



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

December 1, 2021

Dear Senator Tillis:

I am pleased to provide this response to your request for an update on the U.S. Copyright Office’s study on issues relating to online publication.¹ As noted in your letter of May 24, 2021, the Office issued a Notification of Inquiry in December 2019 seeking public comment on potential steps that Congress or the Office could take to provide additional guidance to stakeholders regarding the term “publication” as defined in the Copyright Act. Below, the Office summarizes the progress of this study to date, including its procedural history, the significance of publication under U.S. copyright law, recent actions taken by the Copyright Office in this area, and the issues raised in public comments, including proposed statutory and regulatory changes.

I. Study History and Legal Background

A. Notification of Inquiry

The Copyright Act defines publication as “the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending.” It further provides that “[t]he offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.”²

The present study was initiated in response to concerns expressed by many copyright stakeholders regarding the proper application of this definition in the online context. On December 4, 2019, the Office published a Notification of Inquiry (“NOI”) seeking perspectives and suggestions regarding possible new regulations interpreting the statutory definition of publication and policy guidance regarding the role that publication should play in copyright law

¹ See Letter from Sen. Thom Tillis, Ranking Member, S. Subcomm. on Courts, Intellectual Prop. & the Internet of the S. Comm. on the Judiciary, to Shira Perlmutter, Register of Copyrights, U.S. Copyright Office, at 1 (May 24, 2021). The letter requested that the Office provide its report by December 1, but we were subsequently advised by Subcommittee staff that an update on the progress of the study may be provided at this time.

² 17 U.S.C. § 101 (definition of “publication”).

and the registration process.³ The NOI noted the uncertainty expressed by some registration applicants as to how the term “publication” applies in the online context, as well as a perceived lack of consensus among courts on the issue.⁴

The NOI set out a series of questions concerning potential statutory, regulatory, or other changes that could help to alleviate some of the difficulty in determining a work’s publication status. The NOI also invited comment on any other issues relating to online publication that were not addressed by specific questions. The Office received thirty-seven Initial Comments, five Additional Comments, and fourteen Reply Comments to the NOI.⁵ The commenters comprised a wide range of stakeholders, from individual creators, to industry trade groups, to academics, to bar association intellectual property groups. In general, the comments indicate that uncertainty as to the meaning of publication is a significant concern for many stakeholders.

Commenters provided examples of situations in which they believe it is unclear whether, or when, a work has been published. For example, the American Bar Association Section of Intellectual Property Law (“ABA-IPL”) explained that it is unclear whether uploading one’s work to a social media website like Instagram, whose terms of use allow the site to publish the work, constitutes publication.⁶ Similarly, the Graphic Artists Guild noted that it can be difficult to discern whether posting a portfolio online is a public display (which is not a publication) or an offer to distribute the copies to others for further distribution or display (which is a publication).⁷ The Coalition of Visual Artists posed the following additional hypotheticals:

Take a common scenario experience[d] by family, portrait, pet, and wedding photographers who frequently distribute images to a family. They may allow them to share the images with the extended family so they can decide if others want to buy prints. Or the photographer may allow the client to distribute pictures, but only to the extended family. Is that [an offering to distribute copies to] a “group of people”? Or does the doctrine of limited publication apply? At what point would a “distribution” take place?⁸

These questions are not merely theoretical. As discussed below, the publication status of a work has significant legal implications, and determining the correct publication status is an essential aspect of the copyright registration process.

B. Legal Implications of Publication

The publication status of a work can have significant legal implications for copyright owners. First, registration of a work before publication or within five years of first publication

³ See generally Online Publication, 84 Fed. Reg. 66,328 (Dec. 4, 2019) (“NOI”).

⁴ *Id.*

⁵ The comments received in response to the NOI are available at <https://www.copyright.gov/rulemaking/online-publication/>. The thirty-seven “Initial Comments” and the five “Additional Comments” were submitted prior to the March 19, 2020 deadline to submit initial comments and are referred to in this letter as “Initial Comments.”

⁶ ABA-IPL Initial Comments at 3.

⁷ Graphic Artists Guild Initial Comments at 4–5.

⁸ Coalition of Visual Artists Initial Comments at 8.

constitutes *prima facie* evidence of the validity of the copyright and the facts stated on the certificate.⁹ Second, if a work is registered within three months of first publication, a copyright owner is eligible to recover attorneys' fees and statutory damages for infringement that began prior to the registration of the work.¹⁰

Additionally, the date of publication can determine the term of a work's copyright: the term for works made for hire, anonymous works, and pseudonymous works is the shorter of ninety-five years from the date of the work's publication or one-hundred-twenty years from the date of the work's creation.¹¹ The date of publication can also affect termination rights. Authors of works or their heirs can terminate transfers of copyright that cover the right of publication and were effected after January 1, 1978 during a five-year period that begins at the earlier of thirty-five years from the date of first publication or forty years from the date of the transfer.¹²

Finally, the publication status of a work can also be relevant to a fair use analysis. One factor in that analysis is the "nature of the work," which includes whether the work had previously been published, with the scope of fair use being narrower with respect to unpublished works.¹³

C. Legal Implications of the Nation of First Publication

The place where a work has been published can also have important legal consequences under copyright law. First, whether a work is eligible for copyright protection under U.S. law may depend on whether it is published and, if so, the nation in which it was first published. For example, unpublished, original works of authorship fixed in a tangible medium of expression are eligible for U.S. copyright protection, regardless of the author's nationality or domicile or where the work was created.¹⁴ However, protection of published works depends on various factors, including, but not limited to, whether the author is a national or domiciliary of the United States or a treaty party and whether the work was first published in the United States or a treaty party.¹⁵

Second, access to the courts may depend on whether a work is considered a United States work or a foreign work, and publication is a key concept in making that determination. Under the Copyright Act, before a copyright owner can bring an action for infringement of a United States work, the Copyright Office must either register or refuse to register the claim to copyright.¹⁶ Registration or refusal is not required for works that are not United States works.¹⁷ An unpublished work is a United States work if all of the authors of the work are nationals,

⁹ 17 U.S.C. § 410(c)

¹⁰ *Id.* § 412.

¹¹ *Id.* § 302(c).

¹² *Id.* § 203(a)(3).

¹³ *See id.* § 107; *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985).

¹⁴ *See* 17 U.S.C. §§ 102(a), 104(a)

¹⁵ *Id.* § 104(b).

¹⁶ *See* 17 U.S.C. § 411(a); *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com*, 139 S. Ct. 881, 888 (2019).

¹⁷ *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 9(b), 102 Stat. 2853, 2859 (1988); *Fourth Estate*, 139 S. Ct. at 891.

domiciliaries, or habitual residents of the United States.¹⁸ Whether a published work is a United States work, however, depends largely on the country in which the work was first published.¹⁹ One unresolved question is whether a work that is accessible worldwide via the internet is considered published simultaneously in all countries. If so, then any work made available in that manner would be considered a United States work for purposes of U.S. copyright law, with the consequence that it must be registered in the United States before the copyright owner can bring an infringement lawsuit in this country.²⁰ Cases examining this issue in the United States have not been uniformly decided.²¹

Additionally, whether and where a work is published can determine whether a work whose copyright was lost due to failure to comply with formalities or lack of national eligibility is eligible for restoration under U.S. law.²² And the location of publication impacts the application of the Copyright Act's mandatory deposit requirement. A copyright owner must deposit two copies of most works that are published in the United States with the Copyright Office for the use or disposition of the Library of Congress.²³ That requirement does not apply to non-U.S. works or unpublished works.

D. Importance of Publication Status in the Copyright Registration Process

The distinction between published and unpublished works is woven into many aspects of the Office's registration system. The publication status will determine which application form should be used and the requirements for completing that form. The publication status also determines the proper deposit to submit with an application for registration. For unpublished works, or works first published outside the United States, applicants generally are required to submit one copy of the work with their applications.²⁴ If the work is published in the United States, applicants generally must submit two copies of the "best edition" to the Office.²⁵ The

¹⁸ 17 U.S.C. § 101 (definition of "United States work"). In addition, for unpublished audiovisual works, if all the authors of a work are legal entities headquartered in the United States, the work is a United States work. *Id.*

¹⁹ *See id.*

²⁰ Although foreign works need not be registered before a suit is brought, they are not exempt from the requirement under section 412 to be registered before infringement (for unpublished works) or within three months of first publication (for published works) in order for their owners to be eligible to recover statutory damages and attorneys' fees. *See, e.g., Chadha v. Chadha*, No. CV 16-3739 (ENV) (AKT), 2020 WL 1031385, at *7 (E.D.N.Y. Mar. 2, 2020); *The Football Ass'n Premier League Ltd. v. YouTube, Inc.*, 633 F. Supp. 2d 159, 162–63 (S.D.N.Y. 2009).

²¹ *Compare Kernal Records Oy v. Mosley*, 794 F. Supp. 2d 1355, 1368 (S.D. Fla. 2011) (publication online in Australia is simultaneous publication everywhere), *aff'd on other grounds*, 694 F.3d 1294 (11th Cir. 2012), *with Moberg v. 33T LLC*, 666 F. Supp. 2d 415, 422–24 (D. Del. 2009) (publishing work online in Germany does not constitute simultaneous publication in the United States).

²² *See* 17 U.S.C. § 104A.

²³ *Id.* § 407(a)–(b).

²⁴ *See id.* 408(b)(1), (3).

²⁵ *Id.* § 408(b)(2). If a work is published exclusively online, then the applicant may submit one electronic copy of the work. 37 C.F.R. 202.19 § (c)(5).

publication status of a work also determines how long the Office will preserve the deposit that is submitted with the application.²⁶

Publication status is also important when an applicant seeks to use one of the group registration options provided by the Office’s regulations.²⁷ Certain types of works—*e.g.*, photographs,²⁸ serials,²⁹ and secure test items³⁰—may be registered as a group by submitting a single application and fee. Generally, when an applicant uses a group registration option, each work in the group is considered separately registered.³¹ However, the Office’s regulations currently require that a group consist entirely either of works that are published or of works that are unpublished.³²

Many technical aspects of the Office’s registration system were designed to account for the publication status of a work. For example, the system assigns a registration number to all of the works in a group, the prefix for which indicates if the work is published or unpublished.³³ The system does not have the capability to assign a “hybrid” prefix for published and unpublished works. Similarly, it does not allow the Office to issue registration certificates or public records that combine published and unpublished works on the same record because it is configured to identify the date or range of dates when works were published and not to provide a publication date for unpublished works.

II. Copyright Office Activities Related to Publication

A. Amicus Curiae Brief Filed in *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*

One issue frequently cited in the comments to the NOI was the concern that a copyright registration could be invalidated due to an applicant having made an incorrect determination about the work’s publication status.³⁴ The significance of this issue—as well as the need for any legislative or regulatory remedies—will depend in part on the Supreme Court’s decision in *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, which was argued this Term.

Unicolors involves the construction of section 411(b) of the Copyright Act, which states that a certificate of registration satisfies the requirements of the statute even if the certificate

²⁶ 17 U.S.C. § 704(d) (deposits for unpublished works must be retained for the full term of the copyright, while deposits for published works must be retained for the “longest period considered practicable and desirable by the Register of Copyrights and the Librarian of Congress.”).

²⁷ *See id.* § 408(c)(1), (2) (authorizing group registrations).

²⁸ *See* 37 C.F.R. § 202.4(h) (unpublished photographs); *id.* § 202.4(i) (published photographs).

²⁹ *See id.* § 202.4(d).

³⁰ *See id.* § 202.4(o).

³¹ *See id.* § 202.4(r).

³² *See, e.g., id.* § 202.4(h)(6) (requiring all photographs registered through a group registration of unpublished photographs to be unpublished); *id.* § 202.4(i)(6) (requiring all photographs registered through a group registration of published photographs to be published).

³³ For example, a prefix could be VA (Visual Arts) or VAU (Visual Arts Unpublished).

³⁴ *E.g.*, Ass’n of Med. Illustrators (“AMI”) Initial Comments at 2; Coalition of Visual Artists Initial Comments at 3-4; Copyright Alliance Initial Comments at 6-7.

contains inaccurate information, unless: “(A) the inaccurate information was included on the application for copyright registration with knowledge that it was inaccurate; and (B) the inaccuracy of the information, if known, would have caused the Register of Copyrights to refuse registration.”³⁵ The question presented in *Unicolors* is whether an applicant’s knowledge of the underlying facts, even if it has an erroneous belief as to the legal effect of those facts, is sufficient to constitute “knowledge” of inaccurate information on the application.

The Office worked with the Department of Justice and other federal agencies to prepare an amicus brief to the Supreme Court. The Government’s brief argued that when a statement made on a copyright application “reflects the applicant’s misunderstanding of pertinent law, the registrant lacks ‘knowledge that [the information] was inaccurate,’” and the registration should be considered valid for purposes of allowing the copyright holder to pursue an infringement action.³⁶ In addition to relying on the text of section 411(b) and other provisions of the Copyright Act and the backdrop against which Congress adopted section 411(b), the Government’s position advances the policy interest in ensuring that the registration process does not become a trap for the unwary. The brief notes that “[b]ecause copyright registrants generally are not experts in either copyright law or procedures, treating Section 411(b)(1)(A)’s scienter requirement as inapplicable to mistakes of law could impede enforcement of valid copyrights through civil infringement suits.”³⁷

If the Court agrees with the Government that an application may not be invalidated where the error in a registration application is based on a genuine mistake of law, then the consequences of making an error with respect to a work’s publication status will be diminished. Conversely, a Court ruling that errors based on a mistake of law can invalidate a registration could have significant consequences in litigation. If a registration is invalidated with respect to the work at issue in a litigation, then a plaintiff must submit a new application for registration, and wait until it is issued or refused, before refiling a lawsuit.³⁸ Having to file a new application after a lawsuit has commenced would likely cause the plaintiff to lose the opportunity to obtain statutory damages and attorneys’ fees.³⁹ Concerns about making an incorrect publication determination may also discourage copyright owners from registering their works until they are certain about the publication status, which could mean they will not register in time to claim statutory damages and attorneys’ fees.⁴⁰ Should the Court’s decision permit this outcome, it may be advisable to consider amending the statute.

³⁵ 17 U.S.C. § 411(b)(1).

³⁶ Brief for the United States as Amicus Curiae Supporting Petitioner at 10, *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, No. 20-915 (U.S. Aug. 10, 2021).

³⁷ *Id.* at 27.

³⁸ See 17 U.S.C. § 411(a) (requiring registration of United States works, or refusal of registration, before filing lawsuit); *Fourth Estate*, 139 S. Ct. at 892 (application to register not sufficient to satisfy section 411(a)).

³⁹ See 17 U.S.C. § 412 (requiring the effective date of registration to precede the infringement, or be within three months of first publication in order for a plaintiff to be eligible to recover statutory damages and attorneys’ fees).

⁴⁰ See Coalition of Visual Artists Initial Comments at 10 & n.28 (noting that “[t]he challenge of making this determination [*i.e.*, whether a work is published or not] is one of the many frustrating barriers to registration that cause[s] so many to simply forego registration altogether”).

The *Unicolors* case was argued on November 8, and is expected to be decided within the first half of 2022. The Office will carefully consider the Court’s decision in developing our final conclusions and recommendations in this study.

B. Changes to Copyright Office Materials

Partly in response to comments in this study, the Office has provided additional guidance regarding publication issues in the *Compendium of U.S. Copyright Office Practices* (the “*Compendium*”).⁴¹ Commenters indicated that it would be particularly useful to provide guidance targeted to specific types of creators.⁴²

For example, the Coalition of Visual Artists explained that many artists are unsure of whether and when a work has been published in cases where copies are provided to a client.⁴³ The new version of the *Compendium* clarifies that providing copies of a photograph to a client with a license that would permit further distribution or display of the photograph constitutes publication, regardless of whether the client ever further distributes or displays the photograph.⁴⁴ Similarly, the Office added the example of an illustrator transmitting a copy of an illustration to a client with the copyright owner’s authorization, without imposing any restrictions on the client’s ability to disclose that work to the public. The *Compendium* now clarifies that such action would constitute publication.⁴⁵ The Office also added several detailed examples to assist applicants in determining whether photographs are published when registering groups of published and unpublished photographs.⁴⁶ This updated *Compendium* guidance was targeted at answering some of the most common questions the Office has received regarding publication.

Commenters also requested that the Office provide public guidance regarding publication through other means, including video tutorials, FAQs, and in-application assistance.⁴⁷ The Office is currently developing the technological infrastructure for its new copyright registration system, which will include considerable in-application assistance for applicants, including with regard to determining if a work has been published. The Office also will be adding a video regarding publication issues to its Learning Engine video series, which introduces various copyright concepts to the public.⁴⁸

⁴¹ See, e.g., Entm’t Software Ass’n (“ESA”) Initial Comments at 5; Motion Picture Ass’n (“MPA”) Initial Comments at 1.

⁴² See AMI Initial Comments at 2; Coalition of Visual Artists Initial Comments at 24–25; Graphic Artists Guild Initial Comments at 3.

⁴³ Coalition of Visual Artists Initial Comments at 23.

⁴⁴ U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 1906.1 (3d ed. 2021) (“COMPENDIUM (THIRD)”).

⁴⁵ *Id.* § 1905.1.

⁴⁶ See *id.* §§ 1114.1, 1114.5.

⁴⁷ Coalition of Visual Artists Initial Comments at 24; ESA Initial Comments at 5; Graphic Artists Guild Initial Comments at 3.

⁴⁸ The Learning Engine videos are available at <https://www.copyright.gov/learning-engine/>.

III. Public Comments Regarding Possible Statutory and Regulatory Amendments

As noted, the NOI specifically asked about various options that Congress or the Office could consider to clarify the meaning of the term “publication” in the online context. The comments discussing these options are summarized below.

A. Statutory Amendments

1. Amend 17 U.S.C. § 409(8) to Eliminate Requirement to Identify Publication Information in Copyright Applications

The Office solicited public input concerning the statutory requirement to include publication information in a copyright registration application. Specifically, the NOI asked whether “there [is] a need to amend section 409 so that applicants for copyright registrations are no longer required to identify whether a work has been published and/or the date and nation of first publication.”⁴⁹

A slight majority of commenters answering this question opposed amending section 409(8).⁵⁰ Several groups argued that including publication information in a registration application serves useful functions, including determining term length (in cases of works made for hire and anonymous/pseudonymous works), eligibility for termination, and the copyright owner’s entitlement to seek statutory damages and attorneys’ fees.⁵¹ Some commenters further argued that the inclusion of publication information can help to resolve disputes prior to litigation.⁵² The Committee on Copyright and Literary Property of the New York City Bar Association explained:

For example, absent a publication date, a defendant will not always know, at least pre-litigation or pre-discovery, if a plaintiff can obtain statutory damages and will not want to just trust a putative plaintiff to explain the applicable facts. Nor would a defendant be able to properly assess any fair use defense under Section 107 of the Copyright Act without a clear designation of the published nature of the registered work. . . . Similarly, the nation of first publication has important

⁴⁹ NOI at 66,334.

⁵⁰ See ABA-IPL Initial Comments at 6; Alliance for Recorded Music (“ARM”) Initial Comments at 8; Int’l Assn of Scientific, Technical & Med. Publishers (“STM”) Initial Comments at 6; Int’l Trademark Ass’n (“INTA”) Initial Comments at 10; MPA Initial Comments at 4–5; Nat’l Music Publishers Ass’n (“NMPA”) Initial Comments at 4; N.Y.C. Bar Ass’n Reply Comments at 4–5; see also Authors Alliance Initial Comments at 11–12 (arguing that amending statute may be helpful, but is not necessary because Office can issue regulations interpreting publication); ESA Initial Comments at 11–12 (arguing that amendment is not necessary because “[t]he current statute provides the Office enough flexibility to register the copyrights in games with less balkanization by publication status and date”).

⁵¹ ABA-IPL Initial Comments at 6; INTA Initial Comments at 10; MPA Initial Comments at 1, 4–5; NMPA Initial Comments at 4; N.Y.C. Bar Ass’n Reply Comments at 4–5.

⁵² See, e.g., ABA-IPL Initial Comments at 6; ARM Initial Comments at 8; INTA Initial Comments at 10; MPA Initial Comments at 4–5; NMPA Initial Comments at 4.

ramifications . . . with respect to choice of law to assess copyrightability and copyright ownership.⁵³

Other commenters were in favor of amending the statute, with some offering specific proposals.⁵⁴ For example, in separate comments, consulting firm Shaftel & Shmelzer and Linda Kattwinkel suggested eliminating entirely the requirement to identify whether a work has been published and the date and nation of first publication, arguing that it would be preferable for courts to decide these issues if necessary during the course of a lawsuit rather than risk jeopardizing a copyright owner's ability to proceed with an infringement action due to incorrect publication information on an application.⁵⁵ The Coalition of Visual Artists, the Digital Media Licensing Association ("DMLA"), and Jennifer Unruh recommended amending section 409(8) to make providing publication status optional.⁵⁶ The Authors Guild suggested revising section 409(8) "to apply in cases where that information is indeed needed and not otherwise provided" and replacing the nation of publication requirement with a statement of whether the work was first or simultaneously published 1) outside of the United States by a national of another country, and if so, 2) whether it was first published in a country that has copyright relations with the United States.⁵⁷ Other proposals included requiring only the year of the publication rather than the exact date,⁵⁸ and treating the date of completion of the final version of an illustrator's or graphic artist's work as the year of publication.⁵⁹

The Office appreciates that eliminating the requirements to provide certain publication information in a registration application would prevent some of the errors that can undermine the validity of a registration. We also recognize, however, the importance of the date and nation of publication for determining the availability of certain remedies and whether the work is a United States work subject to the pre-lawsuit registration requirement.⁶⁰ Omitting the publication date from the registration certificate could complicate litigation. The Office continues to consider whether a statutory amendment could be crafted to appropriately balance the concerns on both sides.

⁵³ N.Y.C. Bar Ass'n Reply Comments at 5.

⁵⁴ *See, e.g.*, AMI Initial Comments at 8–9; Coalition of Visual Artists Initial Comments at 32–33; Linda J. Kattwinkel Initial Comments at 6.

⁵⁵ Shaftel & Shmelzer Initial Comments at 19–20; Linda J. Kattwinkel Initial Comments at 6; *see also* Nat'l Writers Union ("NWU") & Am. Photographic Artists ("APA") Initial Comments at 5 (arguing for removal of requirement to provide date and nation of first publication).

⁵⁶ Coalition of Visual Artists Initial Comments at 32–33; DMLA Initial Comments at 6; Jennifer L. Unruh Initial Comments at 7.

⁵⁷ Authors Guild Initial Comments at 8–9.

⁵⁸ Mike Austin Initial Comments at 2 ("Often I only create one illustration for a client and then my contact person has moved on. I can only guess within a couple months of when it was published.").

⁵⁹ Shaftel & Schmelzer Initial Comments at 6.

⁶⁰ *See* 17 U.S.C. § 412 (allowing copyright owners to recover attorneys' fees and statutory damages for pre-registration infringement when registration is made within three months of first publication); *Id.* § 411(a) (requiring a copyright owner to have either registered the work with the Office or had the application refused before commencing an infringement action regarding a United States work).

2. Amend Statutory Definition of Publication in Section 101

The NOI requested comments on whether Congress should clarify the definition of publication in the digital environment.⁶¹ Several commenters opposed any amendment.⁶² For example, ARM argued that the current statutory definition is sufficiently clear with respect to sound recordings, and that any amendment could introduce confusion.⁶³ In its view, the Office should instead focus on clarifying how the definition applies to photographs, articles, and other works that are displayed or transmitted online, which ARM believes to be the chief source of confusion.⁶⁴ The Copyright Alliance argued that “[a]ny alteration to the definition of publication could inadvertently broaden, narrow or otherwise alter the interpretation of the term and could present new questions or unintended consequences.”⁶⁵ STM proposed alternatives to amending the statute, such as requesting that the Office provide further guidance regarding what constitutes online publication that is “respectful of evolving industry standards and best practices.”⁶⁶

Other commenters supported amending the definitional language. For example, APA asked the Office to “urge Congress to give ‘publication’ a plain language definition consistent with its ordinary meaning.”⁶⁷ The Coalition of Visual Artists “urge[d] revising the definition of publication, even if just to add language clarifying the most troubling scenarios for visual artists . . . including online publication, posting to social media, and delivery to clients and potential clients.”⁶⁸ Several commenters offered more specific proposals.⁶⁹ The Kernochan Center for Law, Media, and the Arts at Columbia Law School (“Kernochan Center”) suggested that a work should be considered published in the online context when it is first made available to the public “regardless of whether the access is by download, stream or display (or any combination of these).”⁷⁰ Similarly, the Authors Guild proposed that a work should be considered published “if it has been made publicly available— other than solely by public display or performance—provided the making available was authorized by the copyright owner.”⁷¹ AIPLA proposed replacing the existing definition with a “practical test” where “‘publication’ only occurs if a distribution or offer to distribute copies of works is made ‘by or under the authority of the copyright owner.’”⁷² Shaftel & Schmelzer would define publication as

⁶¹ NOI at 66,334.

⁶² See, e.g., ARM Initial Comments at 5; ESA Initial Comments at 13; Copyright Alliance Initial Comments at 9; MPA Initial Comments at 5; NMPA Initial Comments at 4; N.Y.C. Bar Ass’n Reply Comments at 6.

⁶³ ARM Initial Comments at 5.

⁶⁴ *Id.*; see also ESA Initial Comments at 13 (noting that “recent policy discussions of publication issues have largely centered on the online display of photographs and other visual art works”).

⁶⁵ Copyright Alliance Initial Comments at 9.

⁶⁶ STM Initial Comments at 7.

⁶⁷ AMA Initial Comments at 4.

⁶⁸ Coalition of Visual Artists Initial Comments at 34–35.

⁶⁹ See, e.g., Am. Intell. Prop. L. Ass’n (“AIPLA”) Initial Comments at 5–6; APA Initial Comments at 4; Coalition of Visual Artists Initial Comments at 34–35; Shaftel & Schmelzer Initial Comments at 21.

⁷⁰ Kernochan Center Initial Comments at 6.

⁷¹ Authors Guild Initial Comments at 10.

⁷² AIPLA Initial Comments at 5–6.

“a deliberate and intentional act by the creator or rights holder to make the visual work available for distribution, reproduction or sale.”⁷³

The NOI also sought comment on whether Congress should consider amending the Copyright Act so that a different event, rather than publication, triggers some or all of the legal consequences currently tied to publication.⁷⁴ Commenters differed on which events should be considered under this approach. ABA-IPL and DMLA supported adding a “making available” right to the list of exclusive rights of a copyright owner⁷⁵ and argued that making a work available would be “an appropriate trigger for some or all of the consequences that currently flow from a work’s publication.”⁷⁶ Jennifer L. Unruh proposed that Congress should amend the Copyright Act to “exclude publication as a triggering event in the case of online works.”⁷⁷

Amending the definition of the term “publication” would allow Congress to take into account the vast technological changes that have occurred since the definition was first included in the Copyright Act of 1976. The Office recognizes that evolving technology has made it possible for creators to make their works accessible to the public in many different ways, and that not all of these mechanisms fit neatly into a definition that turns on the distribution of copies. As discussed above, however, the concept of publication is intertwined with many other copyright concepts and requirements in the Copyright Act. The Office is continuing to consider whether amendments to the statutory definition are warranted, and whether any of the solutions proposed by commenters would be beneficial to the registration system in light of the overall goals of copyright.

B. Regulatory Changes

The Office generally requires that separate works be registered using separate applications and filing fees.⁷⁸ The Copyright Act, however, provides the Register with authority to create registration options through which multiple works may be registered using one application and fee.⁷⁹ The Office has created a number of such options, including for registration of certain collective works along with individual contributions to that collective work, as well as for registration of certain published works that constitute a single “unit of publication.”⁸⁰ The Office has also created group registration options for serials, newspapers, newsletters, contributions to periodicals, unpublished photographs, published photographs, short online

⁷³ Shaftel & Schmelzer Initial Comments at 21.

⁷⁴ NOI at 66,334.

⁷⁵ See generally U.S. COPYRIGHT OFFICE, THE MAKING AVAILABLE RIGHT IN THE UNITED STATES (2016), https://www.copyright.gov/docs/making_available/making-available-right.pdf (assessing the state of U.S. law recognizing and protecting copyright holders’ exclusive right of “making available”).

⁷⁶ ABA-IPL Initial Comments at 6–7; see DMLA Initial Comments at 10.

⁷⁷ Jennifer L. Unruh Initial Comments at 7.

⁷⁸ COMPENDIUM (THIRD) § 511.

⁷⁹ 17 U.S.C. § 702 (authorizing the Register to establish regulations not inconsistent with law for the administration of the functions and duties made the responsibility of the Register in Title 17); see also *id.* § 408(c)(2) (requiring the Register to establish regulations specifically permitting a single registration for a group of works first published as contributions to periodicals).

⁸⁰ See 37 C.F.R. § 202.3(b)(2), (4).

literary works, works on an album of music, secure test items, and automated databases.⁸¹ As discussed above, none of these group registration options permits registration of published and unpublished works through the same application.

In the NOI, the Office asked commenters to consider possible regulatory changes that could minimize the consequences of making an error during the application process as to whether a work is published.⁸² As explained above, the Supreme Court’s ruling in *Unicolors* may diminish applicants’ concerns on this issue. If, however, the Court holds that a copyright registration can be invalidated based on a legal error regarding whether a work is published, regulatory changes that provide greater flexibility to change the publication status of a work after an application is filed may be warranted.

1. Partition Published and Unpublished Works after Registration

The Office asked commenters to consider whether we should issue regulations allowing a group registration to be amended and partitioned, post-registration, into published and unpublished groups.⁸³ Twenty-three commenters supported such a regulation. One commenter, the New York Intellectual Property Law Association (“NYIPLA”), proposed allowing partition and correction, together with additional or substitute deposit copies as needed, additional fees to cover the costs, and submission of a declaration of good faith, accompanied by details about any prior partitioning.⁸⁴ Only one commenter, AIPLA, opposed this proposal. Although it agreed “that certain changes to Copyright Office policies and regulations pertaining to group registration options would go a long way in reducing the considerable harm that genuine confusion regarding publication status can cause for rights holders,”⁸⁵ it objected to singling out publication as the only item for which amendments may be made, arguing that doing so “would provide preference for these mistakes over those that may require a new application.”⁸⁶

Any consideration of this proposal would need to take into account potential implications of section 408(d), which authorizes the Office to promulgate regulations for supplementary registrations, in order “to correct an error in a copyright registration or to amplify the information given in a registration.”⁸⁷ If section 408(d) is interpreted to be the sole manner in which the Office can permit registrants to correct an error, the Office would lack authority to adopt the proposed regulation. Section 408(d) also provides that “[t]he information contained in a supplementary registration augments but does not supersede that contained in the earlier registration.”⁸⁸ Even if the Office could issue regulations permitting post-registration partition,

⁸¹ *Id.* §§ 202.3(b)(5), 202.4(c-j), (o).

⁸² NOI at 66,334.

⁸³ *Id.* at 66334.

⁸⁴ NYIPLA Initial Comments at 3–4.

⁸⁵ AIPLA Initial Comments at 3 (citing *Gold Value Int’l Textile, Inc. v. Sanctuary Clothing, Ltd. Liab. Co.*, 925 F.3d 1140, 1148 (9th Cir. 2019)).

⁸⁶ *Id.*

⁸⁷ 17 U.S.C. § 408(d).

⁸⁸ *Id.*; see also 37 C.F.R. § 202.6(f)(2) (“[T]he information contained in a supplementary registration augments but does not supersede that contained in the basic registration.”).

questions would remain regarding whether the information contained in the partitioned registrations would supersede the earlier information, and what effective date of registration the partitioned registrations should be assigned.

Another difficulty involves the deposit requirements. The Office generally does not permit changing a registered work's status from unpublished to published, because of the different deposit requirements for each type of work. With a few exceptions, an applicant registering an unpublished work must submit one copy of the work with the application; if the work is published, two copies of the best edition of the work are required.⁸⁹ The Office would need to build the infrastructure to permit registrants to submit an additional copy of a work post-registration when changing its status from unpublished to published, as the registration system presently does not accommodate such a change.

Finally, there is some concern that a post-registration partition could be misused by applicants to register published and unpublished works together in the initial registration in order to save money, relying on the ability to correct that error during a lawsuit if the information is challenged as erroneous.⁹⁰

2. Group Registration Options for Published and Unpublished Works in a Single Registration

The NOI also invited comment on whether the Office's next-generation registration system should provide an option to register unpublished and published works in a single registration. The Office specifically requested commenters' views regarding the practical and administrative considerations we should take into account in exploring such an option.⁹¹

Commenters overwhelmingly supported this proposal.⁹² Several commenters indicated that permitting published and unpublished works to be registered in the same application would simplify the registration process and decrease costs for applicants. For example, the Copyright Alliance opined that "making this change would be more cost-effective for applicants without imposing an undue burden on the Office, and improve the ease and efficiency of registration."⁹³

⁸⁹ 17 U.S.C. §§ 407(a), 408(b)(1), (2). The Office recognizes an exception where the deposit copy requirements for a published work are the same as those needed for an application for an unpublished work, such as for e-books and serials. 37 C.F.R. §§ 202.20(b)(2)(iii)(B), 202.20(c)(2) (listing works for which two deposit copies are not required); *see also* COMPENDIUM (THIRD) § 1107.5(A) (deposit requirements for serials); *id.* § 1507.2 (deposit requirements for electronic publications). In those cases, the deposit requirements are not an impediment to allowing a change in status from unpublished to published on a registration.

⁹⁰ *See* NYIPLA Initial Comments at 5.

⁹¹ NOI at 66,334.

⁹² *See, e.g.,* Deborah Gerhardt Initial Comments at 14; Jennifer Unruh Initial Comments at 6–7; NMPA Initial Comments at 3–4; Science Fiction & Fantasy Writers of America ("SFWA") Initial Comments at 3; Shaftel & Schmelzer Initial Comments at 15, 18.

⁹³ Copyright Alliance Initial Comments at 8.

Similarly, the Authors Guild opined that providing applicants with the ability to register both published and unpublished works in one application would “inevitably lead to more registrations.”⁹⁴

Permitting registration of published and unpublished works in the same claim would, however, require extensive changes to the existing regulations, technological systems, applications, and deposit retention requirements, which would be costly and time-consuming.⁹⁵ Additionally, although a new system might make it easier to change the publication information for works after the Office has issued a group registration, applicants would still be required by statute to distinguish the unpublished works from the published works and to provide publication dates for the latter. Allowing registration of published and unpublished works in the same claim could also impede the goal of encouraging registration of unpublished works before any distribution has occurred.

We are considering the feasibility of these regulatory options as we develop our next-generation registration system. In doing so, we will weigh the potential benefits these changes could provide against the costs and effort they would require in light of our comprehensive modernization goals.

* * * *

In sum, the Office understands the difficulty applicants have in assessing whether their works have been published, and recognizes the importance this determination has in multiple areas of copyright law and practice. We hope that the Supreme Court’s decision in *Unicolors* will clarify that an applicant’s good faith legal error regarding a work’s publication status cannot invalidate a registration in the context of an infringement action, which would address many of the concerns expressed in comments to the NOI.

Regardless of that outcome, however, a broad range of copyright stakeholders find the current statutory definition of publication insufficiently clear, particularly with respect to online works. Commenters provided insightful, but sometimes conflicting, suggestions about whether and how Congress or the Office could provide further clarity. The Office has already taken action to provide additional guidance regarding what constitutes publication, and we will supplement those efforts going forward. The Office also continues to analyze the comments submitted regarding potential statutory and regulatory changes, and to consider the feasibility of commenters’ various proposals in light of our current and future technological infrastructure and systems.

⁹⁴ Authors Guild Initial Comments at 7–8; *see also* Copyright Alliance Initial Comments at 8 (suggesting that this option would assuage concerns over making a publication determination).

⁹⁵ *See* N.Y.C. Bar Ass’n Reply Comments at 5 (noting the “additional development and administrative costs” that would accompany “develop[ing] the infrastructure necessary to process” applications with published and unpublished works).

Thank you for your attention to this issue. If my staff and I may be of further assistance, please do not hesitate to contact us.

Sincerely,

A handwritten signature in black ink that reads "Shira Perlmutter". The signature is written in a cursive, flowing style with a long horizontal line extending from the end of the name.

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