Before
The Copyright Office
Library of Congress

In the Matter of	)	
	)	
Registration of Copyright: Definition	)	Docket No. RM 2012-3
Of Claimant	)	
	)	

Comments of Public Knowledge

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INTRODUCTION AND SUMMARY

It is an essential part of the copyright system that every registration requires a claimant.[1] Because of this important role, it is imperative that the definition of a claimant be plainly stated and clearly understood. For that reason, Public Knowledge (PK) commends and supports the Copyright Office's (the Office) Notice of Proposed Rulemaking to revise the definition of a claimant in 37 C.F.R. § 202.3(a)(3) by eliminating the accompanying footnote. In doing so, the Office will remove an unnecessarily complicated portion of the Code of Federal Regulations governing registration and will promote greater efficiency without any substantial adverse affects. These regulatory updates are an important part of the Office's efforts to modernize its administration for the 21st century.

The § 202.3(a)(3)(ii) footnote (the footnote)—specifically, the language regarding the "right to claim legal title"—confuses what otherwise would be a largely black-and-white definition of a claimant. Because the footnote's purpose was never explained,[2] the Office appropriately notes that it can only speculate as to why the footnote was included in the first place. Of course, speculation alone cannot justify the footnote's continued existence. Because the footnote does not clarify the preceding section or solve a particular problem within the registration system, but does create confusion that could diminish the efficiency and usefulness of the Office's registration records, it should be eliminated.

DISCUSSION

I. The Footnote Does Not Serve a Functional Purpose.

[1] 17 U.S.C. § 409 (1).
[2] Registration of Copyright: Definition of Claimant, 77 Fed. Reg. 96, 29257 (proposed May 17, 2012), *available at* http://www.copyright.gov/fedreg/2012/77fr29257.pdf (hereinafter Proposed Rules).

Eliminating the footnote would realign the definition of a claimant with the Office's intent for § 202.3(a)(3) to be read narrowly.[3] The Office notes[4] that the Interim Regulation acknowledged that a claimant could only be the author of the work or a person or organization that obtained all rights initially belonging to the author.[5] The Interim Regulation rejects the notion that divisibility of copyright, first introduced in the 1976 Copyright Act, justifies the possible expansion of who can be a claimant in the footnote.[6] PK agrees that the ability of an author to divide the exclusive rights among various third parties does not justify the need for the footnote, as it would allow for an owner of less than all of the exclusive rights to be a claimant, leading to multiple copyright registrations for a single copyrighted work and a polluted, easily outdated, record. The intention that only authors and a person or organization that possesses all of the exclusive rights can be a claimant is better expressed through only § 202.3(a)(3), without the footnote.

Similarly, the potential problem raised by a literal reading of § 202.3(a)(3)(ii) can be adequately resolved by reasonable interpretation of the regulation, without recourse to the footnote. Because § 202.3(a)(3)(ii) requires that a person or organization obtain "all rights under the copyright initially belonging to the author," some have found it necessary to address[7] whether this may include the 17 U.S.C. § 106A exclusive rights that are unique to authors of works of visual art.[8] Since these rights are inalienable, it would be impossible for a non-author to acquire literally all of the rights initially belonging to the author of a visual

[3] Registration of Claims to Copyright 43 Fed. Reg. 3, 965 (proposed Jan. 5, 1978) (hereinafter Interim Regulation).
[4] Proposed Rules at 29257.
[5] 37 C.F.R. §§ 202.3(a)(3)(i)-(ii).
[6] Proposed Rules at 29258.
[7] *Bean v. McDougal Littell*, 669 F. Supp. 2d 1031, 1035 n.4 (D. Ariz. 2008).
[8] *See* 17 U.S.C. § 106A (a) (among others, giving an author of a visual art work the right to claim authorship of the work and prevent use of her name in conjunction with a distortion of the work).

art work in order to qualify as a claimant. This interpretation would render § 202.3(a)(3)(ii) superfluous and only would allow authors to be claimants. Yet the footnote is not required to avoid this untenable result, because the section can be read to require only those rights that can be transferred from an author in the first place be possessed by the claimant for purposes of § 202.3(a)(3)(ii). This is a preferred statutory construction that obviates the need for the footnote to resolve a problem that need not exist.

Furthermore, the Office appropriately recognizes that the footnote should not be sustained by the possibility of an author divesting herself of all alienable exclusive rights to separate parties. Even in that situation, where each of the exclusive rights is held by a different party (and none remain with the author), the work can still be registered by listing the author as the claimant. The eligible claimants listed in the main text of § 202.3(a)(i) and (ii) already ensure that there always is a party that can be properly named as a claimant.

Finally, narrowing the scope of a claimant to only those who are authors or who have acquired all of the rights of the author reduces the opportunity for certain registration schemes that add procedural complexity and pollute the public record. Such registration schemes are permissive through the footnote's "right to claim legal title" language. As noted by the Office, *Bean v. McDougal Littell* involved a process where the author of a work transferred legal title to claim registration to a third party, which registered the copyright as a claimant, only to transfer the copyright back to the author. This scheme is needlessly complex and is unnecessary to achieve similar results.[9] Such an arrangement is ostensibly

[9] *See* William Patry, *Is there such a thing as holding legal title to a registration?*, THE PATRY COPYRIGHT BLOG (July 29, 2008), http://williampatry.blogspot.com/2008/07/is-there-such-thing-as-holding-legal.html.

made for the purpose of efficiency, as it is possible for one collective work registration by a third party to apply to all included individual works.[10] However, the Office's regulations already allow an agent to be appointed for the purpose of registration,[11] which does not rely on the notion of claiming bare legal title to the right to register a copyright.

II. Eliminating the Footnote Would Remove Uncertainty, Promote Clarity, And Not Harm True Owners

Eliminating the footnote would leave two distinct and well-defined groups that could qualify as a claimant for the purposes of registration: authors and persons or organizations that have obtained ownership of all the rights initially belonging to the author. With this straightforward definition, it is very clear who can and cannot be a claimant for a work. This increased clarity is the result of a more simple approach to registration that does not incorporate the notion of "claiming legal title" to the copyright. Because there is a limited number of parties who could be a claimant, the potential for duplicative or outdated filings and a polluted record is greatly reduced.

The added complexity and potential for confusion in the record outweighs any potential benefit from contractual arrangements that depend upon the footnote. Similarly, reliance on the footnote for registration may also encourage parties to enter contracts with questionable results for private enforcement, such as when a third party obtains the non-exclusive "right to sue" from the copyright owner.[12]

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[10] *See* Registration of Claims of Copyright, 76 Fed. Reg. 15, 4072 (proposed Jan. 14, 2011) *available at* http://www.copyright.gov/fedreg/2011/76fr4072.pdf (explaining that a "group database registration…permit[s] the making of a single registration…when all of the updates or other revisions (1) are owned by the same copyright claimant…").
[11] 37 C.F.R. § 202.3(c)(1).
[12] *Righthaven LLC v. Inform Technologies, Inc.,* No. 2:11-CV-00053-KJD, 2011 WL 4904431 (D. Nev. Oct. 14, 2011).

PK agrees with the Office that no party who possesses an exclusive divisible right will be adversely affected by eliminating the footnote. Without the footnote, only an author or a person or organization owning of all exclusive rights can be a valid claimant, but this would not prevent an owner of one of the divisible rights from naming the author as the claimant for the purpose of registration. The statute and regulations also already permit parties to record transfers with the Office under 17 U.S.C. § 205 and 37 C.F.R. § 201.4. Thus, parties that own only a portion of the exclusive rights can publicly record that fact with the Office if they so chose using the recordation procedures. This result is consistent with the original purpose of § 202.3(a)(3).

CONCLUSION

Public Knowledge supports the Copyright Office's proposed elimination of the § 202.3(a)(3)(ii) footnote in order to provide greater clarity to the definition of a claimant. PK urges the Office to continue examining ways in which the Office can modernize its practices and procedures for the 21st century.

Respectfully submitted,

/s

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