



LIBRARY OF CONGRESS

U.S. Copyright Office

37 CFR Parts 201, 202

[Docket No. 2016-10]

Group Registration of Photographs

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The U.S. Copyright Office is proposing to update its regulations governing group registration options for photographers to encourage broader participation in the registration system, increase the efficiency of the registration process, and create a more robust record of the claim. First, the Office has created new online registration applications specifically designed for group registrations of published photographs and group registrations of unpublished photographs. The proposed rule would require applicants to use these online applications, in lieu of any existing paper application. Applicants will be allowed to include up to 750 photographs with each application. Second, the proposal would eliminate less-efficient forms of registering photographs that have been adopted over the years—namely, the pilot program permitting group registration of published photographs using the electronic application designed for registering a single work, and the option of registering a number of unpublished photographs as an “unpublished collection.” The pilot program for photographic databases will remain in effect. Third, the proposed rule will update the deposit requirement for group registrations of photographs and photographic databases by requiring applicants to submit their works in digital form.

DATES: Comments on the proposed rule must be made in writing and must be received in the U.S. Copyright Office no later than [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: For reasons of government efficiency, the Copyright Office is using the regulations.gov system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through regulations.gov. Specific instructions for submitting comments are available on the Copyright Office website at <http://www.copyright.gov/rulemaking/group-photographs/>. If electronic submission of comments is not feasible due to lack of access to a computer and/or the Internet, please contact the Office using the contact information below for special instructions.

FOR FURTHER INFORMATION CONTACT: Robert J. Kasunic, Associate Register of Copyrights and Director of Registration Policy and Practice, or Erik Bertin, Deputy Director of Registration Policy and Practice, at 202-707-8040.

SUPPLEMENTARY INFORMATION:

The U.S. Copyright Office (the “Office”) is proposing to amend the regulation that governs the group registration option for published photographs. In addition, the Office is proposing to create a new group registration option for unpublished photographs. Finally, the Office is proposing to amend the deposit requirements for groups of published photographs and photographic databases, and is proposing to establish similar deposit requirements for the new group option for unpublished photographs. These proposals are discussed in more detail below. The Office invites public comment on each proposal.

Last year the Office issued a notice of inquiry concerning the practical and legal challenges faced by photographers, graphic artists, and illustrators (referred to herein as the

“Visual Works Inquiry”¹). *See* 80 FR 23054 (Apr. 24, 2015). The Office recognized that photographers, graphic artists, and illustrators have a broad impact on U.S. culture, but they face significant challenges in the digital age. To better understand these challenges, the Office requested written comments on how photographs, graphic artworks, and illustrations are monetized, licensed, registered, and enforced under the Copyright Act of 1976 (“the Copyright Act”). The Office sought information concerning the current marketplace for these types of works, as well as observations regarding the real or potential obstacles that these creators and their licensees or other representatives face when navigating the digital landscape. With respect to registration, the Office asked the public to identify the most significant challenges for photographers and other visual artists. 80 FR at 23056.

The Office received 2795 comments and 166 reply comments in response to the Visual Works Inquiry. The Office has not attempted to address these comments in this notice of proposed rulemaking.² The rule proposed in this notice focuses solely on photographs, and it represents an interim improvement to the current electronic registration system. In the future, the Office may consider other options as it assesses the broader concerns of visual artists generally.

I. Background

When Congress enacted the Copyright Act, it authorized the Register of Copyrights (the “Register”) to specify by regulation the administrative classes of works for the purpose of seeking a registration and the nature of the deposit required for each such class. In addition, Congress gave the Register the discretion to allow groups of related works to be registered with

¹ Information concerning the Visual Works Inquiry is available on the Office’s website at <http://copyright.gov/policy/visualworks/>.

² In preparing this notice of proposed rulemaking the Office did consider comments submitted in a prior rulemaking concerning the deposit requirements for photographic databases, which was completed in July 2012. Information concerning that rulemaking is available on the Office’s website at <http://copyright.gov/rulemaking/databases/>.

one application and one filing fee, a procedure known as “group registration.” *See* 17 U.S.C. 408(c)(1). Pursuant to this authority, the Register issued regulations permitting the Office to issue group registrations for certain limited categories of works, provided that certain conditions have been met. *See generally* 37 CFR 202.3(b)(5)-(10).

As the legislative history explains, allowing “a number of related works to be registered together as a group represent[ed] a needed and important liberalization of the law.” H.R. REP. NO. 94-1476, at 154 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5770; S. REP. NO. 94-473, at 136 (1975). Congress recognized that requiring applicants to submit separate applications for certain types of works may be so burdensome and expensive that authors and copyright owners may forgo registration altogether, since copyright registration is not a prerequisite to copyright protection. *Id.* If copyright owners do not submit their works for registration under this permissive system, the public record will not contain any information concerning those works. This creates a void in the record that diminishes the value of the Office’s database.

Congress cited “a group of photographs by one photographer” as an example of a “group of related works” that would be suitable for registration under section 408(c)(1). *Id.* At the same time, when large numbers of works are bundled together in one application, information about the individual works may not be adequately captured. Therefore, group registration options require careful balancing of the need for an accurate public record and the need for an efficient method of facilitating the registration of multiple photographs.

II. Existing Registration Accommodations for Photographers

Under the Copyright Office’s existing regulations and registration practice, photographers have several options for registering groups or collections of photographs with one application and one filing fee. These options are summarized below.

A. Group Registration of Published Photographs

After conducting an extensive rulemaking, the Office issued a regulation in 2001 that allows applicants to register a group of published photographs with one application and one filing fee. *See* 66 FR 37142, 37149-50 (July 17, 2001). The Office refers to this procedure as the “group option for published photographs” or “GRPPH.”

An applicant may register a group of photographs under this procedure if all the photographs were taken by the same photographer and were published within the same calendar year, and if the copyright claimant for all the photographs is the same person or organization. 37 CFR 202.3(b)(10)(i)-(iii). If the photographs were created as works made for hire, the application must provide both the name of the photographer and the name of the photographer’s employer or the party who specially ordered or commissioned the photographs (*e.g.*, “ABC Corporation, employer for hire of John Doe”). *Id.* § 202.3(b)(10)(ix).

As a general rule, the applicant must provide a precise date of publication for each photograph in the group (*i.e.*, month, day, and year), either by providing the date on the application, on a continuation sheet submitted on Form GR/PPh/CON,³ on a separate list submitted on paper or in a text file, or on the photographs themselves (*e.g.*, writing the date on the back of each print, including the date in the file name for each image, etc.). *Id.* § 202.3(b)(10)(iv)(A)-(D). Alternatively, the applicant may provide a range of dates (*e.g.*, February 25, 2015 through May 25, 2015), but only if the photographs were published within three months before the date that the application is received in the Office. *Id.* § 202.3(b)(10)(vi). If the applicant chooses to provide publication information on Form GR/PPh/CON, the applicant may include up to 750 photographs in the claim. *Id.* § 202.3(b)(10)(v). By contrast, if the

³ Form GR/PPh/CON is a continuation sheet for Form VA specifically designed for providing information for a group registration of published photographs.

applicant provides publication information using any other method, there is no limit on the number of photographs that may be submitted. *Id.* § 202.3(b)(10)(v), (viii).

Initially, all applicants were required to file their claims using a paper application submitted on Form VA. As discussed below in Section III.A.1, the Office has established a pilot program that allows applicants to submit their claims through the electronic registration system. *Id.* § 202.3(b)(10)(xi).

In all cases, the applicant must submit one copy of each photograph that is included in the group, and all the photographs must be submitted in the same format. *Id.* § 202.3(b)(10)(x). The applicant may submit the photographs in digital form by saving them on a CD-ROM or DVD-ROM in a JPEG, GIF, TIFF, or PCD format.⁴ Alternatively, the applicant may submit the photographs in a physical form, such as prints, contact sheets, slides, photocopies, or even videotape. *Id.* § 202.20(c)(2)(xx)(B)-(H).

B. Other Registration Options

In addition to the group option for published photographs, there are four other options for registering multiple photographs with the same application. These options are summarized below.

1. Unpublished Collections

Since 1978 the Office has allowed applicants to register a number of unpublished works with one application and one filing fee if the works qualify as an “unpublished collection.” To qualify for this option, the works must be unpublished, the works must have at least one common author, the copyright claimant for each work and the collection as a whole must be the same person or organization, the works must be assembled in an orderly form, and the applicant must

⁴ The regulation that currently governs the deposit requirements for GRPPH does not mention other types of storage devices, such as flash drives. 37 CFR 202.20(c)(2)(xx)(A).

provide a single title identifying the collection as a whole. *Id.* § 203.3(b)(4)(i)(B).

Photographers may use this option to register their photographs if they satisfy these requirements, and at the present time there is no limit on the number of photographs that may be included within each collection. Under this option, the applicant may register the works using the electronic registration system or a paper application submitted on Form VA. *Id.* § 202.3(b)(2).

In all cases, the applicant must submit one copy of each photograph that is included in the collection. The applicant may submit the photographs in digital form (*e.g.*, uploading digital files to the electronic registration system or mailing them to the Office on a CD-ROM or DVD-ROM, etc.) or physical form (*e.g.*, prints, slides, photocopies, etc.), but all of the photographs must be submitted in the same format. *Id.* § 202.20(c)(2)(xx).

2. Group Registration for Contributions to Periodicals

Without prejudice to the Register's general authority to create group registration options under Section 408(c)(2) at the Register's discretion, Congress also directed the Register to create a group option for works by the same individual author that were first published as a contribution to a periodical. 17 U.S.C. 408(c)(2). In response to this directive, the Office established a procedure known as the "group option for contributions to periodicals" or "GRCP." *See* 43 FR 965, 966-67 (Jan. 5, 1978). Photographers may use this option to register their photographs if they satisfy the requirements set forth in the regulation. First, all the photographs must be taken by the same individual, and none of them can be a work made for hire. 37 CFR 202.3(b)(8)(i)(A)-(B). Second, all the photographs must be first published as a contribution to a periodical (*e.g.*, a newspaper, a magazine, a journal, etc.) and they must be published within a twelve-month period (*e.g.*, June 1, 2014 through May 31, 2015). *Id.* § 202.3(b)(8)(i)(C) & n.2. And, third, if the photographs were first published before March 1, 1989, each photograph must

contain an appropriate copyright notice. *Id.* § 202.3(b)(8)(i)(D).

Under the current regulation, there is no limit on the number of photographs that may be registered under GRCP. The applicant must complete a paper application using Form VA and Form GR/CP.⁵ *Id.* § 202.3(b)(8)(ii)(A)-(B). The applicant must submit the photographs in the precise form in which they were first published, and the copies must be submitted in physical – rather than digital – form. *See id.* § 202.3(b)(8)(i)(E). For example, the applicant may submit the entire issue of the periodical that contains the photograph, the entire section of the newspaper that contains the photograph, a photocopy of the entire page from the periodical that contains the photograph, among other formats.⁶ *See id.*

3. Group Registration for Photographic Databases

In 1989, the Office created a procedure that allows database owners to register the updates and revisions to a database with one application and one filing fee. 37 CFR 202.3(b)(5); 54 FR 13177 (Mar. 31, 1989). The Office refers to this procedure as the “group database option.” In the late 1990s, some stock photography companies began using this option to register databases that contain large numbers of photographs. After consulting with representatives from the industry, the Office concluded that the database option could potentially be used to register a photographic database if certain requirements have been met. The Office noted this understanding in an earlier notice of proposed rulemaking that is discussed in Section III.A.1 below. *See* 76 FR 4072, 4075-76 (Jan. 24, 2011).

⁵ Form GR/CP is an adjunct form specifically designed for providing information for a group registration of contributions to periodicals.

⁶ The Office is issuing a separate notice of proposed rulemaking (published elsewhere in this volume of the **Federal Register**, and referred to herein as the “GRCP Rulemaking”) that invites comment on a proposed rule that will modify the group option for contributions to periodicals. To be clear, the Office is not proposing any changes to the GRCP regulation as part of this rulemaking on group registration of photographs.

The requirements for the database option are extremely complex.⁷ Briefly stated, an applicant may register the updates or revisions that were made to a database over a period of three months if the updates and revisions are owned by the same claimant and if the general content and organization of the updates and revisions are similar. 37 CFR 202.3(b)(5). The applicant must submit a detailed statement that describes the content and organization of the database, and in the case of a photographic database, the applicant must submit one copy of each photograph that is included in the group. The applicant may submit an online application or a paper application. The applicant may submit the photographs in digital or physical form, but all the photographs must be submitted in the same format. 37 CFR 202.20(c)(2)(xx).

A registration for a photographic database covers the authorship involved in selecting, coordinating, and arranging the content of the database as a whole. It also may cover the individual photographs that are included within the database if the photographers transferred the exclusive rights in their respective works to the owner of the database, and if the selection, coordination, and/or arrangement of those photographs is sufficiently creative. *See Compendium* section 1117.2. That said, the Office has questioned whether this practice should be revised to limit the examination of a database to the authorship involved in creating the selection, coordination, and arrangement of the database as a whole and to exclude examination (and thus, the *prima facie* validity) of a claim in the component elements of the database. *See* 77 FR 40268, 40269 (July 9, 2012); *see also* 76 FR at 4073. The Office generally discourages photographers from registering their works as part of a photographic database and instead encourages them to use one of the other options discussed in this section, in part, because they provide a better registration record for claims in the individual component works within a

⁷ For a detailed summary of these requirements, see section 1117 of the *Compendium of U.S. Copyright Office Practices, Third Edition* (hereinafter the “*Compendium*”).

database, as opposed to a claim in the database itself as a compilation of data. *See* 77 FR at 40269 n.1; 76 FR at 4073. Moreover, registering photographs as part of a photographic database may limit the copyright owner's ability to seek certain remedies in an infringement action. This issue is discussed in more detail in Section III.G.3 below.

4. Collective Works

Applicants may register a number of photographs with one application and one filing fee if they are part of a collective work. The statute defines a collective work as “a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.” 17 U.S.C. 101. A collective work may consist entirely of photographs, such as a book of photographs, an exhibition catalog, or a retrospective book that contains photographs taken by a particular photographer. A collective work also may combine photographs with other types of authorship, such as a calendar, textbook, coffee table book, or similar types of works.

Applicants may register a collective work with an online application or a paper application. The claim may include photographs taken by multiple photographers, but the applicant does not need to name each photographer in the application and there is no limit on the number of photographs that may be included within each claim. If the claim is approved, the registration will cover the authorship involved in selecting, coordinating, and arranging the content of the collective work as a whole. It also may cover the individual photographs that are included within the collective work if (i) the claimant owns the copyright in both the individual photographs and the collective work as a whole, and if (ii) the photographs have not previously been published or registered. Although a registration for a collective work may cover the individual photographs contained therein, this type of registration may limit the copyright

owner's ability to seek certain remedies in an infringement action. This issue is discussed in more detail in Section III.G.4 below.

III. The Proposed Rule

The Proposed Rule does several things. First, the Office is proposing to amend the regulation that governs the group option for published photographs to reflect certain technical upgrades that will be made to the electronic registration system. Second, the Office is proposing to create, for the first time, an equivalent group registration option for unpublished photographs. This new procedure will be known as the "group option for unpublished photographs" or "GRUPH," and it will replace the option that currently allows photographers to register their works as an unpublished collection. These first two amendments will increase the efficiency of the registration process for both published and unpublished photographs alike by requiring applicants to submit their claims through the electronic registration system. In addition, GRUPH will foster early registration, thereby eliminating complex questions that arise when published and unpublished photographs are commingled.

Third, the Office is proposing to update the deposit requirements for the group options for published photographs and photographic databases by requiring applicants to submit a digital copy of each photograph that is included in the group, and a separate document containing a sequentially numbered list that provides the title and file name for each photograph in the group. Applicants may submit these items by uploading them through the electronic system or by sending them on a physical storage device. This same requirement will apply to the new group option for unpublished photographs.

Finally, the Proposed Rule will memorialize the Office's longstanding position regarding the scope of a group registration for photographs.

Each of these proposals is discussed below.⁸

A. Application Requirements for Groups of Published Photographs (GRPPH) and Groups of Unpublished Photographs (GRUPH)

1. Online Registration

In February 2015 the Office completed a comprehensive analysis of its electronic registration system with input from technical experts and stakeholders. This analysis will support the Office’s long-term goals of creating both a better interface and a better public record. *See* U.S. COPYRIGHT OFFICE, OFFICE OF THE CHIEF INFORMATION OFFICER, REPORT AND RECOMMENDATIONS OF THE TECHNICAL UPGRADES SPECIAL PROJECT TEAM (February 2015), *available at* http://copyright.gov/docs/technical_upgrades/usco-technicalupgrades.pdf; *see also* Technological Upgrades to Registration and Recordation Functions, 78 FR 17722 (Mar. 22, 2013). In December 2015, the Register issued a strategic plan that sets forth the Office’s performance objectives for the next five years. The plan provides a roadmap for re-envisioning almost all of the services that the Office provides, including how applicants register claims, submit deposits, record documents, share data, and access expert resources. With respect to information technology, the plan calls for “a robust and flexible technology enterprise that is dedicated to the current and future needs of a modern copyright agency.” U.S. COPYRIGHT OFFICE, STRATEGIC PLAN 2016-2020: POSITIONING THE UNITED STATES COPYRIGHT OFFICE FOR THE FUTURE, at 35 (Dec. 1, 2015), *available at* <http://copyright.gov/reports/strategic-plan/USCO->

⁸ As mentioned above in footnote 6, the Office is issuing a separate notice of proposed rulemaking involving the group option for contributions to periodicals. The rule proposed in the GRCP Rulemaking states that the Office may refuse to issue a group registration or may cancel a group registration if it determines that the applicant failed to comply with the relevant requirements for a particular group option. These requirements will apply to any group option that the Office creates under section 408 of the Copyright Act, including GRCP, GRPPH, GRUPH, and the group option for photographic databases.

strategic.pdf. At the direction of Congress,⁹ the Office also developed a detailed IT plan, and obtained public comments on specific strategies, costs, and timelines for technology objectives. U.S. COPYRIGHT OFFICE, PROVISIONAL INFORMATION TECHNOLOGY MODERNIZATION PLAN AND COST ANALYSIS (Feb. 29, 2016), *available at* <http://copyright.gov/reports/itplan/>.

In the meantime, the Office has made some enhancements to the current electronic registration system that will benefit photographers, the Office, and the public at large. When the electronic registration system was introduced in 2007, it contained a “standard” application (referred to herein as the “standard online application”). Applicants could use this application to register a single work; they also could use this application to register a number of works as an unpublished collection or as part of a collective work. *See* 72 FR 36883, 36885 (July 6, 2007). But the standard online application was not meant to be used to register groups of published photographs, photographic databases, or contributions to periodicals, because the system was not designed to take in the information required for a group claim. Instead, photographers were required to submit these types of claims using a paper application submitted on Form VA (either alone or together with Form GR/PPh/CON or Form GR/CP).

Photographers soon expressed interest in using the electronic system, and beginning in 2010, some applicants began submitting large numbers of photographs with the standard online application. Although this application was not designed to handle group registrations, the Visual Arts Division processed some of these claims in cases where the application contained all the information required for a group claim. Based on this experience, the Office issued an interim regulation in 2011 that established a pilot program allowing applicants to register groups of published photographs and photographic databases with the standard online application.¹⁰ 76 FR

⁹ H.R. REP. NO. 114-110, at 16-17 (2015).

¹⁰ The pilot program does not apply to the group option for contributions to periodicals.

at 4074, 4075. Applicants that participate in the pilot program may submit their claims through the electronic system (rather than submitting a paper application), provided that they obtain prior authorization from the Visual Arts Division and follow the instructions from that Division concerning the information that should be included in the application and the proper method for submitting the deposit. 37 CFR 202.3(b)(5)(ii)(A), (b)(10)(xi).

The Office explained that, during the pilot, it would assess the desirability and feasibility of allowing applicants to submit groups of photographs through the electronic system on a permanent basis, and invited public comment on the issue. 76 FR 5106 (Jan. 28, 2011). The Professional Photographers of America (“PPA”) and other organizations that represent photographers supported the pilot program, predicting that the standard online application would require less time to complete than a paper application, and that applicants would receive their certificates in a more timely manner.¹¹

While the pilot program was well-intentioned, it has been extremely burdensome for both applicants and the Office. The standard online application was designed to handle claims involving one work or a limited number of works. Using the existing architecture to provide title and publication information for hundreds or even thousands of photographs is necessarily challenging for applicants who are unfamiliar with the system. Examining these types of claims also requires significantly more time. In some cases, registration specialists have spent an entire day processing a single claim, which has resulted in corresponding delays in issuing certificates of registration for such claims. Moreover, the increasing demand on the Office’s limited

¹¹ PPA at 2, *available at* <http://copyright.gov/rulemaking/databases/comments/professional-photographers-of-america.pdf>. PPA jointly submitted its comments with Commercial Photographers International, the Society of Sport & Event Photographers, the Student Photographic Society, Evidence Photographers International Council, and the Stock Artists Alliance. *Id.* at 1.

resources has had an adverse effect on the examination of other types of works within the Visual Arts Division.

To address these concerns, the Office has decided to eliminate the pilot program for published photographs, and replace it with an online application specifically designed for groups of published photographs. (The pilot program for photographic databases will remain in effect for the time being, though as discussed in Sections D.2 and G.3, the deposit requirements for photographic databases will be modified in some respects.) In addition, the Office has created a new online application specifically designed for groups of unpublished photographs.

Under the Proposed Rule, applicants will be required to use the online application designated for GRPPH or GRUPH as a condition for using either of these group options. To facilitate this transition, the Office will contact each applicant that has participated in the pilot program for published photographs and will notify them that the pilot program will be replaced with a new procedure. The Office will provide instructions on how to complete the new applications on its website and in chapter 1100 of the *Compendium*. In addition, the Office will make its staff available to groups or associations that are interested in producing webinars or other educational programs for their members.

Once the Proposed Rule goes into effect, the Office will no longer accept groups of published photographs or groups of unpublished photographs that are submitted with a paper application on Form VA (either with or without Form GR/PPh/CON).¹² Likewise, the Office will no longer accept these types of claims if they are submitted with a standard online

¹² By contrast, Applicants may continue to use Form VA to register a photographic database if they meet the eligibility requirements for that option. Similarly, photographers may continue to use Form VA to register an individual photograph or a collective work, although the Office strongly encourages applicants to use the online application rather than the paper form.

application, rather than the online application designated for GRPPH or GRUPH.¹³ In such cases the Office will ask the applicant to resubmit the photographs using the appropriate application, which may affect the effective date of registration that is assigned to the claim. The Office invites comment on this proposal, including whether it should eliminate the paper application for these group options, phase them out after a specified period of time, or continue to offer them for photographers who prefer to use the paper-based system.

2. Relationship to Supplementary Registration Rulemaking

A supplementary registration is a special type of registration that may be used “to correct an error in a copyright registration or to amplify the information given in a registration,” including a registration for a group of related works. 17 U.S.C. 408(d). Specifically, it identifies an error or omission in an existing registration (referred to herein as a “basic registration”) and places the corrected information or additional information in the public record. The Office refers to this type of registration as a “CA,” which stands for “correction and amplification.”

The Office is issuing a separate notice of proposed rulemaking (published elsewhere in this volume of the **Federal Register**, and referred to herein as the “CA Rulemaking”) that will modify the regulation that governs this procedure. Under the rule proposed in the CA Rulemaking, applicants will be required to file an online application in order to correct or amplify the information set forth in a basic registration for any photograph that is capable of being registered through the electronic system – even if the work was originally registered with a paper application submitted on Form VA (either with or without Form GR/PPh/CON).

¹³ By contrast, applicants may continue to use the standard online application to register a photographic database, as long as they comply with the requirements for the pilot program. Photographers may continue to use the standard application to register photographs as part of a collective work. Likewise, photographers may continue to use the standard online application to register an individual photograph.

If the rules proposed in the CA Rulemaking and in this proceeding both go into effect, applicants will be required to file an online application in order to correct or amplify a basic registration for works registered under the GRPPH and GRUPH options. If an applicant attempts to use a paper application, the Office will ask the applicant to resubmit the claim using the online form. As discussed in Section III.C.1 below, if the basic registration encompasses more than 750 photographs, multiple applications may need to be submitted to correct or amplify that registration. Applicants will not need to contact the Visual Arts Division in order to correct or amplify a basic registration for a group of photographs registered under GRPPH or GRUPH.

This online-filing requirement will also apply when correcting or amplifying a basic registration for works registered under the pilot program for group registration option for photographic databases.¹⁴ Applicants will need to contact the Visual Arts Division before filing an application to correct or amplify a basic registration for a photographic database. This is due to the fact a supplementary registration for a photographic database will have to be submitted under the pilot program. As discussed in Section III.A.1, the Visual Arts Division closely monitors claims submitted under this program to ensure that applicants complete the online application in an appropriate manner.

Comments concerning this proposal should be submitted as part of the CA Rulemaking, and should not be submitted as part of this rulemaking on group registration of photographs.

3. Policy Considerations Supporting Online-only Registration

A substantial majority of the U.S. population has access to the internet,¹⁵ and the Office expects that most photographers will be able to use the electronic system.¹⁶ That said, the Office

¹⁴ Under the rule proposed in the CA Rulemaking, the online filing requirement for supplementary registrations will also apply to basic registrations for a single photograph, a collection of unpublished photographs, or a collective work that contains photographs.

¹⁵ The Pew Research Center found that 84% of adults use the internet, including 85% of the people in

recognizes that millions of Americans do not have broadband service, and that the Proposed Rule may impose a burden on photographers who fall within this segment of the population.¹⁷

Nevertheless, the Office believes that the benefits of requiring applicants to use the online application designated for GRPPH or GRUPH outweigh the potential burden on photographers who do not have direct access to the internet.

As discussed above, the PPA and other organizations that represent photographers expressed support for online registration in a prior rulemaking. They stated that “only a tiny fraction of photographers (1% according to PPA member surveys)” register their works with the Office, in part, because the paper application takes too much time to complete. PPA, *supra* note 11, at 1. Thus, requiring applicants to use the online application will encourage broader participation in the registration process.

If a photographer does not have broadband at home, at the home of a relative, friend, or neighbor, or at her place of employment, there are other options for registering large numbers of published or unpublished photographs. If the copyright owner has a tablet or laptop, she could complete and submit the online application at a coffee shop, a bookstore, or any other place where wi-fi or cellular service is available.¹⁸ She could log onto the electronic system at a public

urban and suburban communities and 78% of the people in rural communities. PEW RESEARCH CENTER, AMERICANS’ INTERNET ACCESS: 2000-2015, at 2, 10 (June 26, 2015), *available at* http://www.pewinternet.org/files/2015/06/2015-06-26_internet-usage-across-demographics-discover_FINAL.pdf.

¹⁶ Approximately 94% of the claims submitted in fiscal year 2015 were filed through the electronic system, while 6% of the claims were submitted on a paper application.

¹⁷ The Federal Communications Commission (“FCC”) reported that 17% of the population does not have access to a broadband service with connection speeds of twenty-five megabits per second (“mbps”) for downloads and three mbps for uploads. This figure includes 8% of the people who live in urban areas, 53% of the people in rural areas, and 63% of the people in U.S. territories and Tribal lands. FEDERAL COMMUNICATIONS COMMISSION, 2015 BROADBAND PROGRESS REPORT at 4 (Jan. 29, 2015), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-10A1.pdf.

¹⁸ When filing an application for a supplementary registration there is no need to upload a copy of the work that is covered by the basic registration. Thus, applicants will be able to submit these types of claims with a tablet or other wi-fi enabled device. In some cases, the registration specialist may need to

library or other institution that provides computers with internet access. Although the photographer would have to submit the application through the electronic system and pay the filing fee through a secure website (www.pay.gov), she would not necessarily have to submit her photographs over the internet. As discussed in Section III.D.1.c, the photographer could save her photographs onto a flash drive or other storage device and mail it to the Office with the required shipping slip that is generated by the electronic registration system.

In the alternative, the photographer could hire an attorney to submit the application on her behalf, either by paying for the attorney's services or by obtaining *pro bono* representation.¹⁹ The Office also notes that a number of companies will prepare an application and file it with the Office for a fee. These companies typically provide this service for copyright owners who wish to register a single work, but they could conceivably expand their offering to include groups of photographs.

The Office's decision to offer a group option for photographers is entirely discretionary, and Congress gave the Office broad authority to set the requirements for these types of claims. 17 U.S.C. 408(c)(1). For the foregoing reasons, the Office believes that requiring applicants to submit an online application as a condition for seeking a group registration for a group of photographs is a reasonable trade-off for improving the overall efficiency of the group

compare the information provided in the application for supplementary registration with the copy of the work that was submitted with the application for the basic registration. For instance, this may be necessary if the supplementary registration changes the publication status of the work or adds additional authors to the registration record. If the Office does not have a copy of the work in its possession, the registration specialist may ask the applicant to submit a replacement copy. *See Compendium* section 1802.9(C). But in all cases, the replacement copy could be sent by first class mail, courier, or hand delivery; the copy does not need to be uploaded to the electronic system (though this would be an option if the applicant has broadband service).

¹⁹ The Office does not require applications to be prepared or submitted by an attorney. In certain special cases the Office may suggest that the copyright owner consider seeking legal advice, but the Office does not furnish the names of copyright attorneys, publishers, agents, or other similar information. *See* 37 CFR 201.2(a)(2).

registration process. Nonetheless, the Office invites comment on this aspect of the Proposed Rule.

B. Filing Fee for GRPPH and GRUPH

The filing fee for registering groups of published or unpublished photographs will be \$55, which is the amount the Office currently charges for a group of published photographs submitted with an online application under the pilot program.²⁰ 37 CFR 201.3(c)(3)(i).

In 2012 the Office conducted a study pursuant to section 708 of the Copyright Act, which authorizes the Register to establish, adjust, and recover fees for certain services that the Office provides to the public. Initially, the Office proposed to increase the filing fee for a group of published photographs, but after weighing the concerns expressed by photographers the Office decided to keep the fee for submitting an online application under the pilot program at \$55 and the fee for submitting a paper application at \$65. The Office noted that photographers “expressed significant concern about the impact of fees on their ability to protect their works,” given “the number of works they produce and must register in order to receive the full range of judicial remedies for infringement.” U.S. COPYRIGHT OFFICE, PROPOSED SCHEDULE AND ANALYSIS OF COPYRIGHT FEES TO GO INTO EFFECT ON OR ABOUT APRIL 1, 2014, at 15 (Nov. 14, 2013), *available at* <http://www.copyright.gov/docs/newfees/USCOFeeStudy-Nov13.pdf>.

Section 708(b) authorizes the Register to adjust the fees that the Office charges for certain services (including the fee for seeking a group registration), but before doing so the Register must conduct a study of the costs incurred by the Office for registering claims, recording documents, and providing other services. In conducting this study, the Register must consider the timing of any fee adjustments and the Office’s authority to use the fees consistent

²⁰ Likewise, the filing fee for registering a photographic database will remain unchanged. Applicants will continue to pay \$55 if the claim is submitted with an online application under the pilot program, and will continue to pay \$65 if the claim is submitted with a paper application on Form VA. 37 CFR 201.3(c)(3).

with its budget. 17 U.S.C. 708(b)(1). Section 708(b) provides that the Register may adjust these fees no “more than that necessary to cover the reasonable costs incurred by the Copyright Office for . . . [such services], plus a reasonable inflation adjustment to account for any estimated increase in costs.” 17 U.S.C. 708(b)(2). It also provides that the Office must submit a proposed fee schedule to Congress and that the Office may implement the schedule 120 days thereafter (unless Congress enacts a law stating that it does not approve the schedule). 17 U.S.C. 708(b)(5).

Once the Proposed Rule has been implemented, the Office will monitor the cost of processing groups of published and unpublished photographs to determine if future fee adjustments may be warranted. The Office will use this information in conducting its next fee study.

C. Eligibility Requirements for GRPPH and GRUPH

This section discusses the eligibility requirements for the group option for published photographs and the group option for unpublished photographs. Applicants that fail to satisfy these requirements will not be permitted to use these options.

1. Photographs That May Be Included in the Group

Among the key requirements of the Proposed Rule are that all the works in the group must be photographs, the group must contain no more than 750 photographs, and the applicant must specify the total number of photographs that are included in the group. These requirements must be satisfied, regardless of whether the applicant uses the group option for published or unpublished photographs.

This represents a change in policy. Under the current regulation, applicants may register a group of published photographs by submitting a paper application on Form VA and may use

Form GR/PPh/CON to provide titles, publication dates, and other pertinent information for each photograph. Completing Form GR/PPh/CON is optional, although it does provide certain advantages. *See Compendium* section 1116.2. When using Form GR/PPh/CON, the applicant may only include up to 750 photographs in each group. By contrast, if the applicant uses any other method for submitting a group of published photographs—such as completing the standard online application under the pilot program or submitting a paper application on Form VA without completing Form GR/PPh/CON—there is no limit on the number of photographs that may be included in the group. Likewise, when an applicant submits a number of photographs as an unpublished collection under § 202.3(b)(4)(i)(B), there is no limit on the number of photographs that may be included in the claim (regardless of whether the applicant submits the claim through the electronic system or with a paper application).

The Office recognizes that photographers are prolific creators. A photographer may take dozens or even hundreds of copyrightable images in a single session and thousands of images over the course of a week, a month, or a year. The Office created a group option for photographs, in part, because it is unrealistic and cost-prohibitive to expect photographers to register all of their images on an individual basis. At the same time, the Office recognizes that an effective public record must provide sufficient information about each claim. Photographers who register their works in a timely manner may be entitled to claim statutory damages in an infringement action and the granularity of the public record is critical to that determination.

Given resource limitations and the modest filing fee for this group option, the Office must impose some limit on the total number of photographs that may be submitted under the group option for published photographs and the new option for unpublished photographs. Based on its experience with Form GR/PPh/CON, the Office has determined that a limit of 750

photographs strikes an appropriate balance between the interests of photographers and the administrative capabilities of the Office.

To ensure that applicants do not attempt to circumvent the 750-photograph limit the Office proposes to eliminate the pilot program that allows applicants to submit groups of published photographs with the standard online application.²¹ If an applicant submits more than 750 photographs or fails to use the online application designated for GRPPH, the Office will ask the applicant to resubmit the claim using the appropriate application and will ask the applicant to limit the claim to no more than 750 photographs.

For the same reason, the Office will no longer register a group of unpublished photographs as an unpublished collection. If an applicant submits more than 750 photographs or fails to use the online application designated for GRUPH, the Office will ask the applicant to resubmit the claim using the appropriate application and will ask the applicant to limit the number of photographs in the group.

The limit on the number of photographs, in turn, will affect the procedure for correcting or amplifying a basic registration for a group of published photographs. As noted in Section III.A.2, the rule proposed in the CA rulemaking will require applicants to file an online application in order to seek a supplementary registration for a group of photographs. If the basic registration covers 750 photographs or fewer, the applicant will be able to correct or amplify the registration record with a single supplementary registration submitted through the online system. But if the basic registration was issued before the Proposed Rule goes into effect, and if that registration covers more than 750 photographs, multiple supplementary registrations may be needed to correct or amplify the record for those works.

²¹ The Proposed Rule only eliminates the pilot program for GRPPH. As discussed in Section III.A.1, the pilot program for photographic databases will remain in effect for the time being.

2. Authorship and Ownership

Another key requirement is that all the photographs in the group must be taken by the same photographer. Applicants will not be allowed to submit groups of photographs taken by different photographers (*e.g.*, 300 photographs by Raul Martinez, 300 photographs by Jose Rodriguez, and 150 photographs by Diego Hernandez). Likewise, the Office will not accept applications claiming that two or more individuals jointly created each photograph in the group as a joint work.²² These requirements are consistent with the regulation that currently governs GRPPH. *See* 37 CFR 202.3(b)(10)(ii).

In all cases, the claim will be limited to “photographs” and that term will be added automatically to the application by the electronic system. The system will not accept claims in “digital editing,” “compilation,” or any other form of authorship other than “photographs.”²³ Likewise, the Office will not allow applicants to add other forms of authorship to the claim during the examination process or with a supplementary registration.

In all cases, the copyright claimant for each photograph must be the same person or organization.²⁴ Specifically, the claimant must be the author of all the photographs in the group, or the copyright owner that owns all the exclusive rights in those photographs.²⁵

²² Joint authors will not be able to use GRPPH or GRUPH. The Office is willing to entertain these types of claims if the applicant submits a separate application for each individual photograph (*i.e.*, not using the group option) and provides a sufficient basis for the claim of joint authorship.

²³ To assert a claim in “digital editing” applicants may submit a separate application and a separate filing fee for each photograph (rather than submitting a group of photographs under GRPPH or GRUPH). In appropriate cases, applicants may assert a claim in a “compilation” of photographs by registering them as part of a collective work, such as a book of photographs, an exhibition catalog, a calendar, or the like.

²⁴ This requirement appears in the current regulation governing groups of published photographs. 37 CFR 202.3(b)(10)(i).

²⁵ The term “claimant” is defined in § 202.3(a)(3)(iii) of the regulations. That provision contains a footnote stating that a person or organization that has obtained “the contractual right to claim legal title to the copyright” may be named as claimant. 37 CFR 202.3(a)(3)(ii) n.1. The Office proposed to eliminate this footnote in a prior rulemaking. *See* Registration of Copyright: Definition of Claimant, 77 FR 29257, 29259 (May 17, 2012). The Office expects to issue a final rule in that proceeding before the new regulations governing GRPPH and GRUPH go into effect.

Applicants will be allowed to register a group of photographs if the claimant obtained all the exclusive rights in those works through a transfer of ownership. Likewise, applicants will be allowed to register a group of photographs as works made for hire (i) if all the photographs are identified in the application as works made for hire, (ii) if all the photographs were created by the same individual for the same employer, and (iii) if the photographer and the employer are both listed in the name of author field (*e.g.*, “Advertising Agency LLC, employer for hire of John Smith”).²⁶ However, the Office will not allow applicants to combine works made for hire with works obtained through a transfer of ownership. Similarly, the electronic system will not allow works created by one photographer to be combined with works created by a different photographer (even if those works are owned by the same claimant).

For example, if an advertising agency acquired a group of photographs from a particular photographer through an assignment of copyright and acquired another group of photographs taken by the same photographer through a work made for hire agreement, the agency could register those photographs under GRPPH or GRUPH only by separating the photographs into two groups and submit a separate application for each group (*i.e.*, one application with the work made for hire question answered “yes” and the other with the question answered “no”). Likewise, if the agency hired five freelancers to take photographs pursuant to a work made for hire agreement, the agency should separate the photographs into five separate groups (*i.e.*, one group for each photographer) and submit a separate application for each group.

3. Publication and Titles

The group options for published and unpublished photographs are designed to be mutually exclusive of each other. Under the Proposed Rule, an applicant will be allowed to

²⁶ This requirement appears in the current regulation governing groups of published photographs. 37 CFR 202.3(b)(10)(ix).

register a group of unpublished photographs if all the photographs are unpublished, and will be allowed to register a group of published photographs if all the photographs are published. Applicants will not be allowed to combine published and unpublished photographs in the same claim. In addition, in the case of published photographs, all the works must be published within the same nation and within the same calendar year (*e.g.*, January 1 through December 31, 2016).²⁷ When completing the online application, applicants will be asked to verify this information by providing the earliest date and the most recent date that photographs were published during the year.

To register a group of published or unpublished photographs, applicants will be required to provide a title for the group as a whole, and will be required to include this information in the online application itself. For example, the applicant may provide a title that identifies the photographer and the month/year that the photographs were created, such as “Jack Jackson’s photos May through July 2016,” or one that identifies the subject matter of the photographs, such as “Tropical Images from Hawaii.”

In addition to this basic information about the group of photographs, applicants will be required to submit a separate document in Excel format (“.xls”), Portable Document Format (“PDF”), or other electronic format that may be specifically approved by the Office that contains a sequentially numbered²⁸ list with a title, file name (matching the file name of the corresponding deposit copy), and in the case of GRPPH, the month and year of publication²⁹ (*e.g.*, “January

²⁷ The current regulation governing GRPPH states that the photographs must be published within the same calendar year, but does not indicate whether the photographs must be published within the same nation. 37 CFR 202.3(b)(10)(iii).

²⁸ Each entry on the list must be sequentially numbered (*i.e.*, 1, 2, 3, etc.); these numbers can be entered automatically with most spreadsheet programs. The Office will use this information to count the number of photographs that are included in the deposit, and to ensure that it matches the number of photographs claimed in the application.

²⁹ Applicants will not be required to provide a precise date of publication for each photograph in the

2016,” “February 2016,” etc.) for each photograph in the group.³⁰ This list must be submitted together with the copies of the photographs, by uploading them through the electronic system or by sending them on a physical storage device. The specific requirements of this list are discussed below.

In addition, applicants will be encouraged—but not required—to provide title and publication information in the online application itself. The Office will provide instructions on its website that will explain how to copy this information from the numbered list into the appropriate fields in the online application.

Although applicants will not be required to provide title and publication information in the online application, there are certain advantages to doing so. If the applicant includes the titles in the online application, they will appear on the certificate of registration and in the Office’s online database. This will improve the quality of the registration record by making the information more accessible to the public. If this information appears on the certificate, and if the certificate is issued within five years after the publication of a particular photograph, the certificate will create a legal presumption that the work was published in the month and year specified on the certificate. *See* 17 U.S.C. 410(c).

By contrast, if the applicant provides title and publication information in the numbered list, but does not include that information in the online application itself, the titles and publication dates will not appear on the certificate of registration or the Office’s online database (although the Office will keep a copy of the numbered list in its files). In such cases, the Office

group (*i.e.*, month, day, and year). This represents a change in the current policy for registering a group of published photographs. Under the current regulation for GRPPH, applicants generally are required to provide a month, day, and year of publication for each photograph, although they may provide a range of dates if the application is received within three months after the first date of publication specified in the application.

³⁰ The specific requirements for the numbered list are discussed below in Section III.D.1.b.

will add an annotation to the record, such as “Regarding title: deposit contains complete list of titles that correspond to the individual photographs included in this group.”

In comments regarding the Office’s pilot program for electronic registration of photographs, the PPA and other organizations stated that photographers struggle with the definition of “publication” and “the public,” and find it difficult to determine whether their works are published or unpublished, particularly when they are distributed in digital form. PPA, *supra* note 11, at 2-3. They explained that their members are reluctant to register their works, in part, because they worry about the possible consequences of classifying an unpublished photograph as a published work (or *vice versa*). They asked the Office to address this “barrier to registration” by providing clarification and guidance on these issues. *Id.* at 3.

The new group option for unpublished photographs will help mitigate this problem by encouraging early registration. The Office strongly encourages photographers to register their works before they are published (*i.e.*, before any distributions have occurred), because this avoids much of the confusion concerning publication and the treatment of published works. The new group option supports this objective by giving photographers a convenient and cost-effective means for registering their photographs before they are distributed to the public.

In addition, the Office released a comprehensive revision of the *Compendium* in 2014, which sets forth and explains key administrative duties of the Copyright Office under title 17 of the United States Code. *See* 79 FR 78911, 78911-12 (Dec. 31, 2014). Among other improvements, the *Compendium* contains an entire chapter on publication. This chapter provides a detailed discussion of the definition of “publication” and “the public” and specific examples of how the Office applies these definitions to photographs and other types of works. *See generally Compendium*, chapter 1900. The *Compendium* provides guidance on how to determine whether

a work is published or unpublished when it is posted on the internet or distributed online. *See id.* section 1008.3. It also explains how to correct an error in a registration if the applicant mistakenly claims that the work was published or unpublished. *See id.* sections 1802.6(I), 1802.7(C).

In the future, the Office intends to develop a portal on its website that will provide photographers with pertinent information on a wide range of copyright issues. In developing these resources it would be helpful to learn more about the specific methods that photographers use to distribute their works to their customers and the general public. The Office previously asked for written comments on this issue in the Visual Works Inquiry, and it welcomes additional input as part of this rulemaking.

D. The Deposit Requirement

The Proposed Rule will modify the deposit requirements for the group option for published photographs and the group option for photographic databases, and it will establish similar requirements for the new option for unpublished photographs. These requirements are summarized below.³¹

1. Deposit Requirements for GRPPH and GRUPH

a. Digital Photographs

Under the Proposed Rule, applicants will be required to submit a digital copy of each photograph that is included in a group of published photographs (GRPPH) or a group of

³¹ The rule proposed in the GRCP Rulemaking will modify the deposit requirements for registering a group of contributions to periodicals in some respects. By contrast, the Office is not proposing to make any changes to the deposit requirements for an individual photograph or a collective work, such as a calendar or a book of photographs. To register an individual photograph, the applicant should submit two complete copies of the best edition if the photograph has been published in the United States or one complete copy if the photograph is unpublished. To register a collective work, the applicant should submit one complete copy of the collective work (if it is unpublished) or two complete copies of the best edition (if the work has been published in the United States). *See generally Compendium*, chapter 1500.

unpublished photographs (GRUPH). Applicants will be required to submit each photograph in one of the following formats: JPEG, GIF, TIFF, or PCD. The Office will no longer accept physical copies, such as prints, contact sheets, slides, photocopies, videotapes, or clippings from a newspaper, magazine, or other publication. This should not impose a significant burden on photographers because it appears that the vast majority of them use digital cameras.

b. Numbered List of Photographs

In addition, as noted above, applicants will be required to submit a separate document containing a sequentially numbered list that identifies the title and file name – and in the case of published photographs, the month and year of publication – for each photograph in the group. The Office will provide a template on its website that may be used to prepare this list. The title and file name for a particular photograph may be the same, and may consist solely of numbers, letters, and spaces that were automatically assigned by the camera or a unique identifier that has been assigned to the image by a third party, such as the PLUS Registry. As noted above, the file names specified in the list must match the corresponding file names in the deposit copy. However, the file name should not contain slashes or any other form of punctuation. Including punctuation marks in the file name (other than spaces) may cause a system error that may prevent the Office from viewing the photographs. The Office also discourages applicants from stating “Untitled,” “No Title,” or the like, because interested parties typically search for works by title and it may be impossible to locate a particular photograph unless a meaningful title has been provided.

The Office will use the list to examine and document the claim, particularly in cases where the applicant does not provide title or publication information in the online application itself. In addition, the Office may use the list to locate and retrieve the deposit in the event it is

needed for litigation or other legitimate purposes. For these reasons, the titles and file names specified in the list must correspond to the titles and file names for the actual photographs that are included in the deposit. In this respect, the Proposed Rule builds upon a suggestion that the Digital Media Licensing Association (“DMLA”) offered in a prior rulemaking.³²

The list must be contained in an electronic file in Excel format (“.xls”), Portable Document Format (“PDF”), or other electronic format that may be specifically approved by the Office. The file name for the list must include the title of the group as a whole and the eleven-digit case number that is automatically assigned to the application by the electronic system (e.g., “[Title of Group] Case Number 12345678910”). The Office will provide further guidance regarding the preferred format and naming conventions for these file names on its website and in Chapter 1100 of the *Compendium*. When completing the online application, applicants will be asked to provide the file name for this document in the application itself. This will help the Office connect the numbered list with the relevant application, and to distinguish it from the files that contain the digital photographs.

c. Procedure for Submitting the Digital Photographs and the Numbered List of Photographs

Applicants will be required to submit the files containing the digital photographs together with the file that contains the sequentially numbered list of photographs. Applicants may upload these files through the electronic system. Alternatively, they may save them onto a physical storage device, such as a flash drive or a CD-R or DVD-R, and send it to the Office by mail, by courier, or by hand delivery together with the required shipping slip.

³² DMLA was previously known as the Picture Archive Council of America (“PACA”). In a prior rulemaking, it stated that works deposited with the Office should be accessible upon request so that parties can easily determine whether a particular photograph is covered by a particular registration. PACA at 1, *available at* <http://copyright.gov/rulemaking/databases/comments/picture-archive-council-of-america.pdf>.

When submitting files through the electronic system, applicants will be strongly encouraged to save them in a .zip file and then upload the .zip file to the system. In all cases, the size of each uploaded file must not exceed 500 megabytes, although the applicant may digitally compress the photographs to comply with this limitation.

When submitting files on a flash drive or other storage device, applicants must send that device in the same package with the shipping slip that is generated by the electronic system. If the applicant fails to include the required shipping slip, the Office may be unable to connect the storage device with the appropriate application. In such cases, the applicant will be required to pay an additional fee to search for the deposit and connect it with the application. If the deposit cannot be located, the applicant will be required to resubmit the storage device, which may change the effective date of registration for the claim.

Packages that are delivered to the Office by mail or by courier will be irradiated to destroy possible contaminants, such as anthrax. This process may damage files stored on electronic media. To avoid this result, applicants will be strongly encouraged to send physical storage devices to the Office in boxes rather than envelopes. Additional information concerning the recommended procedure for delivering physical deposits by mail or by courier will be provided in the *Compendium*.

2. Deposit Requirements for Photographic Databases

The Proposed Rule will impose the same deposit requirements on a database that consists predominantly of photographs. Specifically, database owners will be required to submit a digital copy of each photograph that is included in the claim, and a separate document containing a sequentially numbered list that identifies the title and file name—and in the case of published

photographs, the month and year of publication—for each photograph.³³ Database owners will be required to submit digital copies, regardless of whether they intend to file an online application under the pilot program (in which case the photographs and the numbered list may be uploaded to the electronic system or submitted on a physical storage device with the required shipping slip) or a paper application (in which case the photographs and the numbered list may be submitted on a physical storage device together with Form VA).³⁴

E. When Should A Group Registration Be Filed?

An application for a group registration may be filed at any time. However, a photograph must be registered in a timely manner to seek statutory damages and attorney’s fees in an infringement action. Specifically, a copyright owner typically may seek these remedies if a photograph was registered (i) before the infringement commenced or (ii) within three months after the first publication of that work. *See* 17 U.S.C. 412.

In the case of unpublished photographs, the Office strongly encourages photographers to register their works before sharing them with any other party. By doing so, photographers preserve the ability to seek statutory damages and attorney’s fees in subsequent infringement disputes involving those works.

In the case of published photographs, the Office encourages photographers to submit their claims every three months (instead of filing on an annual or semi-annual basis), and in each case, to file the claim within three months after the earliest date of publication specified in the application. For example, if a photographer first published his or her photographs on June 1, 2016, it would be advisable to submit a complete application, deposit, and filing fee on or before

³³ As discussed in Section III.D.1.b, the Office will provide a standard template that may be used to prepare the numbered list of photographs.

³⁴ When submitting an online application the storage device must be accompanied by the shipping slip that is generated by the electronic system. When submitting a paper application, the device must be accompanied by Form VA.

September 1, 2016. By doing so, the photographer would preserve his or her ability to seek statutory damages and attorney’s fees for any infringements that began after the effective date of registration (*i.e.*, after September 1, 2016), as well as any infringements that occurred within three months after the date of publication (*i.e.*, between June 1, 2016 and September 1, 2016).

F. The Scope of a Group Registration

The Proposed Rule memorializes the Office’s longstanding position regarding the scope of a registration for a group of published photographs, and it confirms that the Office will take the same position regarding the group option for unpublished photographs.

When the Office issues a group registration, it prepares one certificate of registration for the entire group and assigns one registration number to that certificate. The Proposed Rule clarifies that a registration for a group of published or unpublished photographs covers each photograph in the group, and that each photograph is registered as a separate “work.” This understanding is consistent with the statutory scheme. The legislative history makes clear that group registration was “a needed and important liberalization of the law [then] in effect,” which to that point had required “separate registrations where related works or parts of a work are published separately.” H.R. REP. NO. 94-1476, at 154 (1976). In particular, Congress noted that “the technical necessity for separate applications and fees has caused copyright owners to forego copyright altogether.” *Id.* Given that context, it would be anomalous for works registered as part of a group registration application to be given less protection than if they had been registered through separate applications.

For similar reasons, the Proposed Rule also clarifies that when a group of photographs is registered under GRPPH or GRUPH, the group as a whole is not considered a compilation or a collective work under sections 101, 103(b), or 504(c)(1) of the Copyright Act. The group is

merely an administrative classification created solely for the purpose of registering multiple photographs with one application and one filing fee. See 17 U.S.C. 408(c)(1) (“Th[e] administrative classification of works has no significance with respect to the subject matter of copyright or the exclusive rights provided by this title.”). Although an applicant may exercise some judgment in selecting the photographs that are included within a particular group, that decision does not necessarily constitute copyrightable authorship. Instead, the selection is based on the regulatory requirements for these group options, and any coordination or arrangement of the photographs is merely an administrative formality that facilitates the examination of the works.

Likewise, the Proposed Rule clarifies that the group is not considered a derivative work under sections 101, 103(b), or 504(c)(1) of the Copyright Act. When a group of photographs is compiled for the purpose of facilitating registration, those works are not “recast, transformed, or adapted” in any way, and the group as a whole is not “a work based upon one or more preexisting works” because there is no copyrightable authorship in simply following the administrative requirements for GRPPH or GRUPH. 17 U.S.C. 101 (definition of “derivative work”).

G. Group Registration of Published and Unpublished Photographs Distinguished from Other Registration Options

This section discusses the key differences between the options for registering a group of published or unpublished photographs as compared to the options for registering an unpublished collection, a group of contributions to periodicals, a photographic database, or a collective work.

1. Group Registration of Unpublished Photographs vs. Unpublished Collections

The group option for unpublished photographs is intended to replace the option that

currently allows an applicant to register a number of photographs as an unpublished collection. Once the Proposed Rule goes into effect, the Office will no longer accept an application to register photographs under § 202.3(b)(4)(i)(B) of the regulations, regardless of whether the photographs are submitted with a standard application or a paper application (although the Office will continue to accept applications to register other types of works under this provision).

As explained, the GRUPH option provides a more efficient mechanism for capturing information about photographs, and incorporating that information into the public record. Requiring applicants to use this option may also provide photographers with certain legal benefits.

When an applicant submits photographs via the unpublished collection option, and asserts a claim in both the individual photographs as well as the selection and arrangement of the collection as whole, the Office will register the claim as an unpublished collective work, rather than an unpublished collection. A collective work is—by definition—a form of compilation. 17 U.S.C. 101 (“The term ‘compilation’ includes collective works.”). Section 504(c)(1) of the Copyright Act states that a copyright owner may be entitled to recover “an award of statutory damages for all infringements involved in [an infringement] action, with respect to any one work,” but “[f]or the purposes of this subsection, all the parts of a compilation . . . constitute one work.” 17 U.S.C. 504(c)(1). In other words, when a number of photographs are registered as an unpublished collective work, the copyright owner would be entitled to seek only one award of statutory damages in an infringement action, rather than a separate award for each photograph.

In contrast, as noted above in Section III.F, when a number of photographs are registered under the GRUPH option, each photograph is registered as a separate work. For purposes of registration, the group as a whole is not considered a collective work or compilation, and thus,

the individual photographs within the group would not be subject to the limitation on statutory damages set forth in section 504(c)(1). Instead, a registration for a group of unpublished photographs is treated as a separate registration for each photograph that is included within the group.

2. Group Registration of Published Photographs vs. Group Registration for Contributions to Periodicals

The group option for published photographs is not intended to alter or replace the group option for contributions to periodicals. Photographers may continue to register their works as a group of published photographs or a group of contributions to periodicals, as long as they satisfy the relevant requirements for each option.

There are some notable differences between these registration options. While a group of published photographs may include no more than 750 images, there is no limit on the number of photographs that may be included within a group of contributions to periodicals. Moreover, a group of published photographs may include photographs that were published during the same calendar year, while a group of contributions to periodicals may include photographs that were published over a twelve-month period—even if that period extends from one calendar year to the next (*e.g.*, September 1, 2015 through August 31, 2016). In addition, to be eligible for GRPPH, the photographs may be published in any manner, but there is no need to specify the medium of publication and no need to submit the photographs in the specific form in which they were first published. To be eligible for GRCP, the photographs must be first published in a periodical (*e.g.*, a newspaper, a magazine, etc.), the applicant must provide pertinent information about each periodical (*e.g.*, title, issue number, publication date, etc.), and the applicant must submit a copy of the photographs as they appeared in each publication (*e.g.*, a copy of the entire periodical, a

copy of an entire section from a newspaper, etc.).

The Office generally encourages applicants to use GRPPH, in part, because the deposit requirements for published photographs are more flexible than the deposit requirements for GRCP. Regardless of whether the applicant uses GRPPH or GRCP, the registration will cover all the photographs that are included within the group.

3. Group Registration of Photographs vs. Group Registration for Photographic Databases

As noted above, the Proposed Rule makes certain modifications to the deposit requirement for databases that predominantly consist of photographs. The Proposed Rule will not change any of the other requirements for these types of claims. *See* 37 CFR 202.3(b)(5); 202.20(c)(2)(vii)(D)(8).

Although the Office will continue to accept these claims, the Office strongly encourages photographers, stock photography companies, database providers, and other interested parties to register their works with the group option for published or unpublished photographs—rather than the database option—for several reasons. Many photography websites and catalogs do not qualify as a database, and therefore, are not eligible for the group option for photographic databases. For purposes of registration, a database is defined “as a compilation of digital information comprised of data, information, abstracts, images, maps, music, sound recordings, video, other digitized material, or references to a particular subject or subjects. In all cases, the content of a database must be arranged in a systematic manner, and it must be accessed solely by means of an integrated information retrieval program or system with the following characteristics.” *Compendium* section 1117.1. First, “a query function must be used to access the content.” *Id.* Second, “[t]he information retrieval program or system must yield a subset of the content, or it must organize the content based on the parameters specified in each query.” *Id.*

Stock photography websites or catalogs that merely display photographs do not satisfy these requirements and therefore are not considered databases for the purpose of registration. In most cases, users may access all the content on a website or in a catalog by scrolling or browsing through the individual images or categories of related images. *Id.* section 1002.6. By contrast, users cannot access the content of a database in its entirety. *Id.* Instead, they must use a query function to identify specific content within the database, and they must use an information retrieval system to extract the content that matches the user’s search criteria. *Id.* While a user may view the entire content of a website or catalog, a user may view the content of a database only to the extent that it matches a particular query that the user entered into the information retrieval system. *Id.* While some websites may provide a search feature that may be used to locate particular images or categories of images, these types of features do not qualify as an information retrieval system nor do they transform an ordinary website into a database, because these features are not the sole means for accessing the images posted on the site. *See id.* If the Office determines that a particular website, catalog, or other work does not qualify as a database, the Office will refuse to register the work as a database or as a group of updates or revisions to a photographic database.

Copyright owners also should consider the following issue before registering their photographs as part of a photographic database. As noted above in Section III.G.1, the Copyright Act states that a copyright owner may be entitled to recover “an award of statutory damages for all infringements involved in [an infringement] action, with respect to any one work,” but “[f]or the purposes of this subsection, all the parts of a compilation . . . constitute one work.” 17 U.S.C. 504(c)(1). A database is—by definition—a compilation. *See Alaska Stock, LLC v. Houghton Mifflin Harcourt Publishing Co.*, 747 F.3d 673, 676 (9th Cir. 2014)

(concluding that a photographic database is a collective work); *see also Compendium* section 1117.1 (same). Consequently, when a group of photographs is registered as a database, the copyright owner may be entitled to seek only one award of statutory damages for the database as a whole—rather than a separate award for each photograph—even if the defendant infringed all the photographs that are covered by the registration.

By contrast, when a copyright owner registers a group of photographs under GRPPH or GRUPH, the registration covers each photograph in the group, but the group itself is not a compilation within the meaning of the Copyright Act. Therefore, any claim for infringement would not be subject to the limitation set forth in Section 504(c)(1) of the Copyright Act. For these reasons, the group options for published and unpublished photographs provide significant benefits, while avoiding the potential downside of registering a number of works as part of a photographic database.

4. Group Registration of Photographs vs. Collective Works

The Proposed Rule will not change the requirements for registering a number of photographs as part of a collective work, such as a book of photographs, a travel guide, or the like. Applicants may continue to register these types of works with a standard application submitted through the electronic system or with a paper application submitted on Form VA.

Registration of photographs as part of a collective work differs in many respects from group registration of photographs. A registration for a collective work may include photographs taken by multiple photographers (even if the photographers are not explicitly named in the application), and there is no limit on the number of photographs that may be included within each claim. If the claim is approved, the registration will cover the authorship involved in selecting, coordinating, and/or arranging the content of the collective work as a whole. It also

may cover the individual photographs that appear in the collective work if the claimant owns the copyright in those images and the collective work as a whole, and if the photographs have not been previously published or registered.

There are some drawbacks to registering photographs as a collective work. As discussed in Section III.G.1, a collective work is—by definition—a compilation. As such, these types of works are subject to the limitation set forth in section 504(c)(1) of the Copyright Act. When a number of photographs are registered as part of a collective work, the copyright owner may be entitled to receive only one award of statutory damages in an infringement action, even if the defendant infringed all the photographs that appear in that work (regardless of whether the collective work is published or unpublished). By contrast, when a group of photographs are registered under GRPPH or GRUPH, the copyright owner would not be subject to the collective-work limitation in section 504(c)(1). For this reason, photographers may wish to register their photographs under GRPPH or GRUPH, even if those works also may be eligible for registration as part of a collective work.

H. Technical Amendments

The Proposed Rule will move the regulation governing published photographs from § 202.3 to § 202.4.³⁵ In the future, the Office intends to move all regulations governing the various group options that have been implemented under section 408(c) of the Copyright Act to § 202.4. This change is intended to improve the readability of the existing regulations, but it does not represent a substantive change in policy.

In addition, the Proposed Rule incorporates the definitions of “claimant” and “Class VA” that are set forth in § 202.3, and it confirms that an application for a group of photographs may

³⁵ The Office recently issued a notice of proposed rulemaking that would remove the current text of § 202.4 and reserve that section for later use. *See* Copyright Office Technical Amendments, 81 FR 67940, 67942 (Oct. 3, 2016).

be submitted by any of the parties listed in § 202.3(c)(1), namely (i) the author or copyright claimant of those works, (ii) the owner of any of the exclusive rights in those works, or (iii) a duly authorized agent of any author, claimant, or owner of exclusive rights.

IV. Conclusion

The Proposed Rule will allow broader participation in the registration system by expanding the class of works that may be registered as a group, increase the efficiency of the registration process, and create a more robust record of the claim. The Office invites public comment on these proposed changes.

List of Subjects in 37 CFR Part 201

Copyright, General Provisions.

List of Subjects in 37 CFR Part 202

Copyright, Preregistration and Registration of Claims to Copyright.

Proposed Regulation

For the reasons set forth in the preamble, the U.S. Copyright Office proposes amending 37 CFR parts 201 and 202, as follows:

Part 201 – GENERAL PROVISIONS

1. The authority citation for part 201 is amended to read as follows:

Authority: 17 U.S.C. 702.

2. Amend § 201.3 by:

- a. Redesignating paragraphs (c)(3) through (18) as paragraphs (c)(4) through (19), respectively.
- b. Adding new paragraph (c)(3).
- c. Revising newly redesignated paragraph (c)(4).

The revisions and additions to read as follows:

§ 201.3 Fees for registration, recordation, and related services, special services, and services performed by the Licensing Division.

* * * * *

(c) * * *

(3) Registration of a claim in a group of published photographs or a claim in a group of unpublished photographs	55
(4) Registration for a database that predominantly consists of photographs and updates thereto:	
(i) Electronic filing	55
(ii) Paper filing	65

* * * * *

Part 202 - PREREGISTRATION AND REGISTRATION OF CLAIMS TO COPYRIGHT

3. The authority citation for part 202 continues to read as follows:

Authority: 17 U.S.C. 408(f), 702.

4. Amend § 202.3 by:

- a. In paragraph (b)(3) removing the phrase “, subject to the limitations in paragraph (b)(10)(v) of this section” .
- b. Revising paragraph (b)(4)(ii).
- c. Removing and reserving paragraph (b)(10).
- d. In the text of paragraph (c)(2), removing the reference to footnote “6” and adding in its place a reference to footnote “5”.
- e. In paragraph (c)(2), revising footnote 5.

The revisions to read as follows:

§ 202.3 Registration of copyright.

* * * * *

(b) * * *

(4) * * *

(ii) In the case of an application for registration made under paragraphs (b)(4) through (b)(10) of this section or under § 202.4, the “year of creation,” “year of completion,” or “year in which creation of this work was completed,” means the latest year in which the creation of any copyrightable element was completed.

* * * * *

(c) * * *

(2) * * *

5 In the case of an application to register a group of newspapers, newsletters, contributions to periodicals, or photographs under paragraphs (b)(7) or (9) of this section or under § 202.4, the deposit shall comply with the respective requirements specified in those paragraphs.

* * * * *

6. Revise § 202.4 to read as follows:

§ 202.4 Group Registration.

(a) This section prescribes conditions for issuing a registration for a group of related works under section 408(c) of title 17 of the United States Code.

(b) *Definitions.* For purposes of this section, the terms *copy* and *work made for hire* have the meanings set forth in section 101 of title 17 of the United States Code, and the terms *claimant* and *Class VA* have the meanings set forth in § 202.3(a)(3) and (b)(1)(iii).

(c) [Reserved]

(d) [Reserved]

(e) [Reserved]

(f) [Reserved]

(g) [Reserved]

(h) [Reserved]

(i) *Group registration of unpublished photographs.* Pursuant to the authority granted by 17 U.S.C. 408(c)(1), the Register of Copyrights has determined that a group of unpublished photographs may be registered in Class VA with one application, one filing fee, and the required deposit, if the following conditions are met:

(1) All the works in the group must be photographs.

(2) The group must include no more than 750 photographs, and the application must specify the total number of photographs that are included in the group.

(3) All the photographs must be created by the same photographer.

(4) The copyright claimant for all the photographs must be the same person or organization.

(5) The photographs may be registered as works made for hire if all the photographs are identified in the application as such, if all the photographs were created by the same photographer for the same employer, and if the application identifies both the photographer and the employer in the name of author field (*e.g.*, “ABC Corporation, employer for hire of John Doe”).

(6) All the photographs must be unpublished.

(7) The applicant must provide a title for the group as a whole

(8) The applicant must complete and submit the online application designated for a group of unpublished photographs. (The Office will not register a group of unpublished photographs as an unpublished collection under § 202.3(b)(4)(i)(B).) The application may be submitted by any of the parties listed in § 202.3(c)(1).

(9) The appropriate filing fee, as required by § 201.3(c) of this chapter, must be included with the

application or charged to an active deposit account.

(10) The applicant must submit one copy of each photograph in one of the following formats: JPEG, GIF, TIFF, or PCD. The file name for a particular photograph may consist of letters, numbers, and spaces, but the file name should not contain any other form of punctuation. The photographs may be uploaded to the electronic registration system together with the required numbered list, preferably in a .zip file containing all the photographs. The file size for each uploaded file must not exceed 500 megabytes; the photographs may be compressed to comply with this requirement. Alternatively, the photographs and the required numbered list may be saved on a physical storage device, such as a flash drive, CD-R, or DVD-R, and delivered to the Copyright Office together with the required shipping slip generated by the electronic registration system.

(11) The applicant must submit a sequentially numbered list containing a title and file name for each photograph in the group (matching the corresponding file names for each photograph specified in paragraph (i)(10)). The title and file name for a particular photograph may be the same. The numbered list must be contained in an electronic file in Excel format (.xls), Portable Document Format (PDF), or other electronic format approved by the Office, and the file name for the list must contain the title of the group and the case number assigned to the application by the electronic registration system (*e.g.*, “Title Of Group Case Number 16283927239.xls”).

(j) *Group registration of published photographs.* Pursuant to the authority granted by 17 U.S.C. 408(c)(1), the Register of Copyrights has determined that a group of published photographs may be registered in Class VA with one application, one filing fee, and the required deposit, if the following conditions are met:

(1) All the works in the group must be photographs.

- (2) The group must include no more than 750 photographs, and the application must specify the total number of photographs that are included in the group.
- (3) All the photographs must be created by the same photographer.
- (4) The copyright claimant for all the photographs must be the same person or organization.
- (5) The photographs may be registered as works made for hire if all the photographs are identified in the application as such, if all the photographs were created by the same photographer for the same employer, and if the application identifies both the photographer and the employer in the name of author field (*e.g.*, “XYZ Corporation, employer for hire of Jane Doe”).
- (6) All the photographs must be published within the same nation and within the same calendar year, and the applicant must specify the earliest and latest date that the photographs were published during the year.
- (7) The applicant must provide a title for the group as a whole.
- (8) The applicant must complete and submit the online application designated for a group of published photographs. The application may be submitted by any of the parties listed in § 202.3(c)(1).
- (9) The appropriate filing fee, as required by § 201.3(c) of this chapter, must be included with the application or charged to an active deposit account.
- (10) The applicant must submit one copy of each photograph in one of the following formats: JPEG, GIF, TIFF, or PCD. The file name for a particular photograph may consist of letters, numbers, and spaces, but the file name should not contain any other form of punctuation. The photographs may be uploaded to the electronic registration system together with the required numbered list, preferably in a .zip file containing all the photographs. The file size for each

uploaded file must not exceed 500 megabytes; the photographs may be compressed to comply with this requirement. Alternatively, the photographs and the required numbered list may be saved on a physical storage device, such as a flash drive, CD-R, or DVD-R, and delivered to the Copyright Office together with the required shipping slip generated by the electronic registration system.

(11) The applicant must submit a sequentially numbered list containing the title, file name, and month and year of publication for each photograph in the group (matching the corresponding file names for each photograph specified in paragraph (j)(10)). The title and file name for a particular photograph may be the same. The numbered list must be contained in an electronic file in Excel format (.xls), Portable Document Format (PDF), or other electronic format approved by the Office, and the file name for the list must contain the title of the group and the case number assigned to the application by the electronic registration system (*e.g.*, “Title Of Group Case Number 16283927239.xls”).

(k) [Reserved]

(l) [Reserved]

(m) [Reserved]

(n) *The scope of a group registration.* When the Office issues a group registration under paragraphs (i) or (j) of this section, the registration covers each work in the group and each work is registered as a separate work. For purposes of registration, the group as a whole is not considered a compilation, a collective work, or a derivative work under sections 101, 103(b), or 504(c)(1) of title 17 of the United States Code.

7. Amend § 202.20 by:

a. Revising paragraph (c)(2)(vii)(D)(8); and.

b. Removing paragraph (c)(2)(xx).

The revision to read as follows:

§ 202.20 Deposit of copies and phonorecords for copyright registration.

* * * * *

(c) * * *

(2) * * *

(vii) * * *

(D) * * *

(8) In the case of an application for registration of a database that consists predominantly of photographs (including a group registration for revised or updated versions of such a database), “identifying portions” shall instead consist of all individual photographs included in the claim. Photographs must be submitted in digital form in one of the following formats: JPEG, GIF, TIFF, or PCD. In addition, the applicant must submit a sequentially numbered list containing the title and file name – and if the photographs have been published, the month and year of publication – for each photograph in the group. The title and file name for a particular photograph may be the same and may consist of letters, numbers, and spaces, but the file name should not contain any other form of punctuation. The numbered list must be contained in an electronic file in Excel format (.xls), Portable Document Format (PDF), or other electronic format approved by the Office. The file name for the list must contain the title of the database, and the case number assigned to the application by the electronic registration system, if any (*e.g.*, “Title Of Database Case Number 162883927239.xls”). The photographs and the numbered list may be uploaded to the electronic registration system with the permission and under the direction of the Visual Arts Division, preferably in a .zip file containing these materials. The file size for

each uploaded file must not exceed 500 megabytes; the photographs may be compressed to comply with this requirement. Alternatively, the photographs and the numbered list may be saved on a physical storage device, such as a flash drive, CD-R, or DVD-R, and delivered to the Copyright Office together with the required shipping slip generated by the electronic registration system or with a paper application submitted on Form VA.

* * * * *

Dated: November 22, 2016.

Sarang V. Damle
General Counsel and
Associate Register of Copyrights

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