

U.S. House of Representatives  
Committee on the Judiciary

Washington, DC 20515-6216

One Hundred Sixteenth Congress

April 3, 2019

Karyn A. Temple, Esq.  
Register of Copyrights and  
Director of the U.S. Copyright Office  
Library of Congress  
101 Independence Avenue, SE  
Washington, DC 20540

Dear Ms. Temple:

We write to you today following the U.S. Supreme Court's recent decision in *Fourth Estate Public Benefit Corporation v. Wall-Street.com, LLC*,<sup>1</sup> which resolved a split among circuit courts of appeal in favor of requiring the Copyright Office to finish the registration process before an infringement lawsuit can be filed. As Chairman and Ranking Member of the Committee with oversight of the copyright laws, we are concerned about the impact that this ruling will have on the ability of creators and rights-holders to seek timely relief of infringement due to the amount of time it currently takes to complete the standard registration process.

We are aware that the Copyright Office also has created expedited procedures for registration, although they are more expensive, and has begun the process of making much-needed improvements to the Office's IT systems. We ask for the Copyright Office to provide us with the current status of the length of time it takes to register (particularly whether the seventh-month period cited in *Fourth Estate* is still the average), the different options available to rights-holders for registration, and the Copyright Office's current plan and projections for lowering the time needed for standard registration to be closer to what it was when the relevant statutory provision, 17 U.S.C. § 411(a), was passed.

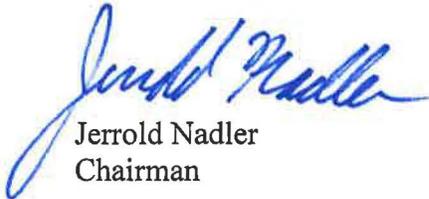
More generally, so that we can also understand how lowering the registration pendency fits within the broader context of Copyright Office modernization efforts, we request that the Copyright Office continue its practice of producing five-year strategic plans, and issue a strategic plan for 2021-2025.

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<sup>1</sup> 139 S. Ct. 881, 887 (2019).

We look forward to hearing from you on these matters, and to continued work with both the Library and the Copyright Office. Should you have any questions, please do not hesitate to contact us.

Sincerely,



Jerrold Nadler  
Chairman



Doug Collins  
Ranking Member



The Register of Copyrights of the United States of America

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The Honorable Jerrold Nadler  
Chairman  
House Judiciary Committee  
United States House of Representatives  
2132 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Doug Collins  
Ranking Member  
House Judiciary Committee  
United States House of Representatives  
1504 Longworth House Office Building  
Washington, D.C. 20515

May 31, 2019

Dear Chairman Nadler and Ranking Member Collins:

I am pleased to deliver this response to the recent congressional inquiries regarding registration and pendency times at the Copyright Office in light of the Supreme Court's decision in *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*.<sup>1</sup> The Copyright Office takes very seriously its responsibility to ensure an efficient and effective registration system for the benefit of the global copyright community, including the general public, and we appreciate the opportunity to provide you with detailed information on our long-standing efforts to continuously improve our practices and processing times. Enclosed for your review are responses to your specific questions, an explanation of registration processes and challenges, and our plans to further reduce application processing times.

The Copyright Office is honored to administer the copyright registration functions for the United States, a responsibility we have held since 1870.<sup>2</sup> Since then, the Copyright Office has registered over 38 million claims to copyright, and has advised Congress and the courts on several

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<sup>1</sup> See Letter from Hon. Thom Tillis, Chairman, and Sen. Christopher A. Coons, Ranking Member, S. Comm. on Judiciary, Subcomm. on Intellectual Prop., to Karyn A. Temple, Register of Copyrights, United States Copyright Office (Mar. 14, 2019), <https://www.tillis.senate.gov/services/files/c633cc00-5326-4e2e-99e7-f5e544fb53f1>; Letter from Hon. Jerrold Nadler, Chairman, and Rep. Doug Collins, Ranking Member, H. Comm. on Judiciary, to Karyn A. Temple, Register of Copyrights, United States Copyright Office (Apr. 3, 2019), [https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/0386\\_001.pdf](https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/0386_001.pdf).

<sup>2</sup> In 1870, Congress consolidated the nation's copyright registration system and placed it in the Copyright Office at the Library of Congress; Congress designated the Copyright Office as a specific department within the Library in 1897.

registration-related matters.<sup>3</sup> Proper interpretation of the Copyright Act is crucial to the functioning of the copyright system, and the Copyright Office welcomed the Supreme Court's unanimous decision and accurate description of the requirements for copyright registration in *Fourth Estate*. As explained in the government's amicus brief in that case, the plain text of section 411 expressly requires the Copyright Office's registration or refusal to register a copyright claim before a claimant may institute an infringement suit. This is a fundamental part of Congress' considered scheme for copyright protection in the United States.<sup>4</sup>

At the same time, the Copyright Office recognizes that the U.S. copyright registration system must be both efficient and responsive, and that it must properly enable copyright owners to promptly enforce their valuable legal rights. The Copyright Office's overarching goal is therefore to deliver registration and other services in an expert and timely manner. We must do this important work, however, within a number of statutory, technological, and budgetary constraints, discussed in detail in the enclosed explanation of processes and challenges. Despite these challenges, the Copyright Office has engaged in initiatives that, with Congress' recent appropriations support (including the ability to hire additional staff), have already resulted in substantially reducing the amount of time it takes to process copyright registration applications. Indeed, the Copyright Office has met—and exceeded—its recent performance goals. Since October 2017, we have reduced our overall average processing time for reviewing copyright claims from eight months to five—a *decrease of almost 40% within two years*. The average time is even lower (now four months instead of seven) for the 73% of all claims received through the electronic registration system for which no correspondence is required. It is lower still for certain categories of works, such as literary works, which, as of April 30, 2019, have an average processing time of three months.

The Copyright Office is committed to building on these significant efforts moving forward. In addition to our modernization efforts, we have already engaged in multifaceted efforts to address processing times, including:

- Increasing staffing to address a period of depressed staffing levels due to sequestration and attrition;
- Streamlining and improving training processes;
- Using internal working groups to develop and implement recommendations for reducing processing times;

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<sup>3</sup> See, e.g., Brief for the United States as Amicus Curiae Supporting Respondents, *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com LLC*, 139 S. Ct. 881 (2019) (No. 17-571); Brief for the United States as Amicus Curiae Supporting Petitioners, *Rimini St. v. Oracle USA, Inc.*, 139 S. Ct. 873 (2019) (No. 17-1625); *Lenz v. Universal Music Corp.*, Brief for the United States as Amicus Curiae, 137 S. Ct. 2263 (2017) (No. 16-217); Response of the Acting Register of Copyrights to Request Pursuant to 17 U.S.C. § 411(b)(2), *Bruhn Newtech, Inc. v. United States*, No. 16-cv-00783 (Fed. Cl. Mar. 18, 2019); Response of the Acting Register of Copyrights to Request Pursuant to 17 U.S.C. § 411(b)(2), *Jeon v. Anderson*, No. 17-cv-01709 (C.D. Cal. Mar. 6, 2019); Response of the Acting Register of Copyrights to Request Pursuant to 17 U.S.C. § 411(b)(2), *Argento v. Santiago*, No. 16-cv-6172 (W.D.N.Y. Jan. 25, 2018).

<sup>4</sup> Brief for the United States as Amicus Curiae Supporting Respondents, *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881 (2019) (No. 17-571).

- Contracting with third parties such as the U.S. Office of Personnel Management (“OPM”) and Smithsonian Organization and Audience Research (“SOAR”) office for third-party review of practices and modernization efforts;
- Resolving the oldest claims and experimenting with an “HOV” process that focuses on claims that are most easily resolved; and
- Evaluating public education regarding preregistration and special handling options for expedited processing.<sup>5</sup>

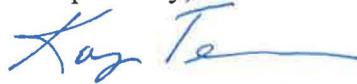
These efforts have resulted in significant improvements in overall processing times.

There are, however, limits to how low registration processing times can be. Efficiency is a critical element, but so are accuracy and quality. As detailed further in the explanation of processes and challenges, the Copyright Office plays an essential role in analyzing applications and complex copyright issues, facilitating predictability for private transactions and promoting efficiency in our judicial system. We are committed to maintaining quality, which requires skillful analysis, including of complex legal issues. Additionally, the time it takes for applicants to respond to Copyright Office communications and for the Office to process the physical deposits required by the best edition guidelines both contribute significantly to processing times. The Copyright Office expects that a flexible new online registration system will help to significantly alleviate some of the logistical issues relating to the current system.

To ensure that the Copyright Office expands upon recent improvements to processing times, we have developed the enclosed pendency reduction plan, which outlines a number of current and new initiatives that the Office is excited to implement. By staying on the current path with appropriate augmentations as outlined in the plan, the Copyright Office will be well positioned to continue to decrease its processing times going forward.

I appreciate your interest in the Copyright Office’s registration program, and look forward to continuing to discuss how the Office can best meet the needs of the copyright community and the public at large.

Respectfully,



Karyn A. Temple  
Register of Copyrights and  
Director, United States Copyright Office

Enclosures

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<sup>5</sup> Preregistration is a relatively simple process for those seeking immediate access to court, yet it is highly underutilized. In FY2018, for example, the Copyright Office received only 661 applications for preregistration. See Parts II and III of the enclosed explanation of registration processes and challenges.

## U.S. COPYRIGHT OFFICE RESPONSES TO SPECIFIC QUESTIONS

May 31, 2019

### Responses to Questions from Chairman Tillis and Ranking Member Coons, United States Senate

Question 1: *What steps will your office take to reduce the pendency of current copyright registration applications?*

Answer: The Copyright Office is committed to providing efficient and quality services, and has been taking steps to reduce pendency times for several years, beginning in 2014.

The first step was to bring on more staff. For reasons detailed in the explanation of processes and challenges, the Copyright Office suffered significant losses of examination staff after 2010. To help combat this problem, the Copyright Office requested additional staffing and obtained congressional approval in FY2015 to bring on twelve new examiner full-time equivalents (“FTEs”). In FY2016, the Copyright Office received funding for twenty additional examiner FTEs. And in FY2018 and FY2019, the Copyright Office received funding for fifteen additional examiner FTEs each year.

As expected, hiring new examiners initially caused processing times to increase. This is because training new examiners required enlisting veteran examiners and supervisors to train and provide oversight for the new examiners. To minimize the impact on productivity, in 2017 the Copyright Office re-envisioned its new examiner training program to reduce the amount of time it takes for new examiners to become fully independent, and the Office continues to make additional improvements.

Since 2014, the Copyright Office has increased the number of examiners by approximately 30% and, by the end of FY2019, will have 126 examiners on staff—a return to 2010 examiner levels, when decreases in staff became significant. This increased staff has contributed to decreasing the number of claims ready for Copyright Office review to just over 114,000 and reducing the average pendency times over the last six months from seven months to five months.

The second step was to responsibly use overtime to more rapidly decrease pendency times. Over the last two years, we have used over 30,000 hours of overtime totaling almost \$1.5 million. The combination of new, trained examiners and overtime has enabled the Copyright Office to consistently decrease the number of claims on hand<sup>6</sup> by approximately 2,000 claims per week for most of the last two years. In total, from the beginning of FY2018, the Office has reduced the number of workable claims by 59%.<sup>7</sup>

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<sup>6</sup> “Claims on hand” are all claims received by the Copyright Office, including those waiting for deposits. “Workable claims” are claims in which the Office has received the application, deposit, and fee in proper form to permit examination.

<sup>7</sup> The Copyright Office has already reduced the number of workable claims to well under 150,000, which historically has been the threshold level for having a backlog.

The Copyright Office also instituted additional initiatives that led to further reductions in processing times, including several interoffice working groups. Remedial actions and recurring review of correspondence bottlenecks have decreased the correspondence rate with applicants from 31% to 24% over the last two years. The reduction of correspondence was achieved through numerous actions, including regulatory changes to the Single Application and the application for unpublished collections; technical changes, including blocking unacceptable file types; and practice changes, including the use of annotations in lieu of correspondence in appropriate circumstances.

The Copyright Office also contracted with third parties such as OPM and SOAR for third party review of the efficiency of Copyright Office practices and modernization efforts. The SOAR analysis helped the Copyright Office study registration examination and identify areas for improvement, resulting in the Office implementing a number of initiatives to improve processing times. OPM is currently conducting a strategic alignment analysis, organization analysis and redesign, and associated position classification review, which will help the Copyright Office optimize its organizational structure and align personnel resources to the emerging needs of the Office that result from implementing the enterprise copyright system (ECS) and revised business processes. More information on these efforts is provided in Part III (B)(3)(4) of the explanation of registration processes and challenges.

Overall, the Copyright Office is making significant reductions in processing times and will continue these reduction efforts moving forward.

Question 2: *How will you ensure such a backlog of copyright registration applications does not occur in the future?*

Answer: As described in Part III of the explanation of processes and challenges, the Copyright Office has implemented a number of initiatives to eliminate, and prevent a recurrence of, an unacceptable backlog of registration applications. Future proposed initiatives are laid out in the enclosed pendency plan.

The main ways to prevent a significant backlog in the future are to ensure that the Registration Program is fully staffed, stabilize IT resources, and ensure that the Copyright Office can continue to operate in the event of a government shutdown.

The primary cause for the significant increase in the number of pending claims was the loss of approximately 40% of the examining staff from 2010 to 2014 because of sequestration, budget constraints, and the loss of FTEs. Ensuring that the Copyright Office can maintain a stable core of examiners is the most critical aspect of preventing a recurrence of the backlog.

An additional requirement that keeps a backlog at bay is a stable IT infrastructure. At times during the past five years, Registration Program staff experienced bandwidth and latency problems when accessing deposits, examining claims in the electronic system, and corresponding with applicants. Many of these problems have decreased or, in some cases, been eliminated, but the examination process is heavily dependent on an efficient and stable IT infrastructure. This is true of the current system as well as any future modernized electronic registration system residing on the Library of Congress IT infrastructure.

An additional risk for preventing a recurrence of a backlog is the possibility of future government shutdowns. When the government shuts down, applicants can continue to submit applications through the electronic registration system to secure the statutory benefits of registration, but examiners cannot review these claims until the shutdown ends. A shutdown of any length can immediately create a backlog, the scope of which is directly related to the length of the shutdown. Under such circumstance, additional hiring is not an option due to the length of time necessary to train new examiners. To prevent long-term effects of a shutdown, remedial overtime funds would be needed in the immediate aftermath to attempt to restore the status quo. For that reason, the Copyright Office has consistently requested that Congress make a statutory change to its appropriation language to allow it to have more flexibility in the use of fees collected in the event of a government shutdown.

Finally, while the Copyright Office will take the appropriate steps to manage the number of claims it receives, there may be times when this number rises, which may or may not result in higher processing times. For example, when the Copyright Office completes the current modernization process, it may be possible to examine a larger number of claims pending while simultaneously reducing processing times. Conversely, modernization may result in some expected increases for processing times at the outset, as users get used to the new system, or may result in additional claimants filing with the Copyright Office because of an improved user experience, which could likewise impact processing times.

Question 3: *What budgetary resources does your office need to reduce the pendency of copyright registration applications from several months to, at maximum, a few weeks?*

Answer: For the reasons discussed in the explanation of processes and challenges, reducing registration processing times to one to two weeks is not a realistic goal currently, especially prior to the completion of the Copyright Office's modernization efforts and full transition to a new IT system and infrastructure. It would be impossible for the Copyright Office to meet processing times of a few days or weeks if the Office must continue to accept physical deposits and examine them for compliance with best edition requirements. Moreover, not all processing times are fully within the Copyright Office's control, such as where correspondence is required or where the applicant delays in providing their deposit; similarly, cuts to the Office's budget or examination staff would likely cause the same delays in processing times as they have in the past. The cited one to two-week processing time is also based on the Copyright Office's functions as they existed in the 1950s, more than sixty years ago, prior to the 1976 Copyright Act and the increasing use and complexity of the current copyright legal regime.

Despite these limitations, the Copyright Office believes that it can further reduce current processing times and is fully committed to doing so. The Copyright Office has already substantially reduced its processing times in the last two years (as noted by a 40% reduction since October 2017) and will continue to achieve further reductions with Congress' ongoing support.

The specific budgetary resources that the Copyright Office needs to build upon its successes and further reduce processing times include budget support for institutionalizing the HOV initiative that temporarily achieved a substantial increase in productivity; this is discussed in Part III (B) of

the explanation of registration processes and challenges. This budget support would include funds to provide a cadre of new subject matter expert examining positions in the Registration Program to handle a significant amount of the claims requiring correspondence, thereby allowing the majority of examiners to expeditiously examine the 75% of claims that do not require correspondence. Based on the HOV initiative performed in March of 2018, the Copyright Office believes that this change can provide a significant benefit to pendency reduction times. The Copyright Office also seeks expanded flexibility to utilize its fees, as well as continued funding for critical IT and modernization upgrades.<sup>8</sup>

Question 4: *Will you develop and submit a pendency reduction plan to the Senate Judiciary Committee, Subcommittee on Intellectual Property by no later than May 31, 2019?*

Answer: Yes. The requested plan is enclosed along with these responses.

Question 5: *Will you commit to providing staff from our offices with regular updates—at least once per quarter—on your efforts to reduce copyright registration backlogs?*

Answer: The Copyright Office will be pleased to provide regular (quarterly or otherwise) updates to your staff on the Office's progress in continuing to reduce registration processing times.

Question 6: *Are you developing a strategic plan for the Copyright Office's modernization initiatives? If so, when will this plan likely be released?*

Answer: The Copyright Office released a new strategic plan on April 5, 2019, covering the next five years from 2019–2023, which includes discussion of modernization initiatives.<sup>9</sup> The strategic plan encompasses six major focus areas (information technology modernization, optimizing business processes, organizational change management, education and engagement, impartial expertise on copyright law and policy, and measuring success), all of which will contribute to improving Copyright Office operations and further streamlining Office pendency times.

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<sup>8</sup> The Copyright Office was relatively conservative in its budget request for FY2020, but will request an increased budget for FY2021 to accommodate necessary changes.

<sup>9</sup> See U.S. COPYRIGHT OFFICE, STRATEGIC PLAN 2019–2023, COPYRIGHT: THE ENGINE OF FREE EXPRESSION (2019), <https://www.copyright.gov/reports/strategic-plan/USCO-strategic2019-2023.pdf>.

**Responses to Questions from Chairman Nadler and Ranking Member Collins,  
United States House of Representatives**

Question 1: *We ask for the Copyright Office to provide us with the current status of the length of time it takes to register (particularly whether the seven-month period cited in *Fourth Estate* is still the average), the different options available to rights-holders for registration, and the Copyright Office's current plan and projections for lowering the time needed for standard registration to be closer to what it was when the relevant statutory provision, 17 U.S.C. § 411(a), was passed.*

Answer: Part III of the enclosed explanation of registration processes and challenges details the Copyright Office's current processing times and different available registration options. As explained there, the seven month average processing time cited in *Fourth Estate* for online claims that do not require correspondence has already been reduced to four months.<sup>10</sup> Statutory options already in place for rightsholders to expedite registration processing include preregistration, which allows owners of certain types of copyrighted works to preregister before a work is even complete, as well as the special handling option that allows those facing litigation to ask for their applications to be handled more quickly, with the Copyright Office generally responding within five business days. Combined, these initiatives provide an extremely effective and expedited way for rights-holders to meet the legal standards necessary to get into court under the *Fourth Estate* decision. The Copyright Office has also implemented a number of initiatives to further reduce processing times, and future proposed initiatives are laid out in the enclosed pendency plan.

Question 2: *[W]e request that the Copyright Office continue its practice of producing five-year strategic plans, and issue a strategic plan for 2021-2025.*

Answer: The Copyright Office released a new strategic plan on April 5, 2019, covering the next five years from 2019–2023,<sup>11</sup> which aligns with the Library's 2019–2023 strategic plan. We will continue to provide strategic plans moving forward.

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<sup>10</sup> As noted previously, the pendency time for all open claims has been reduced to five months, a 40% reduction.

<sup>11</sup> The plan is available on the Copyright Office's website at <https://www.copyright.gov/reports/strategic-plan/USCO-strategic2019-2023.pdf>.

# EXPLANATION OF U.S. COPYRIGHT OFFICE REGISTRATION PROCESSES AND CHALLENGES

May 31, 2019

The Copyright Office has administered the nation’s copyright registration system for almost 150 years, since 1870.<sup>1</sup> During that time, the Copyright Office has taken great care to thoughtfully review applications to register claims for copyright, and has provided advice on copyright matters to all branches of the federal government. Below, we provide key background on the registration system, including challenges we face and actions we already have taken to address those challenges. The Copyright Office is committed to providing a thorough, authoritative, and efficient registration system for the global copyright community and the public at large.

## I. THE ROLE OF COPYRIGHT REGISTRATION

### A. Statutory background.

Under the Copyright Act, copyright protection attaches to a fixed original work of authorship at the time of its creation.<sup>2</sup> Registration of a claim in a copyrighted work with the Copyright Office is voluntary.<sup>3</sup> While the process to register and legal effect of registration have changed over time, Congress has provided for the official registration of copyright claims with the federal government, in one form or another, since the initial Copyright Act of 1790.<sup>4</sup> Under current law, to apply for registration, an applicant must deliver to the Copyright Office a completed application form, full filing fee, and requisite deposit consisting of a complete copy (or copies) of the work to be registered.<sup>5</sup> When received, the Copyright Office “examin[es]” the “material deposited” to determine whether it “constitutes copyrightable subject matter” and whether “the other legal and formal requirements of [title 17] have been met.”<sup>6</sup> If so, the Copyright Office

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<sup>1</sup> In 1870, Congress consolidated the nation’s copyright registration system and placed it in the Copyright Office at the Library of Congress; Congress designated the Copyright Office as a specific department within the Library in 1897.

<sup>2</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 . . . .”).

<sup>3</sup> *Id.* § 408(a) (“Such registration is not a condition of copyright protection.”).

<sup>4</sup> *See* BENJAMIN KAPLAN, STUDY NO. 17: THE REGISTRATION OF COPYRIGHT (1958), *reprinted in* STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMM. ON THE JUDICIARY, U.S. SENATE: STUDIES 17–19, at 9 (Comm. Print 1960); COPYRIGHT LAW REVISION, REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 71 (Comm. Print 1961).

<sup>5</sup> 17 U.S.C. §§ 408, 409, 708; *see* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 204 (3d ed. 2017) (“COMPENDIUM (THIRD)”); U.S. COPYRIGHT OFFICE, CIRCULAR 2: COPYRIGHT REGISTRATION (2017).

<sup>6</sup> 17 U.S.C. § 410(a).

registers the claim and issues a certificate of registration to the applicant.<sup>7</sup> The Copyright Office also creates an official public record of the registration by entering information about it into the Office’s publicly searchable records catalog, with deposit copies available for public inspection.<sup>8</sup> If the Copyright Office determines that a work is not copyrightable or the claim is invalid for any other reason, the Office refuses registration.<sup>9</sup>

Although registration is optional, the Copyright Act provides substantial incentives to encourage early registration of copyright claims. First, a certificate of registration issued by the Copyright Office after examination constitutes *prima facie* evidence of the validity of the copyright and of the facts stated in the certificate, but only if registration is made before or within five years of the first publication of the work.<sup>10</sup>

Second, the Act provides that copyright owners may only pursue statutory damages and attorney’s fees if the effective date of registration is within three months of publication or before infringement.<sup>11</sup> This creates a powerful incentive to register works as soon after their creation or publication as possible.<sup>12</sup>

Finally, under section 411(a), a copyright owner of a U.S. work may not institute a civil action for infringement until registration has been made or refused by the Copyright Office.<sup>13</sup> This last incentive was the subject of the Supreme Court’s decision in *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*.<sup>14</sup> Previously, there had been some disagreement in the courts over whether a plaintiff needed to merely file an application for registration to bring suit (the “application approach”) or whether they needed to wait until after the Copyright Office acted on the application by examining the copyright claim and then registering or refusing to register it (the “registration approach”). While the Fifth and Ninth Circuits had followed the application approach, the Tenth and Eleventh Circuits, along with over 100 district courts, including at least one in every other circuit, had held in favor of the registration approach.<sup>15</sup>

In *Fourth Estate*, the Court unanimously held for the registration approach. The Court concluded that “‘registration . . . has been made’ within the meaning of 17 U.S.C. § 411(a) not when an application for registration is filed, but when the Register [of Copyrights] has registered

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

<sup>8</sup> *Id.* § 705(a)–(b). The Office’s online public records catalog is available at <https://cocatalog.loc.gov>.

<sup>9</sup> *Id.* § 410(b).

<sup>10</sup> *Id.* § 410(c).

<sup>11</sup> *Id.* § 412. Section 410(d) states that the “effective date of a copyright registration 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.”

<sup>12</sup> Other provisions permit recovery of statutory damages and attorney’s fees for infringements that predate registration, but they too encourage early registration. *See, e.g.*, 17 U.S.C. § 408(f) (preregistration); *id.* § 411(c) (works that are first fixed simultaneously with their transmission (*i.e.*, live sporting events)).

<sup>13</sup> *Id.* § 411(a).

<sup>14</sup> 139 S. Ct. 881 (2019).

<sup>15</sup> *See* 5 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 17:78 (2019) (collecting cases).

a copyright after examining a properly filed application.”<sup>16</sup> That is when registration occurs, and when “a copyright claimant may commence an infringement suit.”<sup>17</sup> The Court found that this is “the only satisfactory reading of § 411(a)’s text.”<sup>18</sup>

## **B. Registration is integral to the U.S. copyright system.**

The Copyright Act’s incentives for timely registration of copyright claims recognize that registration furthers several important public policy objectives. As the United States explained to the Supreme Court, “[r]egistration of creative works confers significant benefits on the Library of Congress and the public.”<sup>19</sup> 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.”<sup>20</sup> This record thus “serves as a valuable resource for those seeking to use copyrighted works lawfully.”<sup>21</sup> 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.”<sup>22</sup> 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>23</sup>

Copyright registration is part of Congress’ considered scheme to filter copyright claims through the Copyright Office, resulting in an improved record for the courts, as well as the public at large, to rely upon. The Copyright Office’s examination process weeds out incomplete, abandoned, and dubious claims. A significant number of registration applications—about 29% in FY2018 and about 24% during the first half of FY2019—require correspondence.<sup>24</sup> The potential for applicant error is compounded by the fact that many applications are filed by individual creators, non-lawyers, and others not familiar with the process. When an application arrives at the Copyright Office with deficiencies, examiners correspond with applicants to attempt to remedy these issues.

The Copyright Office uses correspondence to limit or otherwise clarify the scope of claims, better identify copyrightable contributions, ensure submission of a proper deposit, or secure payment of the correct fee, among other things. But for this correspondence, these claims would likely be refused. Even after correspondence, claims still may not be registrable, such as when

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<sup>16</sup> *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, No. 17-571, slip op. at 12 (Mar. 4, 2019).

<sup>17</sup> *Id.* at 1.

<sup>18</sup> *Id.* at 4.

<sup>19</sup> 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>20</sup> *Id.* at 5.

<sup>21</sup> *Id.* at 22.

<sup>22</sup> *Id.* at 11.

<sup>23</sup> *Id.* at 4.

<sup>24</sup> U.S. COPYRIGHT OFFICE, REGISTRATION PROCESSING TIMES (Oct. 1, 2018 – Mar. 31, 2019), <https://www.copyright.gov/registration/docs/processing-times-faqs.pdf> (last visited Apr. 16, 2019); U.S. COPYRIGHT OFFICE, REGISTRATION PROCESSING TIMES (Oct. 2, 2018), <https://www.copyright.gov/registration/docs/processing-times-faqs.pdf> (last visited Apr. 10, 2019).

the material deposited does not constitute copyrightable subject matter. In FY2018, of the 643,518 claims closed by the Copyright Office, approximately 25,000 (4%) were refused. In addition, approximately 58,000 (9%) claims were abandoned by applicants during the registration process.<sup>25</sup> Thus, the examination process helps minimize judicial inefficiencies by precluding flimsy or defective copyright claims.

*1. Registration creates a definitive public record.*

Registration records provide the public with authoritative information about millions of vetted copyright claims. The Copyright Office holds the largest compilation of copyrighted works and copyright ownership information in the world, encompassing an unparalleled record of American cultural heritage. This expansive public record includes key facts relating to the authorship and ownership of these works, as well as the works themselves, such as their titles, years of creation, and dates of publication. Public access to this information helps the national and international copyright system flourish by facilitating licensed uses of copyrighted works.<sup>26</sup> This is augmented by the Copyright Office’s recordation system, which enables rights owners to provide updated ownership information relating to copyright claims.

And so, while registration is voluntary, as noted by Public Knowledge and the R Street Institute, “Congress took deliberate steps to preserve the registration and deposit requirements by attaching them to a complex web of benefits and penalties,” which “is a testament to the unique and ultimately irreplaceable role that registration plays in the market for creative works; namely, its value in creating and maintaining a comprehensive public record of ownership rights.”<sup>27</sup> The Association of American Publishers recognized this as well, testifying during 1993 congressional hearings regarding section 411 that, “statutory incentives [to register] are *absolutely essential* to the public record envisaged by the registration system,” and “[t]his registration record provides invaluable data regarding such matters as authorship, ownership and duration of copyright, dates of creation and publication and the like,” such 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.”<sup>28</sup>

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<sup>25</sup> When claims are abandoned, registration has not been refused, meaning that suit cannot be brought under the second part of section 411(a). Similarly, if an application with formal deficiencies (*e.g.*, an incorrect fee or incomplete deposit) is refused, that applicant may not file an infringement suit.

<sup>26</sup> See U.S. COPYRIGHT OFFICE, STRATEGIC PLAN 2019–2023, COPYRIGHT: THE ENGINE OF FREE EXPRESSION 4 (2019) (“The Office’s core services of registration, recordation, and statutory licensing are integral to marketplace transactions in the United States and abroad—providing legal certainty for licensing works to new businesses, bringing U.S. content to foreign countries, and ensuring public access to copyright ownership information.”).

<sup>27</sup> Brief of Public Knowledge and the R Street Institute as Amici Curiae in Support of Respondents at 16, *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881 (2019) (No. 17-571).

<sup>28</sup> *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) (emphasis in original) (quotation marks omitted).

## 2. Registration promotes judicial efficiency in infringement actions.

Registration also provides important litigation benefits, by allowing an expert agency to assess the work, verify or reconcile application and deposit information, and properly tailor claims. Through this examination process' vetting of claims, 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.

Congress has repeatedly chosen to retain section 411(a), in part because the Copyright Office's review of a copyright claim has a positive impact on litigation for both the courts and the litigants.<sup>29</sup> For example, the House Judiciary Committee's report for the Berne Convention Implementation Act noted that "[c]opyright registration promotes efficient litigation practices, to the benefit of the courts and the public as well as to the parties in the lawsuit."<sup>30</sup> The report acknowledged that "[r]egistration narrows the issues that must be litigated and, since it pertains to proof of ownership, assists the courts in resolving the underlying copyright dispute."<sup>31</sup> The House report notes that without the benefit of the Copyright Office's ruling on the copyrightability of a work, plaintiffs with weak or abusive copyright claims "can exploit discovery and other procedures (or even, as is common, generate unfavorable and destructive publicity in the business world) to extract settlements and cause financial harm to legitimate competition and ultimately the public through higher prices."<sup>32</sup> Accordingly, curtailing examination "would result in attempts to use the legal system to exert control over materials that Congress intends to be in the public domain."<sup>33</sup>

The House noted, too, that the judiciary had contacted them about the issue: "[T]he Judicial Conference of the United States advise[d] the Committee that if the requirement of registration as a prerequisite to suit were eliminated, there would likely be increased difficulty in trying copyright cases."<sup>34</sup> More recent judicial determinations have also taken note of the Copyright Office's ability to reduce litigation burdens and have deferred to the Office's registration expertise.<sup>35</sup>

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<sup>29</sup> See 5 PATRY ON COPYRIGHT § 17:80 ("Section 411(a)'s resiliency is a strong testament to the public policies it serves.").

<sup>30</sup> H.R. REP. NO. 100-609, at 41 (1988).

<sup>31</sup> *Id.* at 41.

<sup>32</sup> *Id.* at 42.

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

<sup>34</sup> *Id.* at 41–42; see also REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 24 (Mar. 15, 1988).

<sup>35</sup> See, e.g., *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 479–80 (6th Cir. 2015) ("district court erred by failing to give greater deference to the Copyright Office's registration determinations," as "[t]he Copyright Office's expertise . . . surpasses [the court's]") *aff'd* 137 S. Ct. 1002 (2017); *Torres-Negron v. J & N Records, LLC*, 504 F.3d 151, 161 (1st Cir. 2007) ("One purpose of the registration requirement is to allow the Copyright Office to make an initial judgment about the validity of copyrights, based on its experience and expertise, and to reduce the burdens of litigation by giving that judgment some weight in subsequent litigation."); *Southco, Inc. v. Kanebridge*

This is consistent with the Copyright Office’s own views. Testifying before the Senate in 1988 during consideration of the Berne Convention Implementation Act, then-Register of Copyrights Ralph Oman explained:

If section 411(a) is eliminated as an incentive, courts will be asked to rule on an increased number of novel copyright issues, without benefit of an administrative record to expedite their proceedings. Copyright owners with questionable claims will seek to enforce rights by asking the courts—often in the context of shortfused temporary restraining order or a preliminary injunction—to rule directly on their claims without risking the negative implications that would arise from a possible Copyright Office denial of registration. Attorneys with weak cases, or novel cases would have a powerful incentive to bypass the Copyright Office in precisely the kind of case in which the courts want to have the advice of an expert agency.<sup>36</sup>

And certain copyright owners also expressed support for section 411(a) at that time, testifying, for example, that “[t]he Author’s Guild has not yet found an example of a writer being unable to bring a meritorious infringement claim under the present scheme,” while “[o]n the other hand, the repeal of sections 411(a) and 412 seems likely to foster increased litigation whose net effect will be to burden authors’ rights of free expression.”<sup>37</sup>

### 3. *Registration assists the Library of Congress in growing its collections.*

Under the Copyright Act, “[i]n the case of published works, all copies, phonorecords, and identifying material deposited [with the Copyright Office] are available to the Library of Congress for its collections, or for exchange or transfer to any other library.”<sup>38</sup> These deposit copies of works are a major source of acquisitions for the Library’s collections, helping the Library establish an unparalleled collection, with more than 168 million items.<sup>39</sup> In FY2018, the Copyright Office forwarded 289,308 registration deposits to the Library’s collections.<sup>40</sup>

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*Corp.*, 390 F.3d 276, 286 & n.5 (3d Cir. 2004) (en banc) (Alito, J.) (“the Copyright Office’s longstanding [registration practice] merits deference” because “[a]t a minimum, the practice of the Copyright Office ‘reflects a body of experience and informed judgment to which courts and litigants may properly resort for guidance’”) (quoting *Yates v. Hendon*, 541 U.S. 1 (2004)).

<sup>36</sup> S. REP. NO. 100-352, at 23–24 (1988) (quoting testimony of Ralph Oman, Register of Copyrights, U.S. Copyright Office).

<sup>37</sup> *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. 54–55 (1993) (statement of Scott Turow, Member, The Authors Guild, New York, NY, accompanied by Robin Davis-Miller, Executive Director, Authors Guild).

<sup>38</sup> 17 U.S.C. § 704(b).

<sup>39</sup> *Fascinating Facts*, LIBRARY OF CONGRESS, <https://www.loc.gov/about/fascinating-facts/> (last visited Mar. 19, 2019).

<sup>40</sup> In addition to the registration process, material was also acquired directly through “mandatory deposit” under section 407, a separate provision that requires two copies of the “best edition” of works published in the United States to be sent by the copyright owner within three months of publication for the use or disposition of the Library of Congress.

### C. Congress has created limited exceptions to address processing time concerns.

In considering section 411, Congress has repeatedly “reaffirm[ed] the importance of registration—to the public, the Library of Congress, the judiciary, and the copyright community—and its ongoing validity.”<sup>41</sup> As the Supreme Court observed, to the extent copyright owners are concerned about waiting to bring suit while the Copyright Office processes a registration application, “Congress adverted to this concern” through various exceptions to section 411(a)’s general registration rule.<sup>42</sup>

First, following registration, “a copyright owner can recover for infringement that occurred both before and after registration.”<sup>43</sup> As the Court explained:

[T]he Copyright Act safeguards copyright owners, irrespective of registration, by vesting them with exclusive rights upon creation of their works and prohibiting infringement from that point forward. If infringement occurs before a copyright owner applies for registration, that owner may eventually recover damages for the past infringement, as well as the infringer’s profits. § 504. She must simply apply for registration and receive the Copyright Office’s decision on her application before instituting suit.<sup>44</sup>

Likewise, an infringing party will be liable for any continued infringement during the time the Office is reviewing the registration application.<sup>45</sup>

Second, the statutory construct “effective date of registration” addresses the eligibility for awards of statutory damages and attorney’s fees for works for which a copyright owner has timely applied for registration, taking into account the processing time that may be necessary to prosecute the application.<sup>46</sup> The “effective date” of a copyright registration 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.”<sup>47</sup> By keying eligibility for damages to the effective date of registration, Congress minimized the effect that processing time has on the recovery of these awards.

Third, Congress established limited exceptions to the general registration requirements, including a scheme for “preregistration” under section 408(f) for classes of works being prepared for commercial distribution that have a history of pre-release infringement,<sup>48</sup> an exception for live

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<sup>41</sup> 134 CONG. REC. 30,105 (1988). See S. REP. NO. 100-352, at 14 (1988); H.R. REP. NO. 100-609, at 41–42 (1988); see also Copyright Reform Act of 1993, H.R. 897, 103rd Cong. § 102 (1993).

<sup>42</sup> See *Fourth Estate Pub. Benefit Corp.*, slip op. at 10–11.

<sup>43</sup> *Id.* at 1.

<sup>44</sup> *Id.* at 10.

<sup>45</sup> See 17 U.S.C. § 504(a)(1), (b).

<sup>46</sup> *Id.* § 412.

<sup>47</sup> *Id.* § 410(d).

<sup>48</sup> *Id.* § 408(f)(1)–(2).

broadcasts under section 411(c),<sup>49</sup> and for enforcement of copyright interests by U.S. Customs and Border Protection in cases where “the owner has submitted an application for registration under title 17, United States Code, with the United States Copyright Office, to the same extent and in the same manner as if the copyright were registered with the Copyright Office . . . .”<sup>50</sup> Preregistration seriously reduces the concern over time required for examination, as it relates to a large number of types of works.

## II. REGISTRATION AT THE COPYRIGHT OFFICE TODAY

### A. Current registration processing times.

The Copyright Office publishes its average processing times twice each fiscal year,<sup>51</sup> and the processing times for claims closed during the first half of FY2019 represent a steady and substantial improvement upon prior snapshots:

Average processing time for all claims:

- March 2019: five months
- October 2018: seven months
- March 2018: eight months

Average processing times for claims submitted online and not requiring correspondence:

- March 2019: four months (approximately 73% of applications)
- October 2018: six months (approximately 67% of applications)
- March 2018: seven months (approximately 66% of applications)

Processing times for claims requiring correspondence also improved, with the average processing time for those claims down by two months (about 22%) for online applications and six months (30%) for mailed applications.

Notably, the Copyright Office accomplished all of this while processing more claims. The Office closed nearly 120,000 more claims in FY2018 than in FY2017.<sup>52</sup> From January 2018 to May 22, 2019, the Copyright Office has reduced the number of applications pending for more than one year by 96%, and during FY2018, the Office reduced the number of workable claims<sup>53</sup>

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<sup>49</sup> *Id.* § 411(c). This exception allows an owner to file an infringement suit even before the broadcast is fixed in a tangible medium, so long as certain requirements are satisfied, including registering the work within three months of its first transmission.

<sup>50</sup> Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, § 304, 130 Stat. 122, 150–51 (2016); *see also* S. REP. NO. 114-45, at 31 (2015); *accord* H.R. REP. NO. 114-114, pt. 1, at 73 (2015) (noting “[d]uring the time for processing an application at the U.S. Copyright Office, many right holders may suffer significant damage due to a lack of border enforcement).

<sup>51</sup> *See* U.S. COPYRIGHT OFFICE, REGISTRATION PROCESSING TIMES (Oct. 1, 2018–Mar. 31, 2019), <https://www.copyright.gov/registration/docs/processing-times-faqs.pdf>.

<sup>52</sup> The Copyright Office closed 643,518 claims in FY2018, compared to 523,760 claims in FY2017. *See* U.S. COPYRIGHT OFFICE, FISCAL 2017 ANNUAL REPORT 4 (2018).

<sup>53</sup> “Workable claims” are those claims for which the Copyright Office has received the application, deposit, and fee in proper form and has everything it needs to examine the claim. Claims that require correspondence due to defects

on hand by 46%. During this time the Copyright Office updated the way it calculated processing times to provide more accurate information to public. For example, prior to FY2017, the Copyright Office excluded from overall processing times any claims that were in correspondence or awaiting information from the claimant. The Copyright Office now includes those claims in calculating its overall average processing times, which serves to increase transparency.

In FY2018, the Copyright Office launched a specific initiative to address the oldest pending claims and was able to resolve 92.4% of them within eighteen months. Resolving these oldest claims temporarily, but significantly, increased the processing time averages and the ranges, because those averages are based on when a claim is received and when it is closed. Closing a large volume of the oldest claims increased these averages. Some of the decreases seen in the first six months of FY2019 are the result of diminishing numbers of older claims. By the end of this fiscal year, the Copyright Office is committed to resolving all of the oldest claims and preventing a reoccurrence of lingering claims in the future.

The progress made in reducing processing times during FY2018 and the first half of FY2019 is expected to continue through the end of FY2019 and beyond. The examiners hired in FY2018 will be fully trained in division-specific basic claims by the end of FY2019, and the fifteen new FY2019 FTEs are expected to begin training in June or July of 2019.

The Copyright Office's processing times vary based on a number of factors, including the complexity of the claim, whether the deposit is electronic or physical, whether the Office needs to correspond with an applicant to clarify or correct something, and the number of staff available to review claims. Overall processing times usually are longer for claims submitted entirely by mail, so the Copyright Office encourages applying online.

Processing times are measured from the time a record is created in the Copyright Office's internal electronic system until a registration decision has been made.<sup>54</sup> That is, the Copyright Office measures the overall processing time from the applicant's perspective, including periods where the Office may be waiting for additional information, payment, or deposit material from the applicant. When correspondence is required to remedy deficiencies, the Copyright Office waits for applicants to respond, which they have up to forty-five days to do.<sup>55</sup> Where additional rounds of correspondence are required to rectify deficiencies or clarify ambiguities, processing time can easily be extended by several months. Thus, for claims submitted through the Copyright Office's online application system that required correspondence (approximately 22% of applications), the average processing time was seven months. For claims mailed to the

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or ambiguities in the application or deposit are removed from "workable" status until the Copyright Office receives the applicant's response, at which time the claim once again becomes "workable."

<sup>54</sup> For claims submitted through the Copyright Office's online application system, a record is created when the Office receives the electronic application and payment, even though the applicant may send the deposit at a later date; for claims mailed to the Office on a paper application, a record is created when the application information is transcribed into the Office's system.

<sup>55</sup> COMPENDIUM (THIRD) § 605.6(B)-(D). The Copyright Office allows up to forty-five days to respond to correspondence, at the request of applicants and examiners who had found the prior response window of twenty days for email correspondence to be too short. *See id.* § 605.6(B).

Copyright Office on a paper application that required correspondence (approximately 2% of applications), the average processing time was fourteen months.

Further, for many electronic applications, the processing time clock starts running before the required deposit is received, which can negatively impact the Copyright Office's overall average processing times. After an applicant submits an electronic application form and filing fee, the applicant has up to ninety days to submit the deposit before the Copyright Office will correspond about the status of a deposit.<sup>56</sup> Thereafter, the applicant has an additional forty-five days to provide the deposit before the claim is closed as being abandoned.<sup>57</sup> The Copyright Office cannot begin processing these claims until the deposit is received and this wait time is factored into the above processing time averages. For example, if the claim is eventually closed because no deposit is ever received, that claim would have a processing time of about 4.5 months, and that number would be included in the overall average for all claims; or if it took a full ninety days for the deposit to be sent to the Copyright Office, three months would be added to the average processing time for that claim. Although delays in the arrival of deposits are not actively tracked by the Copyright Office's system, a snapshot reveals that on April 16, 2019, the Office had about 20,000 open electronic claims on hand for which the required deposit had not been received. Of those applications, more than 45% had been pending for over thirty days.

## **B. Current options for expedited registration.**

Meanwhile, two options are available through which applicants may seek faster registration decisions: preregistration and special handling. Following the *Fourth Estate* decision and increased interest in registration processing times, the Copyright Office is committed to publicizing the availability of these options.

### *1. Preregistration*

As noted above, preregistration enables rightsholders to immediately sue in court and is available for certain classes of works that are vulnerable to pre-release infringement.<sup>58</sup> Unlike the more comprehensive review undertaken as part of the full registration process, the Copyright Office only conducts “a limited review of applications for preregistration, in order to ascertain whether the application describes a work that is in a class of works” for which the preregistration option is available.<sup>59</sup> Instead of submitting a deposit copy of the complete work for examination, preregistration applicants only need to provide a short description of the work—limited by regulation to less than 2,000 characters (approximately 330 words).<sup>60</sup> Preregistration is currently available for the following classes of works: motion pictures, sound recordings, musical

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<sup>56</sup> *Id.* § 605.6(C).

<sup>57</sup> *Id.*

<sup>58</sup> Note that applicants must also subsequently file an application for full registration within the statutorily allotted time.

<sup>59</sup> 37 C.F.R. § 202.16(c)(7).

<sup>60</sup> *Id.* § 202.16(c)(6).

compositions, literary works being prepared for publication in book form, computer programs (including videogames), and advertising or marketing photographs.<sup>61</sup>

Preregistration applicants benefit from expedited processing times that the Copyright Office is committed to keeping on par with special handling requests—five working days where there are no deficiencies. This relatively simple filing option for those seeking immediate access to court is highly underutilized. In FY2018, the Copyright Office only received 661 applications for preregistration. The Copyright Office plans to further publicize this option.<sup>62</sup>

## 2. *Special Handling*

The Copyright Office has also established a special handling procedure through which claimants may seek expedited processing of their applications. Special handling moves an application to the front of the examination queue, and is available in cases of (1) pending or prospective litigation, (2) customs matters, and (3) contract or publishing deadlines that necessitate the expedited issuance of a certificate.<sup>63</sup> The Copyright Office makes every effort to complete its examination of claims receiving special handling within five working days.<sup>64</sup> If there is something wrong with the application, the Copyright Office will generally correspond with the applicant “within five working days,” but like the general examination process, the need for correspondence will increase processing time.<sup>65</sup> Special handling can be requested at “any time before the Office issues a certificate of registration,” either upon submission of the application or after the application has been submitted, *i.e.*, upgraded claims.<sup>66</sup> The special handling fee is currently \$800 per application.<sup>67</sup> Prospective litigants have been using the special handling option extensively—in each fiscal year since 2008, an average of about 2,400 requests for special handling were received and approved.

Recently, some commenters have questioned the \$800 fee amount, and requested relief in cases of imminent litigation.<sup>68</sup> The Copyright Office is considering this request in connection with its

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<sup>61</sup> *Id.* § 202.16(b)(1).

<sup>62</sup> Preregistration is an option that can help alleviate concerns of copyright owners who need to get to court quickly. Preregistration, which is available to a wide range of works, does not require extensive examination and can be used to get into court, if followed later with an application to register.

<sup>63</sup> COMPENDIUM (THIRD) § 623.4.

<sup>64</sup> *See generally* U.S. COPYRIGHT OFFICE, CIRCULAR 10: SPECIAL HANDLING (2017); COMPENDIUM (THIRD) § 623.4.

<sup>65</sup> COMPENDIUM (THIRD) § 623.4.

<sup>66</sup> *Id.* § 623.5.

<sup>67</sup> 37 C.F.R. § 201.3(d)(7).

<sup>68</sup> *Cf.* American Intellectual Property Law Association, Comments Submitted in Response to U.S. Copyright Office’s May 24, 2018, Notice of Proposed Rulemaking at 6–7 (Sept. 19, 2018) (noting in response to a proposed fee increase that “[g]iven the amount of time normal processing can take . . . and the looming question before the Supreme Court in *Fourth Estate Public Benefit Corp. v. Wall-Street.com* (Dkt. No. 17-571) regarding whether a decision by the Office on a registration application is required before filing suit, this proposed increase seems unnecessary or perhaps should be tabled by the Office pending the Supreme Court’s decision.”); National Music Publishers’ Association, Comments Submitted in Response to U.S. Copyright Office’s May 24, 2018, Notice of Proposed Rulemaking at 15 (Sept. 21, 2018) (“The increase in special handling fees in particular will increasingly make copyright enforcement a privilege rather than a right.”).

ongoing fee study, but there are two important considerations. As of now, there is no evidence of actual harm to the enforcement of copyright under the existing system of special handling.<sup>69</sup> It is also likely that waiving the special handling fee entirely could undermine progress made on the overall processing times, as well as overwhelming the current, well-functioning special handling process. Moreover, although special handling comes with an added cost, that cost is minimal compared to the overall expense of copyright litigation. For instance, a 2017 survey by the American Intellectual Property Law Association found that the median cost in 2017 for a party to litigate a copyright infringement lawsuit with less than \$1 million at risk through to appeal was \$200,000; even to reach the close of discovery, the median cost was \$100,000.<sup>70</sup> In cases with \$1 million to \$10 million at risk, the median cost was \$388,000 through to appeal, and \$213,000 to the end of discovery.<sup>71</sup>

### III. REGISTRATION PROCESSING CHALLENGES AND CURRENT INITIATIVES

#### A. The Copyright Office has endured many challenges to maintaining swift registration processing times.

##### 1. *The copyright registration landscape has undergone considerable change since the 1950s and 1980s.*

In its *Fourth Estate* opinion, the Supreme Court stated that the registration processing time in 1956 was one to two weeks.<sup>72</sup> That statistic comes from a 1982 report issued by the U.S. General Accounting Office (the “GAO Report”), that said that in 1956,<sup>73</sup> processing time for claims “not involving correspondence” was “1 to 2 weeks.”<sup>74</sup> The same report, however, acknowledged that for 1981, processing time, again where there was *no correspondence*, was “between 5 and 6 weeks,” while for claims needing correspondence averaged “16 weeks or longer” and “*often several months*.”<sup>75</sup> Conditions, both legal and logistical, have affected the registration landscape since the 1950s and 1980s. While the Copyright Office continues working on bringing down processing times, these changed circumstances impact the Office’s ability to recreate the historical times of more than sixty years ago and thus are not an accurate marker of current Office efficiency.

*Increase in applications.* To start, the Copyright Office today examines and processes considerably more registration applications than it did in the 1950s and 1980s. In today’s digital world, more content is being created than ever before and the proliferation of technology like

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<sup>69</sup> See generally *Fourth Estate Pub. Benefit Corp.*, slip op. at 11 & n.6 (referencing special handling option and noting that the risk that processing times will preclude owners from enforcing their rights is “overstated”).

<sup>70</sup> AM. INTELLECTUAL PROP. LAW ASS’N, 2017 REPORT OF THE ECONOMIC SURVEY 44 (2017).

<sup>71</sup> *Id.*

<sup>72</sup> *Fourth Estate Pub. Benefit Corp.*, slip op. at 12.

<sup>73</sup> It is unclear if the GAO Report was referring to 1956 or 1957. Compare U.S. GEN. ACCOUNTING OFFICE, IMPROVING PRODUCTIVITY IN COPYRIGHT REGISTRATION i (1982) (referring to 1956) with *id.* at 3 (referring to 1957).

<sup>74</sup> U.S. GEN. ACCOUNTING OFFICE, IMPROVING PRODUCTIVITY IN COPYRIGHT REGISTRATION 3 (1982).

<sup>75</sup> *Id.* at i, 3 (emphasis added).

smartphones makes it easier for everyone to create high volumes of copyrightable works. This cornucopia of creativity has led to more applications for copyright registration over time. In FY1956, the Copyright Office registered 224,908 claims;<sup>76</sup> in FY1981, the Office registered 471,178 claims.<sup>77</sup> In contrast, the Office registered 560,013 claims in FY2018. This is a nearly 150% (or 2.5x) increase in claims from FY1956, and a nearly 20% increase in claims from FY1981.

*Increased types of works.* Not only is the Copyright Office registering more claims, but these claims are more complex and cover many more works, and more types of works, than in the 1950s or 1980s. Following the 1950s, federal copyright law was amended to expressly protect sound recordings, pantomimes, and choreographic works, increasing the potential universe of works from which claims might be submitted for registration.<sup>78</sup> Following the early 1980s, the Copyright Act was further amended to provide copyright protection for computer programs (1980) and architectural works (1990), as well as certain protection for mask works (1984) and vessel designs (1998).<sup>79</sup> Changes in technology have also increased the variety of works created today within existing categories, including websites, video games, podcasts, ringtones, ebooks, and databases.

*Increased complexity of application material.* The 1976 Act complicated the examination process by specifically enumerating “several [items] that [were] not [previously] included in the Copyright Office’s application forms.”<sup>80</sup> For example, section 409(5), added in recognition of “the increased importance and interrelationship between registration of copyright claims and recordation of transfers of ownership,” requires, “if the copyright claimant is not the author, a brief statement of how the claimant obtained ownership of the copyright.”<sup>81</sup> This added a step to the examination process that did not exist in the 1950s. If a required transfer statement is missing, ambiguous, or contradicted by other registration materials, the Copyright Office will correspond to obtain an accurate and complete statement before registering the claim. Other additions in section 409 that the Copyright Office now examines for and potentially corresponds over include, where applicable, “the death dates of authors; a statement . . . that the work was

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<sup>76</sup> U.S. COPYRIGHT OFFICE, FIFTY-NINTH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 30, 1956, at 1–2 (1956).

<sup>77</sup> U.S. COPYRIGHT OFFICE, 84TH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 1981, at 24 (1982).

<sup>78</sup> See 17 U.S.C. § 102(a); COPYRIGHT LAW REVISION, REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 10–18 (Comm. Print 1961); Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971); see 17 U.S.C. § 102(a)(7).

<sup>79</sup> Architectural Works Copyright Protection Act, Pub. L. No. 101-650, tit. vii, 104 Stat. 5089, 5133 (1990) (codified at 17 U.S.C. § 102(a)(8)); Semiconductor Chip Protection Act of 1984, Pub. L. No. 98-620, tit. iii, 98 Stat. 3335, 3347 (1984) (codified at ch. 9 of title 17); Vessel Hull Design Protection Act, Pub. L. No. 105-304, tit. v, 112 Stat. 2860, 2905 (1998) (codified at ch. 13 of title 17).

<sup>80</sup> H.R. REP. NO. 94-1476, at 156 (1976).

<sup>81</sup> *Id.*

made for hire; ‘any previous or alternative titles under which the work can be identified’; and ‘the year in which creation of the work was completed.’”<sup>82</sup>

*Proliferation of group registration options.* For the first time, the 1976 Act gave the Copyright Office authority to “require or permit . . . a single registration for a group of related works.”<sup>83</sup> In 1981, the Office only had one group option.<sup>84</sup> Today, partially in recognition of the explosive growth of creative works in the digital age, the Copyright Office has nine group options covering a wide variety of works, and that list is growing.<sup>85</sup> In contrast to the 224,908 claims registered in FY1956, or the 471,178 claims registered in FY1981, with the nine group options available today, the 560,013 claims registered by the Copyright Office in FY2018 comprised *millions* of individual works. Group registration options are typically created in response to public demand, and from the applicant’s point of view, generally are the easiest and least expensive way to register multiple related works.<sup>86</sup> They are vital to high-volume creators and copyright owners who may not be able to afford to register each of their works individually. But group registration options typically increase the density of the examination process.<sup>87</sup> Applications for group registration, including the numerous individual works of which they are comprised, are examined and processed in the same attentive and vigorous manner as claims covering only a single work. Consequently, they take longer to evaluate, extending overall processing times.

*Staffing cuts.* Although the Copyright Office is processing more claims overall, more complicated claims, and more claims covering many more individual works, with necessarily more work to process those claims, it does so with significantly fewer staff than in past decades. According to the GAO Report, at the end of FY1981, the Copyright Office had a total of 535 staff.<sup>88</sup> That is 110 more full-time employees than the Copyright Office had at the end of FY2018. In other words, the Copyright Office in FY2018 registered about 20% more claims with about 20% fewer staff as compared to FY1981 (excluding the increased number of works

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<sup>82</sup> See COPYRIGHT LAW REVISION PART 6, SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 122 (Comm. Print1965); *accord* 17 U.S.C. § 409(2), (4), (6), (7).

<sup>83</sup> 17 U.S.C. § 408(c)(1).

<sup>84</sup> See Copyright Registrations, 43 Fed. Reg. 965, 967 (Jan. 5, 1978).

<sup>85</sup> These include groups of unpublished works, serials, newspapers, newsletters, contributions to periodicals, published and unpublished photographs, automated databases, and secure test items. See 37 C.F.R. § 202.3(b)(5); *id.* § 202.4(c)–(k). The Office has recently issued a Notice of Proposed Rulemaking to create a new group option for short online literary works (*i.e.*, blogs) and another notice is forthcoming regarding digital music albums.

<sup>86</sup> See, *e.g.*, Registration of Claims to Copyright: Group Registration of Daily Newspapers, 57 Fed. Reg. 39,615, 39,615 (Sept. 1, 1992) (requested by the Newspaper Association of America); Registration of Claims to Copyright: Group Registration of Serials, 55 Fed. Reg. 50,556, 50,556 (Dec. 7, 1990) (requested by representatives of serial publishers); Group Registration of Short Online Literary Works, 83 Fed. Reg. 65,612, 65,612–13 (Dec. 21, 2018) (requested by various writer organizations).

<sup>87</sup> See Registration of Claims to Copyright: Group Registration of Serials, 55 Fed. Reg. 50,556, 50,556 (Dec. 7, 1990) (explaining that the Copyright Office had previously declined to establish a group option “due to concerns about the administrative burden associated with processing several works on a single application”; “[b]ased on the Office’s experience with statutory group registration of contributions to periodicals, the Office finds that, unless appropriate restrictions limit the availability of group registration, the administrative costs and burden on the Office escalate”).

<sup>88</sup> U.S. GEN. ACCOUNTING OFFICE, IMPROVING PRODUCTIVITY IN COPYRIGHT REGISTRATION 2 (1982).

registered in light of more group registration options). The Copyright Office had even higher staffing levels in FY1978, totaling 573.<sup>89</sup>

The Copyright Office's current staffing levels are not just well below what they used to be historically, they are also far below that of their closest peer agency.<sup>90</sup> In FY2018, the Copyright Office had 118 registration examiners to process the 520,086 claims it received, while the U.S. Patent and Trademark Office (PTO) had 579 trademark examining attorneys to process the 468,926 trademark applications it received.<sup>91</sup> Notably, even with those resources, the PTO's average time between filing and the "examiner's first action" was 3.4 months, and the time to registration was 9.6 months,<sup>92</sup> well above the Copyright Office's current overall average of five months. While certainly not an apples-to-apples comparison, the Copyright Office nevertheless processes more claims with fewer staff and with lower average processing time than its closest peer agency.

*Processing physical deposits.* Another logistical difference from the 1950s and 1980s is that not all applications and deposits arrive at the Copyright Office at the same time. As mentioned above, applicants submitting an electronic application have up to 4.5 months to submit their deposit. When a physical deposit is sent, the Copyright Office must match it to the corresponding pending electronic application by manually checking shipping slips and deposits to confirm a match. At times, the Copyright Office receives large boxes filled with numerous deposits and numerous slips, which must be manually matched up before ingestion into the Office's internal electronic system. In some cases, the shipping slip is missing, or correspondence is necessary to confirm a match. Since the early 1990s, the Copyright Office also takes the additional and time-consuming step of securing deposits with antitheft devices.

And since FY2002, because the Copyright Office is part of the U.S. Capitol Complex, all mail, including paper registration applications and physical deposits, undergoes mandatory off-site security screening and decontamination before arriving at the Office.<sup>93</sup> This process typically

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<sup>89</sup> U.S. COPYRIGHT OFFICE, ANNUAL REPORT OF THE LIBRARIAN OF CONGRESS FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 1978, CH. 7 COPYRIGHT SERVICES 89, 106 (1979).

<sup>90</sup> The Copyright Office is often compared to the U.S. Patent and Trademark Office as an administrator of intellectual property law. *See, e.g., Legislative Branch Appropriations for 2019: Hearings Before the H. Comm. on Appropriations*, 115th Cong. 357 (2018) (statement of Hon. Kevin Yoder, Chairman, H. Subcomm. on Legislative Branch) (comparing copyright registration processing times to the processing times of the U.S. Patent and Trademark Office).

<sup>91</sup> U.S. PATENT AND TRADEMARK OFFICE, FY 2018 PERFORMANCE AND ACCOUNTABILITY REPORT 193, 205 (2019), <https://www.uspto.gov/sites/default/files/documents/USPTOFY18PAR.pdf>.

<sup>92</sup> *Id.* at 193.

<sup>93</sup> *See* U.S. COPYRIGHT OFFICE, 105TH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 2002, at 3 ("[A]s a result of the anthrax incidents, an offsite screening process began for all Postal Service mail to Capitol Hill facilities, including the Copyright Office. The necessity for this safety and security screening will affect the delivery and receipt of all mail in the Office well into the future."); U.S. COPYRIGHT OFFICE, 106TH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 2003, at 7 ("The Office is accommodating the new and apparently permanent reality of mail screening and irradiation.").

takes three to five business days but can take as many as ten business days.<sup>94</sup> In some cases, deposits can be damaged by this process, often by the scan itself, and the Copyright Office must correspond to obtain replacements, starting the process over again and causing further delays.

2. *Fluctuations in appropriations can significantly affect processing times.*

Because the Copyright Office is not fully funded by the filing fees it collects from those who use its services, the Office's ability to administer the nation's copyright registration system is dependent upon appropriations from Congress.<sup>95</sup> Budget cuts more than anything else were the cause of the most recent spike in registration processing times. From 2010 to 2013, the Copyright Office experienced a large reduction in its appropriation that, combined with an unexpected decrease in collected fees, required the Office to make significant cutbacks.<sup>96</sup> These included reductions in new hiring and reduced training expenditures, as well as the postponement of important upgrades to the electronic registration system.<sup>97</sup> Most critically, the Copyright Office lost about 40% of its registration examination staff, dropping by about fifty full-time employees, from close to 130 examiners in 2010 to seventy-six examiners by 2015.<sup>98</sup> The Copyright Office experienced staff loss due to traditional retirement and budget cuts, when the Office encouraged early retirements and offered buyouts to address the overall reduction in its budget. Following these losses, the Copyright Office was unable to hire new staff to begin reducing processing times until FY2015.

Although, as discussed below, Congress has since strongly supported the Copyright Office's efforts to rebuild its registration ranks, these budget cuts had lasting impacts on the Office's backlog of pending applications, and resources remain a constant concern. With the loss of certain fees resulting from passage of the Orrin G. Hatch-Bob Goodlatte Music Modernization Act,<sup>99</sup> the Copyright Office is undertaking even greater responsibilities with fewer resources. As the Supreme Court observed in *Fourth Estate*, changes in funding have real-world effects on the copyright community, and resulting processing delays can be "attributable, in large measure, to staffing and budgetary shortages that Congress can alleviate."<sup>100</sup>

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<sup>94</sup> Special handling claims are screened at a separate facility that usually takes one to two business days.

<sup>95</sup> Although the Copyright Office is organizationally within the Library of Congress, it receives its own separate appropriation. See, e.g., Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, div. i, tit. i, 132 Stat. 348, 783 (2018).

<sup>96</sup> *Fiscal 2014 Budget Request Before the Subcomm. on Legislative Branch Appropriations of the S. Comm. on Appropriations*, 113rd Cong. (2013), <https://www.copyright.gov/about/budget/2013/regstat05072013.html> (statement of Maria A. Pallante, Register of Copyrights & Director, U.S. Copyright Office).

<sup>97</sup> *Id.*

<sup>98</sup> *Fiscal 2016 Budget Request Before the Subcomm. on Legislative Branch Appropriations of the S. Comm. on Appropriations*, 114th Cong. 4 & n.4 (2015), <https://www.copyright.gov/about/budget/2015/budget-senate-fy16.pdf> (statement of Maria A. Pallante, Register of Copyrights & Director, U.S. Copyright Office).

<sup>99</sup> Pub. L. No. 115-264, 132 Stat. 3676 (2018). The legislation eliminated the need for certain notices of intention for certain mechanical licenses under 17 U.S.C. § 115. This change will reduce the Office's incoming fees by a not insignificant amount.

<sup>100</sup> *Fourth Estate Pub. Benefit Corp.*, slip op. at 12; Cf. *Fiscal 2020 Budget Request Before the Subcomm. on Legislative Branch Appropriations of the S. Comm. on Appropriations*, 116th Cong. 10 (2019),

3. *The Copyright Office's information technology systems are outdated and in need of modernization.*

The general IT problems plaguing the Copyright Office are considerable and well documented, as are the steps currently being taken to address them.<sup>101</sup> In short, the Copyright Office's outdated software applications and antiquated IT infrastructure and architecture are badly in need of modernization.<sup>102</sup> In acknowledgement of this predicament, Congress has generously funded the Copyright Office's appropriation requests to help it modernize, but until that multiyear process is completed, the challenges imposed by the Office's current systems remain.<sup>103</sup> Specifically with respect to registration, a recent outside assessment described the Copyright Office's outdated systems as "not user-friendly or state-of-the-art," elaborating that:

eCO, the automated online interface between applicants and the [registration program], falls far short of best practice. However, its shortcomings are recognized, and addressing them is a top priority. . . . [P]roblems with eCO contribute, probably substantially, to inefficiency in the examination process. This is because eCO's lack of user friendliness results in avoidable application errors that require correspondence (or at least annotation) to sort out.

Siebel, the internal system for processing cases, is also notoriously awkward. As with eCO, the weaknesses of Siebel are widely recognized; examiners and managers know they could do their jobs better with a better system. For example, examiners are frustrated by Siebel's correspondence function and lack of sorting; team leaders spend hours each week pulling data that, in a better-designed system,

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<https://www.copyright.gov/about/budget/2020/senate-budget-testimony-fy20.pdf> (statement of Karyn Temple, Register of Copyrights & Director, U.S. Copyright Office) ("The Copyright Office would also benefit significantly from greater flexibility in the use of prior-year unobligated fee balances. This could allow the Office to provide services to the public in the event of a lapse in appropriations.").

<sup>101</sup> See, e.g., U.S. COPYRIGHT OFFICE & LIBRARY OF CONGRESS, MODIFIED U.S. COPYRIGHT OFFICE PROVISIONAL IT MODERNIZATION PLAN: ANALYSIS OF SHARED SERVICES, SUPPORT REQUIREMENTS, AND MODERNIZATION EFFORTS (2017) (Modified IT Plan); U.S. COPYRIGHT OFFICE, PROVISIONAL INFORMATION TECHNOLOGY MODERNIZATION PLAN AND COST ANALYSIS (2016); U.S. COPYRIGHT OFFICE, REPORT AND RECOMMENDATIONS OF THE TECHNICAL UPGRADES SPECIAL PROJECT TEAM (2015).

<sup>102</sup> See, e.g., Modified IT Plan at 20 ("IT modernization. . . is a crucial component, as technological systems that are outdated (or completely lacking, as in the case of the paper-based recordation system) currently prevent the Office from adopting the 'major regulatory changes necessary to effectively examine, register, protect, document, and license copyright interests and information.'") (quotation omitted).

<sup>103</sup> See, e.g., H.R. REP. NO. 115-199, at 19 (2017) ("[M]odernization of the USCO's electronic copyright registration system is of utmost importance."); H.R. REP. NO. 114-594, at 17 (2016) ("The Committee recognizes and strongly supports the need for a robust information technology modernization effort within the Copyright Office to support the growth of creativity and commercial artistic activity in our nation and to effectively serve users and copyright owners in the 21st century."); S. REP. NO. 114-258, at 39 (2016) ("The Committee fully understands and supports the need for improved IT infrastructure and modernized software systems for the Copyright Office."); H.R. REP. NO. 114-110, at 16 (2015) ("In order to serve the copyright owners and the copyright community in the 21st century, a robust modern information technology (IT) operation will be necessary."); S. REP. NO. 113-196, at 40 (2014) ("[T]he Copyright Office is currently in need of significant IT and related upgrades to be fully interoperable with the digital economy it serves.").

would be available with a few clicks; and aggregate data that would be useful for top-level management purposes is difficult or even impossible to collect.<sup>104</sup>

Problems with these systems, including user errors necessitating correspondence and examiners not being able to review and process applications efficiently, contribute significantly to longer processing times, as do more general IT challenges, such as network and system outages.<sup>105</sup>

4. *Evaluating deposits for compliance with the “best edition” requirements and making acquisition decisions for the Library of Congress lengthens processing times.*

In addition to demonstrating copyrightable subject matter, deposits received through the Registration Program often must be the “best edition” of the work, meaning “the edition, published in the United States at any time before the date of deposit that the Library of Congress determines to be the most suitable for its purposes.”<sup>106</sup> The mandatory deposit requirement of section 407 has served as an important source of acquisitions by the Library of Congress, the largest library in the world and the holder of an unparalleled collection of American cultural resources. In FY2018, the Copyright Office forwarded 736,833 deposits with a value of more than \$47.5 million to the Library’s collections, of which 289,308 came from registration deposits.<sup>107</sup> Unlike materials sent to the PTO, for example, many registration deposits serve the unique dual functions of copyright registration and Library acquisition.

The use of the copyright registration system to satisfy important Library acquisition objectives, however, can complicate registration processing time. There are three main reasons: (1) it takes more time to process physical copies of works; (2) it takes additional time to evaluate deposits for compliance with the complex best edition rules; and (3) examiners spend additional time evaluating deposits for potential inclusion in the Library’s collections.

To be appropriate for the Library’s collections, deposits must be in certain formats and of a certain quality that the Library has determined best meet its needs. The Library’s “Best Edition Statement” outlines these requirements, and in nearly all cases, physical copies of works are required.<sup>108</sup> The best edition rules do not apply to all types of works. For example, unpublished works, works published solely outside the United States, works published in a single format, and most works published only online, are all generally exempt.<sup>109</sup>

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<sup>104</sup> SMITHSONIAN ORG. & AUDIENCE RESEARCH, U.S. COPYRIGHT REGISTRATION PROGRAM OVERVIEW AND ISSUES 11–12 (July 2018).

<sup>105</sup> See, e.g., U.S. COPYRIGHT OFFICE, FISCAL 2015 ANNUAL REPORT 9 (explaining that an increase in open claims in FY2015 was caused in part by “a nine-day shutdown of the electronic registration system that occurred when the Library of Congress was unable to bring back online a data center hosting Copyright Office systems after routine maintenance,” and during which “applicants could not file new applications using the online registration system, and Office staff could not access most of the internal registration functions”).

<sup>106</sup> 17 U.S.C. §§ 101, 408(b); 37 C.F.R. § 202.20(b)(1).

<sup>107</sup> The remainder came from the mandatory deposit requirements of 17 U.S.C. § 407.

<sup>108</sup> See 37 C.F.R. pt. 202, app. B.

<sup>109</sup> See COMPENDIUM (THIRD) § 1504.1; U.S. COPYRIGHT OFFICE, CIRCULAR 2: COPYRIGHT REGISTRATION 3–4 (2017); U.S. COPYRIGHT OFFICE, CIRCULAR 7B: BEST EDITION 1 (2017).

The “best edition” needs of the Library are frequently higher than the quality of copies that the Copyright Office may require for purposes of registration examination, where the Office needs to confirm the existence and scope of copyrightable subject matter and authorship information. While the Office administers these two separate deposit requirements as codified in the Copyright Act, Copyright Office regulations often require the best edition to satisfy the mandatory deposit requirements.<sup>110</sup> Even where the Copyright Office is capable of receiving and examining electronic copies of works for registration purposes, it requires physical copies so that these deposits may additionally satisfy copyright owner’s duties under the mandatory deposit provision of the Act. Nearly 30% of all claims closed during the first half of FY2019 had physical deposits.

On average, physical deposits take an additional two months for the Copyright Office to process. Physical deposits generally entail several additional steps to ingest before arriving at the examiner’s desk: (i) they must undergo off-site security screening and decontamination, which as noted above usually takes three to five business days but can take up to ten business days; (ii) each package must be manually opened, sorted, and in most cases, matched to a corresponding pending electronic application; (iii) additional security measures must be manually applied, including antitheft devices, stamps, and barcodes for identification and tracking; (iv) information must be ingested into the Copyright Office’s internal electronic system, such as entering the deposit’s barcode number, format type, receipt date, and the location of the portable basket or book cart where the item is located; and (v) the portable baskets and carts are then manually wheeled across the James Madison Memorial Building to the examiner’s workspace, for examination to begin.

All deposits (whether physical or electronic) are examined for compliance with the best edition rules or to confirm whether they are exempt from those rules.<sup>111</sup> This is an additional, separate evaluation from determining whether the work is copyrightable. The Library’s best edition criteria and the Copyright Office’s corresponding regulations governing registration deposits are complicated and examiners must undergo extensive training to learn these rules.<sup>112</sup> Correspondence frequently results.

Since FY2008, examiners also evaluate deposits to determine whether they should be selected for inclusion in the Library’s collections. Copyright examiners apply internal Library selection criteria, and if a determination cannot be made based on those extensive criteria, the examiner sends the deposit to a Library selection officer to make a final decision.

Members of the copyright community have recognized some of these particular challenges, concluding that the Library’s need for physical formats “is a major obstacle to the Copyright Office’s efforts to make the registration process more efficient and less expensive for copyright

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<sup>110</sup> The Copyright Office, with the Librarian’s approval, may permit “identifying material” to be provided in lieu of copies of the works for purposes of registration. *See* 17 U.S.C. § 408(c)(1); *see also* Registration Modernization, 83 Fed. Reg. 52,336, 52,337 (Oct. 17 2018); (soliciting information on whether the Copyright Office should further separate deposit requirements of sections 407 and 408 to assist the administration of the copyright registration program through its modernization initiative).

<sup>111</sup> *See* COMPENDIUM (THIRD) § 1504.3.

<sup>112</sup> *See* 37 C.F.R. § 202.20; *id.* pt. 202, app. B.

owners.”<sup>113</sup> The Copyright Office has recently worked with the Library to effectively decrease the number of required best edition deposit copies from two to one for certain types of literary works and for musical compositions published in print formats, reducing the amount of physical handling needed to process applications to register these works.<sup>114</sup>

## **B. The Copyright Office is engaged in numerous initiatives focused on reducing registration processing times.**

Despite these institutional challenges, the Copyright Office is working to reduce its processing times. Starting with 2014 budget planning, the Copyright Office has embarked on a number of ambitious initiatives toward this end. As the Copyright Office previously noted, “[a] principal reason that the Office has prioritized modernization is to improve the Office’s processing times for claims submitted for registration.”<sup>115</sup> A key component of modernization is the development of a new ECS to replace the Copyright Office’s outdated systems, including both the internal and public-facing registration portals.<sup>116</sup> But modernization also encompasses business realignments and the streamlining and coordinating of Copyright Office processes, practices, and policies to promote timely and reliable services.<sup>117</sup> The Copyright Office has been focused on other ways to update its business and reduce processing times, even while IT modernization is ongoing.

### *1. Staffing and training.*

Adequate, trained examination staff is perhaps the single most critical factor in the Copyright Office’s ability to bring down its processing times and keep them low. Since FY2015, the Copyright Office has sought appropriations to hire new registration examiners to make up for budget cuts between 2010 and 2014. Thanks to Congress’ support, the Copyright Office has recently rebuilt registration examiner ranks back up to approximately 2010 levels (before staffing numbers began to decrease significantly), subject to several positions that are still in the process of being filled. Adding new examiners does not immediately result in decreased registration processing times, due to the training involved for new examiners, so the positive effects of the

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<sup>113</sup> *The U.S. Copyright Office: Its Functions and Resources: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 12 (2015) (statement of Keith Kupferschmid, General Counsel and Senior Vice President, Intellectual Property Software & Information Industry Association) (“Because the deposit copy is used by the Library for one purpose and by the Copyright Office for a completely different—and often competing—purpose, the Library and the Office are often at odds with one another over the type and use of the deposit copy.”); *see also id.* at 29 (statement of Lisa A. Dunner, Chair of the Section of Intellectual Property Law, American Bar Association) (“To streamline the registration process, it may be advisable to separate the requirement of deposit for registration (which would likely be in electronic form) from the deposit for the Library (which could be in hard copy form).”).

<sup>114</sup> *Simplifying Deposit Requirements for Certain Literary Works and Musical Compositions*, 83 Fed. Reg. 2,371, 2,371 (Jan. 17, 2018); *see* *Simplifying Deposit Requirements for Certain Literary Works and Musical Compositions*, 82 Fed. Reg. 38,859, 38,861 (Aug. 16, 2017).

<sup>115</sup> *Registration Modernization*, 83 Fed. Reg. 52,336, 52,337 (Oct. 17 2018).

<sup>116</sup> For more details on these efforts, see the Copyright Office’s dedicated modernization website available at <https://www.copyright.gov/copyright-modernization/>.

<sup>117</sup> *See generally* U.S. COPYRIGHT OFFICE, STRATEGIC PLAN 2019–2023, COPYRIGHT: THE ENGINE OF FREE EXPRESSION (2019).

added staff have yet to be fully realized. Processing times should continue to fall as the remaining vacancies are filled and already-hired staff complete their training.

To properly carry out their responsibilities, examiners must undergo extensive training on all facets of their job. Prior to restructuring of the Copyright Office's training program, examiners were generally trained via a mentorship model, where they were paired with a senior examiner who gave them on-the-job tutoring and guidance. This required many senior examiners to divide their focus between processing claims and teaching new employees. Beginning in 2015, the Registration Program developed a centralized classroom training model, where all new examiners are taught a uniform curriculum by a dedicated training team on copyright concepts across all three divisions. This change improved the quality and consistency of new-examiner training, while allowing the trainees to work on actual claims under the supervision of experienced examiners. And in 2018, the Copyright Office reviewed recommendations by an outside consultant as well as launched a specific training working group to provide further internal recommendations for updates to its training processes. As a result, the training program was further streamlined. New examiners now spend six months in the centralized classroom before receiving more specialized, division-specific training. The Copyright Office also increased training for veteran examiners and developed recurring specialized workshops. The net effect of these changes is better overall efficiency of training and the processing of registration applications by new and veteran examiners.

## *2. Overtime.*

Overtime is another tool the Office has successfully utilized as a short-term solution to help decrease processing times when the Copyright Office is understaffed or waiting for new staff to complete their training. During FY2019, the Copyright Office has, on average, closed over 1,500 more claims per week in pay periods where examiners were given the option to work overtime, as compared to pay periods where no overtime was offered. Thus, overtime is a valuable tool that helps reduce processing times, and it helps the Copyright Office make adjustments when processing times are high.

## *3. Updates to regulations, policies, practices, and procedures.*

Over the last few years, the Copyright Office has revised, clarified, or adopted numerous regulations, practices, and procedures aimed at improving the efficiency of copyright registration. Starting in FY2017, task-specific internal working groups were developed and external partners were engaged to help the Office in these endeavors. For example, the Copyright Office created an internal application processing times working group to develop a comprehensive and coordinated plan to address backlogs of claims, established an internal examiner training working group to retool the training program, and began an initiative to prioritize processing older claims. The Copyright Office also contracted with SOAR to study registration examination and identify areas for improvement. As a result, the Copyright Office recently implemented the following initiatives to improve processing times and increase efficiency:

- Issued two major revisions to the *Compendium of U.S. Copyright Office Practices* and updated many of the Copyright Office’s circulars to better explain law, policy, and practices to the public.
- Developed new performance requirements for examiners to reduce the number of open claims in their personal queues, such as responding to correspondence faster and closing abandoned claims more consistently.
- Developed new performance requirements for team leaders and enhanced procedures to monitor and track quality and accuracy of the examiners on each team.
- Incentivized examiner productivity through merit awards.
- Established a permanent team dedicated to training new and existing examiners.
- Experimented with having examiners prioritize claims not requiring correspondence ahead of those that did, instead of processing claims in the order they were received. This “HOV initiative” increased productivity during the trial period, but left claims that required correspondence to be resolved after the initiative.
- Expanded a policy to annotate the record in appropriate situations to reflect certain facts instead of corresponding for clarification. Examples include where there is a variance between the title in the deposit and the title in the application, where the year of creation is provided in the submission material but is missing from the application form, or where part of the otherwise copyrightable claim is for a non-copyrightable “idea” or “concept.”
- Centralized and streamlined a repository of pre-approved language to assist examiners with common correspondence scenarios.
- Offered professional writing seminars to examiners to foster more efficient correspondence and cut down on back-and-forth exchanges with applicants.
- Updated various on-screen instructions in the online registration system to help reduce public confusion over matters that had commonly led to mistakes requiring correspondence.
- Upgraded the online registration system to automatically prevent applicants from uploading unacceptable file formats, eliminating the need to correspond over this issue.
- Issued a new version of the Single Application along with help text and a video tutorial to address recurring issues identified by the Copyright Office.
- Developed new procedures to improve the tracking and assigning of claims with physical deposits:
  - Implemented a new process whereby physical deposits are now brought to examiners’ desks on carts or in baskets by support staff, reducing the amount of

time examiners were spending moving physical deposits back and forth through the workspace.

- Implemented a new procedure whereby shipping slips for physical deposits are marked as relating to a claim filed on a Single Application or a Standard Application, which allows for faster routing of the application to an appropriate examiner.

In addition to these initiatives, the Copyright Office has undertaken several registration-related rulemakings to streamline and clarify requirements and to gain processing efficiencies.<sup>118</sup> For example, recent regulatory changes in the past several years include:

- Decreased the number of required best edition deposit copies from two to one for certain types of literary works and for musical compositions published in print formats, reducing the amount of physical handling needed to process applications to register these works.<sup>119</sup>
- Clarified and streamlined the eligibility requirements for using the Single Application, reducing the need for correspondence when applicants submit ineligible claims.<sup>120</sup>
- Updated the registration requirements for architectural works to require these claims to be submitted with an online application rather than a paper form.<sup>121</sup>
- Amended the group registration option for photographs to require applications to be submitted online, to mandate that the deposited photographs be in a digital format (though they can still be submitted via a physical storage medium, like a disc or flash drive, in lieu

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<sup>118</sup> Changes surrounding deposit requirements were made in consultation with the Library Services division, in most cases, through the use of alternative means of acquiring copies of those works if desired by the Library for its collections. *See, e.g.*, Group Registration of Newsletters and Serials, 83 Fed. Reg. 61,546, 61,548 (Nov. 30, 2018) (While “newsletter and serial publishers will no longer be required to provide the Library of Congress with complimentary subscriptions to or microfilm copies of their issues as a condition for seeking a group registration,” “[i]f a newsletter or serial is published in the United States in a physical format, the publisher will be expected to provide the Library with two complimentary subscriptions to physical copies of that publication, unless the publisher is notified that the newsletter or serial is not needed for the Library’s collections”); Simplifying Deposit Requirements for Certain Literary Works and Musical Compositions, 83 Fed. Reg. 2,371, 2,371 (Jan. 17, 2018) (“[T]he Office will retain the right to demand a second copy under the mandatory deposit provision should the Library need it”).

<sup>119</sup> 83 Fed. Reg. at 2,371; *see* Simplifying Deposit Requirements for Certain Literary Works and Musical Compositions, 82 Fed. Reg. 38,859, 38,861 (Aug. 16, 2017) (“[These literary works] are heavy, unwieldy, and often include multi-volume sets of books. To distribute these materials to the staff, the copies must be strapped together, which doubles the size and weight of each submission. Sometimes the Literary Division does not have enough space to store the copies that it has on hand. The bulky nature of these physical copies also slows down the examination of each work. On average, the copies must be moved at least eight times or more during the examination process, which increases the risk that they may be damaged, misplaced, mismatched, or lost. Requiring two copies limits the amount of work that the examiner may keep at his or her desk at any given time. It also increases the amount of time that the examiners need to examine the claim, prepare the copies for dispatch, and retrieve his or her next assignment.”).

<sup>120</sup> Streamlining the Single Application and Clarifying Eligibility Requirements, 83 Fed. Reg. 66,627 (Dec. 27, 2018).

<sup>121</sup> Architectural Works, 84 Fed. Reg. 16,784 (Apr. 23, 2019).

of electronically uploading them), and to reduce the size of the group from an unlimited number of photographs to 750 photographs per application.<sup>122</sup>

- Established a similar group registration option for unpublished works that mandates that the application must be submitted online, the deposit must be uploaded in a digital format, and the group generally may include no more than ten works (reduced from an unlimited number of works under the prior procedure).<sup>123</sup>
- Amended group registration options for newspapers, newsletters, serials, and contributions to periodicals to require applications to be submitted online and for the required deposits to be uploaded electronically.<sup>124</sup>
- Updated the rules for supplementary registration to require most applications to be submitted online, avoiding the need to transcribe information into the Copyright Office’s system by hand.

The Copyright Office anticipates continuing to focus on potential regulatory updates to improve its administration of the registration system, and is currently analyzing a number of suggestions received through a notice of inquiry on this subject in connection with IT modernization.<sup>125</sup>

#### 4. *Copyright Office-wide organizational initiatives.*

The Copyright Office is currently engaged in two further initiatives involving the organization and internal processes of the Office. First, as part of overall modernization, the Copyright Office engaged with OPM’s Human Resources Solutions in FY2018 to conduct a strategic alignment analysis, organization analysis and redesign, and associated position classification review. OPM’s forthcoming output will help the Copyright Office optimize its organizational structure and align personnel resources to the emerging needs of the Office that result from implementing the ECS and revised business processes. This work is projected to continue through the end of the second quarter of FY2020, and to result in findings and recommendations designed to achieve more effective operations, including recommendations for staffing levels, position management improvements, and organization restructuring options.

Second, and as a complement to OPM’s work, in FY2019, the Copyright Office initiated a business process reengineering (“BPR”) effort to analyze business processes, workflows, and staff responsibilities with the aim of revising internal processes to improve efficiencies and reduce processing times. The Copyright Office will engage an expert consultant to work with a team of staff representing all areas of the Office in conducting the BPR.

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<sup>122</sup> Group Registration of Photographs, 83 Fed. Reg. 2,542 (Jan. 18, 2018).

<sup>123</sup> *Id.*

<sup>124</sup> Group Registration of Newspapers, 84 Fed. Reg. 3,698 (Feb. 19, 2019); Group Registration of Newsletters and Serials, 83 Fed. Reg. 61,546 (Nov. 30, 2018); Group Registration of Newspapers, 83 Fed. Reg. 25,375 (June 1, 2018); Group Registration of Newspapers, 83 Fed. Reg. 4,144 (Jan. 30, 2018).

<sup>125</sup> Registration Modernization, 83 Fed. Reg. 52,336 (Oct. 17, 2018). All comments can be viewed on the Copyright Office website at <https://www.copyright.gov/rulemaking/reg-modernization/>.

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The Copyright Office fully appreciates the critical importance of the U.S. registration system, both to copyright owners and the public at large. Although the Copyright Office has faced significant challenges, the Office's future initiatives and planning, discussed further above and in the enclosed pendency plan, will continue to improve processing times overall. The Copyright Office is firmly committed to these efforts and to updating Congress and the public on its ongoing results.

# **U.S. COPYRIGHT OFFICE PENDENCY REDUCTION PLAN AND FUTURE INITIATIVES**

**May 31, 2019**

The United States Copyright Office strives to provide excellent, efficient services as part of its administration of the nation's copyright law, including registration of copyright claims. The Copyright Office is committed to reducing processing times while not compromising quality. There has been significant success in reducing these times in the past several years, reducing the overall average processing time from eight months to five—a decrease of almost 40%. The average time is even lower (now four months instead of seven) for the 73% of all claims received through the electronic registration system for which no correspondence is required. The Copyright Office is not resting on these achievements, but instead is planning more activities to further reduce processing times as appropriate.

Specifically, the Copyright Office has developed the following processing time reduction plan (“Plan”) that explains the steps we have already taken, and sets out planned new initiatives. These include:

- Completed and ongoing initiatives:
  - Increased staffing to address a period of depressed staffing levels that occurred due to sequestration and attrition
  - Streamlined and improved training
  - Internal working groups to develop and implement recommendations for reducing processing times
  - Third party review of efficiency of practices and modernization efforts
  - Resolution of oldest claims and HOV plan
- Future initiatives:
  - Additional staffing plan with new positions for subject matter experts (who will handle the most difficult claims), a training director, a program manager, and filling assistant chief positions
  - Data-driven performance goals
  - More flexible use of no year funds
  - Continued evaluation of potential regulatory, policy, and practice updates
  - Organization-wide initiatives

Below, the Copyright Office sets forth these initiatives in detail.

## **I. COMPLETED AND ONGOING INITIATIVES**

The Copyright Office has proactively addressed many challenges that impact processing times. As explained in more detail below, the Copyright Office has undertaken a holistic review of processes and made significant strides in reducing processing times.

### **A. Staffing.**

The Copyright Office recognizes that examiner staffing is the primary cause of a backlog and delayed processing times. From 2010 to 2014, the Copyright Office lost approximately 40% of its examining staff through attrition and sequestration. To address this deficit, the Copyright Office began seeking additional funding from Congress to bring staffing levels up to an appropriate level.<sup>137</sup> Moving forward, it will be essential to continue backfilling examiners lost through retirement, resignation, or promotion. Approximately 25% of the examiner staff are eligible for retirement. Prompt hiring and training of replacements will maintain the process of reducing processing times

### **B. Training.**

In conjunction with the new examiner hires in FY2015—the first hires since 2010—the Registration Program redesigned and centralized its examiner education to better train examiners in the concepts of copyright law, the newly revised *Compendium of Copyright Office Practices*, and the intricacies of the electronic registration system. The new training initiative decreased initial training times to six months, allowing additional training to occur while trainees are embedded in divisions, thus resulting in trainees being able to examine claims more quickly.

Training must be performed by Registration Program attorneys, managers, supervisors, and examiners, and inevitably takes some of the best examiners away from examining duties to train and review the work of the new examiners. Thus, when examiners are in training, productivity can temporarily decrease until the trainers return to their normal examination duties following training. The need to hire and train so many examiners over the last five years meant that the backlog and processing times got worse before they got better. As more new examiners were trained from 2015 through 2017, the Copyright Office began to make progress on decreasing the backlog and processing times. This progress continues to grow rapidly as the Copyright Office trains an increasing number of examiners, using training that is more refined and efficient. In this fiscal year, the Copyright Office reduced the centralized training time by 50% to move new examiners into their respective divisions—the Literary, Performing Arts, and Visual Arts Divisions—more rapidly. As all the examiners hired since FY2015 increase their levels of experience, the Copyright Office is confident that there will be increased productivity.

### **C. Processing time working group.**

In FY2017, the Copyright Office established a working group of senior staff to recommend and coordinate changes that would foster reduced pendency times. In addition to confirming the primary importance of examiner staffing and training, the working group recommended additional changes that were implemented, including:

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<sup>137</sup> For additional detailed information on how examination staffing numbers changed significantly, see Part III(A)(2) of the enclosed explanation of processes and challenges.

- Regulatory changes to modify particular registration application options that caused a significant amount of time-consuming correspondence, such as the regulation on the Single Application and the regulation on unpublished collections. Both regulations have been revised and the correspondence rates have been reduced, leading to decreased processing times.
- Changes to the eCO system, the Copyright Office’s electronic registration system, such as improved onscreen instructions and technical blocking of unacceptable file types. These technical changes eliminated correspondence on what had been a recurring source of delays.
- The use of overtime to increase the rate of backlog reduction until a sufficient number of examiners have been hired and fully trained. The Registration Program has consistently used overtime during FY2018 and FY2019. This resulted in a steady average reduction of approximately 2,235 claims on hand per week. As the number of workable and open claims decrease, there is a corresponding, albeit delayed, reduction in the overall processing times.

#### **D. External review of practices and modernization efforts.**

To receive an objective review of the efficiency of its practices, in 2017 the Copyright Office engaged the services of SOAR to review processes, practices, perceptions, and quality in the Registration Program. SOAR provided its report in July 2018, and documented many of the major changes that the Registration Program had instituted to improve efficiency and quality. For example, the report noted the changes adopted in the Literary Division to create streamlined handling of physical deposits as well as regulatory changes to reduce the amount of physical deposits by up to 50%.

SOAR also recommended placing maximum emphasis on modernization efforts as an essential means of enhancing greater long-term efficiency. SOAR stated that “problems with eCO contribute, probably substantially, to inefficiency in the examination process” and that the “internal system for processing cases [] is notoriously awkward.”<sup>2</sup> Creating a modern user-friendly public interface could significantly help avoid applicant errors that require time-consuming correspondence. SOAR further explained that a better-designed electronic registration system would also increase examination efficiency and help supervisors and managers obtain meaningful data that would facilitate increasing efficiency.

#### **E. Resolution of the oldest claims and HOV process.**

In 2018, the Copyright Office launched an initiative to assess and address its oldest claims. The Copyright Office identified all claims older than January 1, 2017, began quarterly meetings of registration management on the status of those claims, and implemented a new procedure that required direct reporting of claims older than January 1, 2017 to the Associate Register of Copyrights and Director of Registration Policy and Practice and the Register of Copyrights. As a result, during FY2018, the Copyright Office resolved 92.4% of its oldest claims on hand. By the

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<sup>2</sup> SMITHSONIAN ORG. & RESEARCH, U.S. COPYRIGHT REGISTRATION PROGRAM OVERVIEW AND ISSUES 11–12 (July 2018).

end of FY2019, the Copyright Office is committed to resolving the remainder of claims submitted prior to January 2018. While less than 1% of the 500,000+ claims received annually were submitted prior to January 2018 (many involving problems with physical deposits), the Copyright Office is prioritizing resolving the oldest claims and is dedicated to ensuring that claims do not linger in the Office unresolved in the future. This is achievable now that staffing levels have increased.

Additionally, for a set time this past spring, the Copyright Office experimented with an “HOV Initiative” for error-free claims. Under this approach, examiners prioritized claims that did not require correspondence ahead of those that did, instead of processing claims in the order they were received. This resulted in a significant reduction in the number of pending claims. It also provided the Registration Program with an opportunity to later analyze the claims that did require correspondence and look for ways to reduce correspondence in certain areas.

## **II. FUTURE INITIATIVES**

In addition to maintaining and seeking improvements in all of the Copyright Office’s existing initiatives that have yielded consistent reductions in processing times, the Office also plans on moving forward with additional initiatives that will require continuing congressional support.

### **A. Staffing and training initiatives.**

The Copyright Office plans to add several positions to the Registration Program to assist in increasing efficiency, reducing processing times, and implementing modernization efforts, which includes:

- The creation of new non-supervisory, senior examiner/subject matter expert (“SMEs”) positions at a GS-13 level in each of the three divisions of the Registration Program. These SMEs would handle each division’s most difficult claims that require correspondence, while allowing the vast majority of GS-11 and GS-12 examiners to more quickly resolve the 75% of claims that do not require correspondence. This proposal builds on the four-week HOV Initiative performed in March of 2018 that yielded significant increases in productivity. It also addresses the deficiencies of that approach, namely putting aside those claims that require correspondence and ultimately having to deal with those claims at a later date.
- The creation of SMEs in each division can assist in quickly resolving those difficult and complex claims in a timely manner, without creating a roadblock for the remaining examiners and claims that do not require correspondence. These new positions will also allow greater centralization and consistency in the handling of expedited special handling claims and preregistration claims. These positions will also foster staff retention by providing a promotion path for the most experienced examiners, who would serve as critical subject matter experts during the ongoing processes of registration modernization.
- Filling vacant assistant chief positions in the Performing Arts and Visual Arts divisions. The assistant chiefs would directly report to the chief of each division, assisting with the

day-to-day workflow and training needs of the division, in addition to supervising the newly-created GS-13 SMEs in their division.

- Hiring a Director of Training and a Program Manager in the Registration Program Office. The Director of Training will supervise and coordinate new examiner training, as well as ongoing internal and external training of existing examiners and Registration Program staff. This position would also be responsible for implementing quality review across the divisions to determine training needs on an ongoing basis.

The Program Manager will be responsible for coordinating modernization efforts related to registration as well as serving as a key liaison to other divisions within the Copyright Office, the Library, and the public. This position would also be responsible for obtaining and maintaining accurate data from the current system as well as ensuring that the new electronic registration system captures significantly more robust data reporting capabilities.

- Continuing to refine training processes by periodically reviewing the training program and by soliciting feedback from trainees on the process.

These new positions and future increases in the number of GS-13 SMEs in each division would benefit from additional funding by Congress. Similarly, sufficient funding to support overtime for examiners can increase the rapidity of decreased processing times, helping to manage processing times and handle unexpected surges in applications.

## **B. Data-driven performance goals.**

The Copyright Office has had great success with setting specific performance goals, and plans to develop additional goals to help guide the process.

Over the past several fiscal years, the Registration Program has set and exceeded ambitious performance goals. In FY2018, the Registration Program reduced the backlog of workable claims<sup>3</sup> by 72.7%. During that same period, 92.4% of the oldest claims in the system were resolved and the correspondence rate was reduced by 2% from 31% to 29%.

In the first half of FY2019, the Registration Program has reduced the number of workable claims to under 120,000, used with the HOV initiative, continued resolving the oldest claims, decreased the correspondence rate by an additional 5% to 24%, and reduced the overall average processing time to five months—a reduction of two months since the beginning of the fiscal year.

On October 1, 2018, for the first time the Copyright Office provided a comprehensive public update of registration processing times that includes a breakdown of the processing times for electronic applications and paper applications that do not require correspondence (collectively,

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<sup>3</sup> “Workable claims” are those claims in which the Copyright Office has received the application, deposit, and fee in proper form and has everything it needs to examine the claim. Claims that require correspondence due to defects or ambiguities in the application or deposit are removed from “workable” status until the Copyright Office receives the applicant’s response, at which time the claim once again becomes “workable.”

75% of claims) and electronic and paper applications that do require correspondence. This information was updated in early April of 2019 to reflect the processing times six months into the fiscal year. This information will be updated at regular intervals to demonstrate the ongoing progress that the Copyright Office is dedicated to achieving.

Beginning in October of 2019, the Copyright Office intends to subdivide the current category of electronic applications into (1) electronic applications with electronic deposits and (2) electronic applications with physical deposits. This change will better demonstrate the additional time required for the receipt, screening, and handling of physical deposits because it will show more clearly the processing time differences between fully electronic and hybrid electronic/physical applications.

All of these performance goals have proven tremendously successful in reducing pendency times. These strategies will continue as the Copyright Office looks for additional ways to leverage greater efficiencies. These efforts will culminate in creation of requirements for a new electronic registration system that will be tailored to produce greater efficiency from both the applicant's and the examiner's perspectives.

### **C. Funding and examination.**

Funding the Copyright Office at appropriate levels is critical to developing and maintaining an efficient, quality registration process.

First, the Copyright Office will continue to assess its needs and make funding requests that will ensure its ability to provide optimal services. The Copyright Office is very appreciative of Congress' recent support, which, as noted above, has resulted in real benefits in processing times. Going forward, the Copyright Office will take care to analyze its budgetary needs and provide Congress with the information necessary to support future funding requests.

Second, the Copyright Office has sought greater flexibility in the use of no year unobligated fee balances in order to allow the Office to provide services to the public—such as registration—in the event of a lapse in appropriations or to cover unexpected operational costs and other short-term deficits. Flexibility in management of prior-year balances across budget cycles also could provide for more efficient and cost-effective administration of large, non-recurring projects.

### **D. Updates to regulations, policies, and practices.**

As detailed above, the Copyright Office has recently implemented significant updates of its registration regulations, policies, practices, and procedures, which have had a salutary effect on processing times. The Copyright Office anticipates a continued focus on potential regulatory updates to improve its administration of the registration system, and is currently analyzing a number of suggestions received through a notice of inquiry on this subject issued in connection with IT modernization.<sup>4</sup> The Copyright Office is also preparing a public notice of inquiry

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<sup>4</sup> See Registration Modernization, 83 Fed. Reg. 52,336, 52,337 (Oct. 17, 2018). All comments can be viewed on the Copyright Office website at <https://www.copyright.gov/rulemaking/reg-modernization/>.

regarding issues related to online publication with respect to registration practices, in response to stakeholder suggestions that guidance from the Copyright Office on this statutory requirement would reduce registration challenges for certain copyright industries, such as visual artists.<sup>5</sup>

In addition, the Copyright Office has determined that applications with physical deposits have increased processing times in light of the Capitol Hill mail security measures and the process of matching deposits to applications, among other things. Currently, the Copyright Office still requires a number of physical deposits, including for use by the Library of Congress; on average, physical deposits take an average of two additional months to process compared to electronic deposits. The Register has regulatory authority to alter these deposit requirements, subject to the approval of the Librarian of Congress. The Copyright Office will review the types of deposits that are appropriate, and identify what, if any, changes might help to improve processing times.

#### **E. Organizational initiatives.**

The Copyright Office also will closely analyze the results of the OPM and BPR analyses, described in detail in Part III (B)(4) of the explanation of processes and challenges. In short, the recommendations received through these processes should help the Copyright Office guide operational processes to further improve efficiencies and productivity.

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In sum, the Copyright Office takes very seriously its obligations to the public and Congress, and, after making significant progress on decreasing processing times, will continue striving for the most efficient and productive methods to examine claims to copyright and provide decisions on registration. The Copyright Office is honored to administer the nation's copyright registration system, and is committed to providing the best services possible.

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<sup>5</sup> See U.S. COPYRIGHT OFFICE, COPYRIGHT AND VISUAL WORKS: THE LEGAL LANDSCAPE OF OPPORTUNITIES AND CHALLENGES 11 (Jan. 18, 2019), <https://www.copyright.gov/policy/visualworks/senate-letter.pdf>.