decades-old law and practices to process the applications. This would not only add substantial legal complexity, but also complicate examiner training in terms of the timing and scope.<sup>106</sup> Yet the alternative approach is also problematic.<sup>107</sup> If the Office were to simply apply whatever laws and practices are in effect at the time that examination is requested, differences in current legal requirements could generate a host of issues.

In that same vein, implementing a DRE option seems likely to increase the Office's level of correspondence generally.<sup>108</sup> Due to the amount of time that may pass between the DRE application and the request for examination, correspondence could be necessary to address other matters such as changes in the facts about the work, updates, and new points of contact. There could also be losses of memory and of records, especially where the original applicant is deceased or rights have changed hands several times. In such cases, even determining who is entitled to seek examination could be challenging and require correspondence. Any increase to the Office's current correspondence levels is likely to not only raise costs, but also increase processing times.

Lastly, offering a DRE option would increase deposit storage costs for the Office with respect to deposits awaiting an examination request (which may never come).<sup>109</sup> Limiting a DRE option to electronic deposits, as some commenters advocated, does not eliminate these concerns, as digital storage costs may also be significant. For example, the Office currently offers "full-term retention" of published deposits as a service and charges \$540 for physical deposits and \$220 for electronic deposits.<sup>110</sup>

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<sup>104</sup> Shaftel & Schmelzer Comments at 9–10 (stating "[t]he application should be considered valid and proper according to the Compendium at the time of application").

<sup>105</sup> See, e.g., AMI Comments at 6; CVA Comments at 13–14; Copyright Alliance Comments at 17–18; GA Guild Comments at 2.

<sup>106</sup> New examiners currently spend about six months in a centralized classroom setting, and then continue to receive specialized training within their assigned divisions for an additional six months.

<sup>107</sup> See Copyright Alliance Comments at 18–19 (proposing that when examination is requested, the requester should be "responsible for updating and correcting the [DRE application] as necessary," including to account for "updates necessitated by changes in . . . the law or regulations").

<sup>108</sup> See, e.g., MPA & RIAA Comments at 13–14 ("[R]outine communication between examiners and submitters that takes place under the existing system would become much more complex and time-consuming, requiring substantially more examiner attention and resources, and likely lengthening processing times, including for traditional applications.").

<sup>109</sup> See, e.g., CCIA Comments at 5 (stating "[t]he Office would likely have to assess additional fees for such storage [of deposits], thereby rendering inconsequential any alleged decreased costs").

<sup>110</sup> 37 C.F.R. § 201.3(d)(11).

## 2. *Processing Time Impacts*

As discussed above, registration processing times have significantly improved in recent years. As commenters acknowledged, even during the pandemic, the Office made significant strides in this area.<sup>111</sup> The Office does not believe that adopting a DRE option would lead to faster processing times. This is because, as discussed above, we would still need to perform largely the same intake, initial processing, and review that is currently performed for all registration applications. There is also a risk that DRE could translate into processing delays due to the dual workstream and other inefficiencies discussed above.<sup>112</sup>

## 3. *Budgetary Impacts*

In addition to the foregoing, the Office is concerned about overall budget impact. If DRE were to be offered at such an attractive fee as to significantly reduce the number of traditional registrations, and a sizable number of DRE applications are never actually registered (meaning the additional examination fee is never paid), fee receipts could be severely impacted, potentially leading to a serious budget shortfall.<sup>113</sup> As noted above, for the Standard Application (our most popular registration option), the Office currently achieves only about 69% cost recovery. Further decreases in cost recovery could mean staffing reductions in the absence of supplemental appropriations from Congress. Such reductions would translate into longer processing times and a delayed backlog when examination needs to be performed.<sup>114</sup>

## IV. **ALTERNATIVE PATHS FORWARD**

Despite these conclusions, we are committed to exploring other approaches to address many of the concerns with the current registration system that have been raised by DRE proponents. We understand that the traditional registration process and fees, which entail investments of time and financial resources, can serve as a barrier to full participation in the copyright system, particularly for high-volume individual creators.<sup>115</sup> It is our intent that the ongoing modernization process will better position the Office to deliver an improved registration

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<sup>111</sup> See CCIA Comments at 2; LCA Comments at 3; MPA & RIAA Comments at 14.

<sup>112</sup> See, e.g., CCIA Comments at 3; MPA & RIAA Comments at 13–14 (noting that “[i]t is imperative that the Office not reverse the hard-won gains it has made in recent years in reducing the application backlog” by adopting a complicated DRE regime).

<sup>113</sup> See MPA & RIAA Comments at 6–7 (“Commenters are concerned that a deferred-examination system could result in less revenue for the Copyright Office, which could undermine its ability to adequately fund existing services, including, but not limited to, registration services.”).

<sup>114</sup> See CCIA Comments at 3–4 (“Reducing application fees as proposed under a deferred examination system would force the Copyright Office to reduce the number of examiners, which would increase the application processing time and place other burdens on the Office.”). For example, from 2010 to 2014, due to budget cuts, caused by a large reduction in appropriations combined with an unexpected decrease in collected fees, the Office lost about 40% of its examination staff and was unable to hire new staff. Such loss was the primary cause for the significant backlog and delayed processing times that persisted through 2017. 2019 REGISTRATION EXPLANATION at 16.

<sup>115</sup> See, e.g., AIPLA Comments at 2; CVA Comments at 3 (“[T]he cost and time needed to consistently register a constant flow of new works can be overwhelming.”); Copyright Alliance Comments at 2–3; GA Guild Comments at 1.

experience that is more affordable and less burdensome.<sup>116</sup> While modernization is an ongoing process, we separately conduct periodic fee studies to account for changing costs and work processes.

We agree with those commenters who suggested that DRE proponents' concerns should be addressed with targeted solutions that lower per-work registration fees where needed while avoiding the potential harmful consequences discussed above.<sup>117</sup> To that end, we are, and have been, actively evaluating a variety of new approaches, including several suggested by commenters in this and other proceedings. Examples under consideration include: establishing a dynamic fee structure that could include lower fees for small-entity or individual filers;<sup>118</sup> expanding group registration options for certain types of visual art works, like graphic designs and illustrations;<sup>119</sup> increasing the 750-work limit for the group registration option for photographs;<sup>120</sup> adopting registration options with subscription-based pricing;<sup>121</sup> developing

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<sup>116</sup> See LCA Comments at 1 (“[D]ue to the Office’s modernization efforts, the ‘burden’ registration places on applicants is much lighter than in the past.”).

<sup>117</sup> See MPA & RIAA Comments at 3–4, 9.

<sup>118</sup> See Registration Modernization, 83 Fed. Reg. 52,336, 52,339 (Oct. 17, 2018) (Notice of Inquiry) (soliciting public input on alternative methods for calculating fees, including “a system that varies fees based upon the kind of work submitted for registration and/or the number of works included in each application”); FEE STUDY at 34 (stating that the Office will “examine alternative vehicles for variable fee setting, including through further solicitations for public comment”); see also AIPLA Comments at 6; AMI Comments at 8; CVA Comments at 19–20; Shaftel & Schmelzer Comments at 22–23.

<sup>119</sup> See Group Registration of Photographs, 83 Fed. Reg. 2,542, 2,547 (Jan. 18, 2018) (acknowledging commenters’ request for the development of new group options for other types of visual arts works, and stating that the Office would “consider[] these issues and . . . take them into account when developing its priorities for future upgrades to the electronic registration system”); Group Registration of Unpublished Works, 84 Fed. Reg. 3,693, 3,695 (Feb. 13, 2019) (“[T]he Office will monitor the amount of time needed to examine visual art claims submitted under GRUW” and “will use that information to determine whether it would be appropriate to create a separate group registration option for visual art works other than photographs.”); see also AMI Comments at 8; CVA Comments at 20; Copyright Alliance Comments at 31; Shaftel & Schmelzer Comments at 28–29.

<sup>120</sup> See, e.g., CVA Comments at 6, 10; Copyright Alliance Comments at 31; Shaftel & Schmelzer Comments at 12. While our data suggests that this limit is more than sufficient for most—on average, applicants submitted between about 320 and 340 photos with each application between 2018 and 2021, with about 18% of applications containing the 750-photograph maximum—it is not for some types of applicants. See Pro. Photographers Ass’n Comments at 3, Submitted in Response to May 24, 2018 Notice of Proposed Rulemaking, Copyright Office Fees, U.S. Copyright Office Dkt. No. 2018-4 (Sept. 21, 2018) (noting that “a single wedding photographer often captures approximately 1,500 images in a weekend”). Accordingly, the Office is investigating how the limit may be increased in the ECS.

<sup>121</sup> See 83 Fed. Reg. at 52,339 (soliciting public input on whether the Office should establish “a subscription service that would let authors register a specific number of works over a designated period”); see also AIPLA Comments at 6; CVA Comments at 21; Copyright Alliance Comments at 31–32; Shaftel & Schmelzer Comments at 21–22. In trying to deliver such options to applicants, the Office investigated whether it would be feasible to establish a pilot program testing differentiated fees in a subscription-based pricing model. Unfortunately, the technical limitations of the Office’s current “eCO” system for registration have so far prevented further development and implementation.

APIs to enable submission of registration applications via other programs;<sup>122</sup> and providing expanded screening and controls to help reduce good-faith application errors.<sup>123</sup>

For a number of years, the Office has been working to modernize our IT systems and to develop new regulations, practices, and workflows, all with the aim of increasing efficiency and expanding access.<sup>124</sup> The Office greatly appreciates Congress’s continued support and funding of this critical initiative. Beyond the specific proposals mentioned above, modernization will result in a completely new and fully redesigned registration system that will be part of ECS. It will have numerous new features and upgrades as compared to the current system, on both the front and back ends, including plans for a more dynamic application tracking dashboard, an integrated drag-and-drop submission option for electronic deposits, an improved messaging system to improve communication between the Office and applicants, and enhanced controls and help features to reduce errors and correspondence. On the whole, the new registration system should result in a less time-intensive registration experience for applicants and should enable the Office to achieve greater levels of efficiency, decreasing costs and providing greater flexibility in changes connected to registration fees.

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In sum, the Office believes that the issues DRE aims to resolve are better addressed through other means. During the more than 150 years that the Office has administered the nation’s copyright registration system, we have taken great care in reviewing applications to register claims for copyright and have sought to provide an authoritative and efficient registration system and trustworthy public catalog. We remain committed to improving our registration services to make them more accessible and efficient for all who wish to use them.

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<sup>122</sup> See Registration Modernization, 85 Fed. Reg. 12,704, 12,710 (Mar. 3, 2020) (Statement of Policy and Notice of Inquiry) (pledging “to explore and clarify [the Office’s] business needs related to the use of APIs for two purposes: (1) Ingesting data into the Office online registration system, and (2) extracting information from the online public record”); see also CVA Comments at 21; Copyright Alliance Comments at 32.

<sup>123</sup> See 85 Fed. Reg. at 12,706 (pledging to “request development of new tools for in-application assistance”); see also AIPLA Comments at 2–3, 6; CVA Comments at 19–20; Copyright Alliance Comments at 32; Robert Brauneis & Zvi Rosen Comments at 25.

<sup>124</sup> See, e.g., STRATEGIC PLAN 2022 at 7 (pledging to “follow a user-centric approach to meet the needs of the copyright community”); *Oversight of Modernization of the United States Copyright Office, Hearing Before the S. Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 116th Cong. 4, 6 (2019) (written statement of Jody A. Harry, Chief Financial Officer and Acting Chief of Operations, U.S. Copyright Office), <https://www.copyright.gov/laws/testimonies/121019-testimony-harry.pdf>; 2019 REGISTRATION EXPLANATION at 20–25; 85 Fed. Reg. at 12,704–06.

Please do not hesitate to contact me should you require any further information on this subject.

Respectfully,

A handwritten signature in black ink that reads "Shira Perlmutter". The signature is written in a cursive style with a long horizontal flourish at the end.

Shira Perlmutter  
Register of Copyrights and Director  
U.S. Copyright Office